


Death and the Brain
Time to Re-Examine the Legal Definition of Death
 A free webinar for all audiences
 Langue : anglais / Language: English



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 Mitchell Hamline School of Law, U.S.A.
 Visiting Fulbright Researcher
 University of Ottawa

Jennifer Chandler – Moderator
 Faculty of Law
 University of Ottawa

The 50th anniversary of the concept of brain death came and went in 2017, but brain death continues to be a source of practical, philosophical and legal controversy. Join the leading American expert on the legal definition of death to hear about the challenges that have led to calls to re-examine the American Uniform Determination of Death Act (UDDA), and similar challenges in the Canadian context.

Thursday 25 February
 3–4 pm (ET)

Share

UNIVERSITY OF OTTAWA / UNIVERSITÉ D'OTTAWA
 Death, éthique et
 éthique de la santé
 Health Law,
 Policy and Ethics

1

Death and the Brain

Time to Reexamine the Legal Definition of Death

2



3

30 / 30

4

Disclosures

5



Uniform Law Commission

6



A Brain-Based Definition of Death and Criteria for its Determination
After Arrest of Neurologic or Circulatory Function in Canada

7

**INTERNATIONAL
DONATION AND TRANSPLANTATION**

LEGISLATIVE AND POLICY FORUM

**FORUM LÉGISLATIF ET POLITIQUE INTERNATIONAL
SUR LE DON ET LA TRANSPLANTATION**

8

Not financial

“other relationships or activities that readers could **perceive** to have influenced”

9



March 24-25, 2021

**Making Progress on Death:
Towards an Updated Normative Framework**

10

Introduction

11



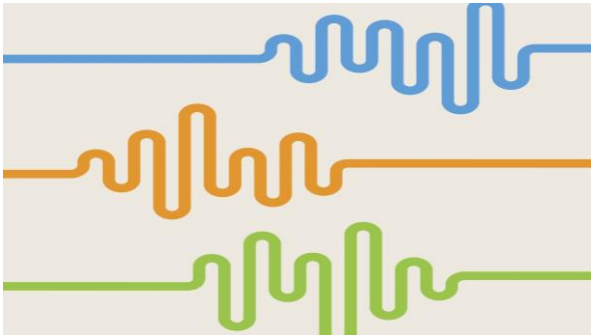
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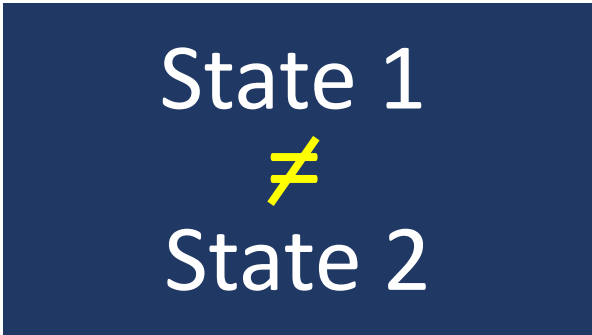
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18

Law
≠
Practice

19

Tolerate
Encourage

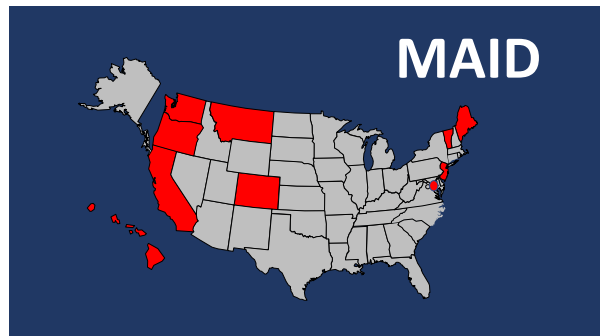
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laboratories
that try novel
social
experiments



**Sandra Day
O'Connor**

21



22

BUT

23

Death is
different

24

Death is more consequential

25

Medical

26

Treatment
Organ D&T

27

Legal

28

Criminal

murder v. aggravated assault

Tort

wrongful death v. medical malpractice

Insurance

Health insurance stop paying

Life insurance pay

29

Property

inheritance, estate tax, probate

Family

spouse status (single, married), children

30

Family

31

When
to grieve
to bury

32

Uniformity
Clarity
Certainty

33



34



35



36



37

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

38



39

She's not only
merely dead,
She's really most
sincerely dead.

40



41



42



43

Brain death
is **also**
under attack

44



45

"Doctors declared your loved one **brain dead** and want to withdraw life-sustaining treatment against your will"

"We can help"

46



47



48

McKitty v. Hayani, 2019 ONCA 805
 Ouanounou v. Humber River Hospital,
 2017 ONSC 6511
 In re HC (Ont CCB 2019)
 In re TP (Ont CCB 2017)
 In re UH (Ont CCB 2016)
 In re EI (Ont CCB 2016)

49



REPORTS OF ORIGINAL INVESTIGATIONS

Requests for somatic support after neurologic death determination: Canadian physician experiences

Demandes de soutien des fonctions vitales après un diagnostic de décès neurologique : les expériences des médecins canadiens

Amanda van Beinum, MSc · Andrew Healey, MD · Jennifer Chandler, LLM ·
 Sonny Dhanani, MD · Michael Hartwick, MD, MEd ·
 Ariane Lewis, MD · Calista Marshall, BSc · Jocasta Marshall, LLB ·
 Sam Shemie, MD · Jeffrey M. Singh, MD, MSc

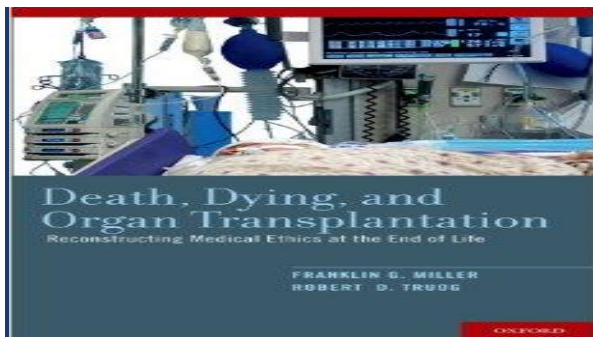
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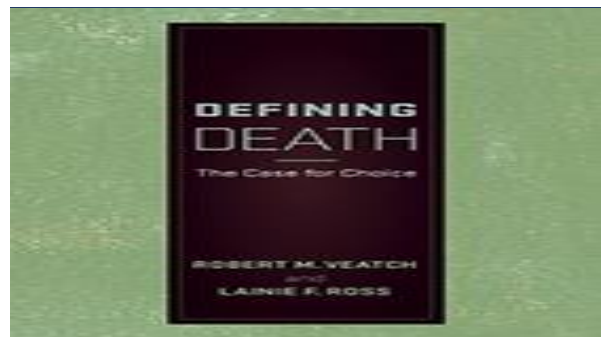
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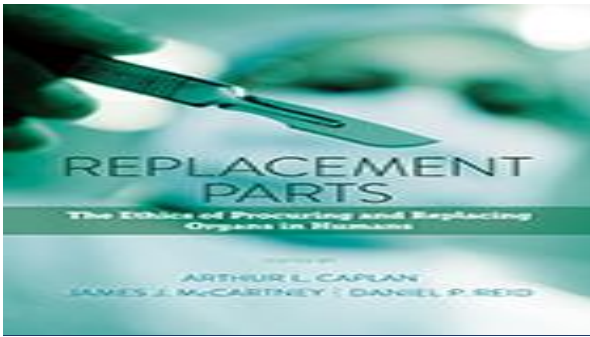
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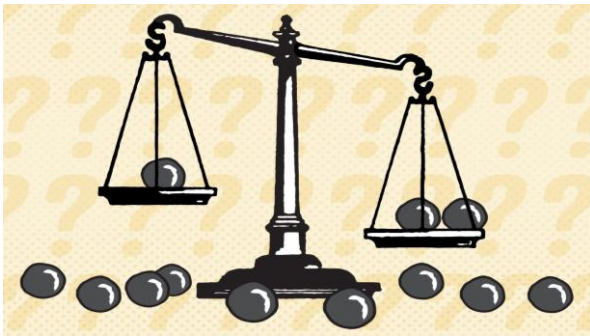
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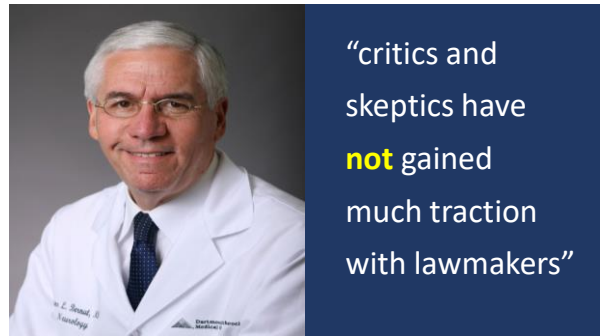
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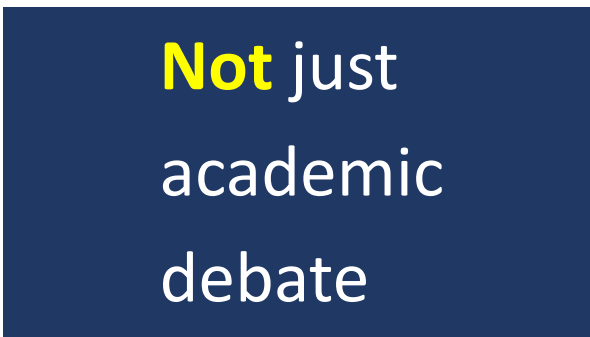
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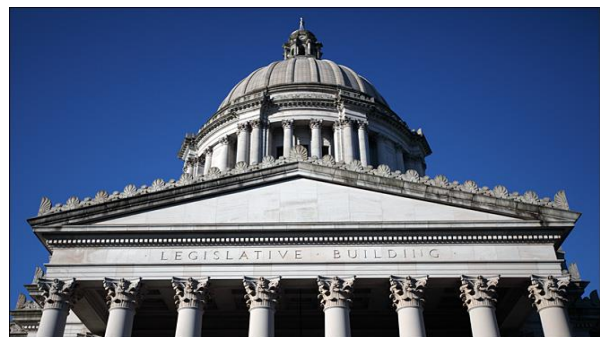
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Roadmap

61

4 parts

62

Legal primer
brain death

63

4 Legal
attacks

64

Response
RUDDA

65

Reasons
for RUDDA

66

UDDA

67

All 56 US
jurisdictions

68

There are
2 ways
to determine death

69

“irreversible cessation of
circulatory & respiratory
functions”

70

or

71

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

72

We'll focus on this

2nd newer
prong

73

Brain death
=
Death

74

Total brain failure
=
Death

75

Dead
↓
w/d OST

76

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*

“brain dead . . . medical
support should be
discontinued.”

77

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

“**all** medical
interventions
should be
withdrawn.”

78

Legally **settled**
since 1980s

79



80



81

Attack 1

82

Want
religious
exemption

83



84

“[D]eath ... **shall not be declared** ... neurological ... violate ... **personal religious beliefs**”

85

Religious objection  No death by BD

86

Pt may **satisfy** BD criteria

87

BUT

88

May **not declare** death

89

Until death by CP criteria

90



91



92



93

Rejected
everywhere
 outside NJ

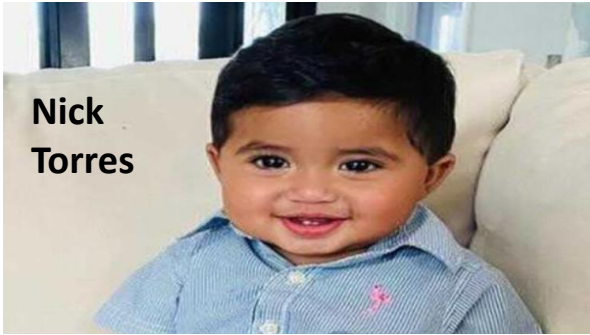
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Still
 asked for

95



96



Nick
Torres

97



September 17, 2020

98



99



Israel Stinson

100

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

Jonee 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 Doe
2 through 10, inclusive,
Defendant.

) Case No.: 2:16-cv-00889-KJM-EFB
)
) Second Amended Complaint for
) Equitable Relief
)
) REQUEST FOR JURY TRIAL

**Suing state
of California**

101

“Plaintiffs are Christians with firm **religious beliefs** . . . heart is beating . . . is alive.”

102

“remove CP support ...
unconstitutional ...
interferes ...
freedom of religion”

103



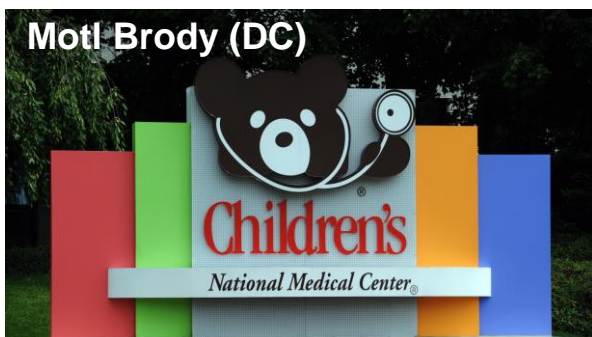
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105



106



107



108



Cho Fook Cheng (Mass)

109



110



111



112



Taquisha McKitty

113



Shalom Ouanounou

114

Will see **more**
of these cases

115



116

Attack 1
Religious
exemption

117

Attack 2

118

Must clinicians
get **consent**
for BD tests?

119

Some try to
prevent
BD diagnosis

120

2020-61396 / Court: 234

9/30/2020 2:53:25 AM
Marilyn Burgess - District Clerk
Harris County
Envelope No: 46692309
By: DENMON, BRIANNA J
Filed: 9/30/2020 2:53:25 AM

CAUSE NO. _____

MARIO TORRES and ANA PATRICIA TORRES, individually and A/N/F of N.T., a minor,
Plaintiffs,

v.

TEXAS CHILDREN'S HOSPITAL, and DR. JOHN DOE and DR. JANE DOE,

Defendants.

CIVIL ACTION NO. _____

JURY DEMANDED

Pgs-3

WVBNX
TRORX
SDD
MEDCX
CASO

ORDER GRANTING PLAINTIFFS' TEMPORARY RESTRAINING ORDER

121



122



123



124



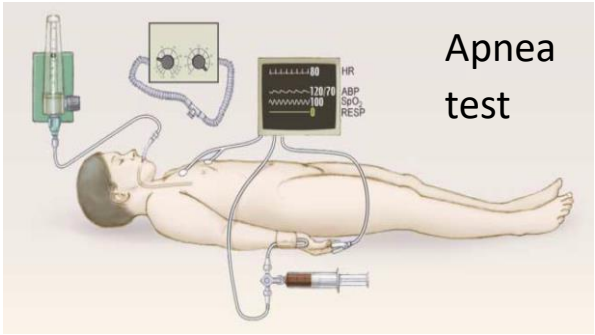
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Focus on pre-BD rights

127



128

Final confirmatory test

129

SPECIAL ARTICLE

AMERICAN ACADEMY OF NEUROLOGY

Evidence-based guideline update: Determining brain death in adults

Report of the Quality Standards Subcommittee of the American Academy of Neurology

Esko F.M. Wijdevits, MD, PhD

ABSTRACT

Objective: To provide an update of the 1995 American Academy of Neurology guideline with regard

130

American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN™

Guidance for the Clinician in Rendering Pediatric Care

Clinical Report—Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations

abstrakt

Thomas A. Nakagawa, MD, Stephen Ashwal, MD, Mudit

131

BUT

132

More family refusals

133



134

Parental refusals

135



136

No apnea test



No BD

137

No BD



Treatment duties continue until CP

138

Opt out
BD

139

Practically, same
as NJ religious
exemption

140

NJ

Determine **YES**
Declare **NO**

141

Here

Determine **NO**
Declare **NO**

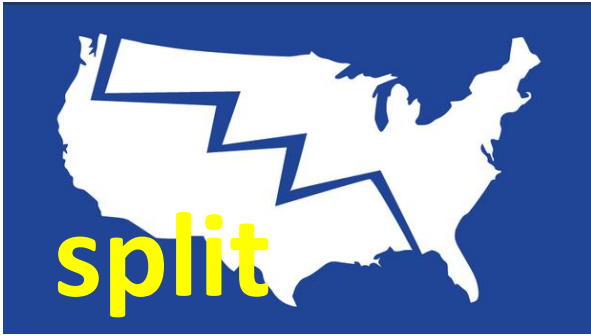
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Must clinicians
honor the
refusal?

143

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

144



145



146



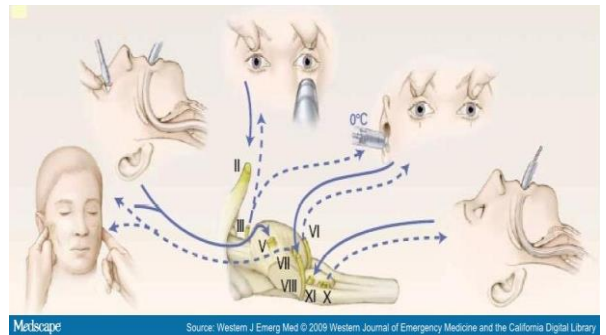
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148



149



150



151

MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF A.C.,FILED
SEP 23 2016
JULIA M. KELLY
CLERK OF DISTRICT COURT
PONDERA COUNTY, MONTANA

a minor.

Cause No. DG-16-08

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

152

“no”

153

“request ...
permitting ... testing
... **is denied**”

154

“**mother has sole authority**
to make medical decisions .
. . . **including** . . . brain
functionality examinations”

155

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

156

MT said
“yes”

157

KS also
“yes”

158



159

18TH JUDICIAL DISTRICT COURT
SEDGWICK COUNTY, KANSAS

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

160

CA also
“yes”

161



162



163



164

1 ALLISON ARANDA
 2 P.O. Box 2015
 3 Napa, CA 94559
 4 707.227.6744

5 Attorney for Petitioner

6

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

9

10

11

12

13

14 ALEX PIERCE, by and through his
 15 mother SABRINA PIERCE, }
 16 Plaintiff, }
 17 vs. }
 18 LOMA LINDA UNIVERSITY MEDICAL }
 19 CENTER, }
 20 Defendant }

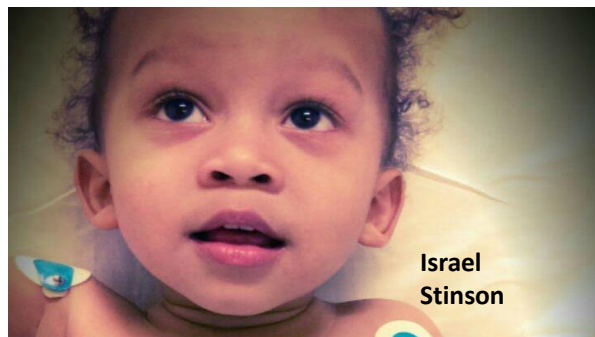
FILED
 CLERK OF THE SUPERIOR COURT
 COUNTY OF SAN BERNARDINO DISTRICT
 JUN 7 2016
 BY Rebecca Lee DEPUTY

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

165



166



167

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

168

MT, KS, CA
said “**yes**”

169

Plausible

170

Normally, may **not**
do things to patient
without **consent**

171



172

No

173



174



175



176



177



178

YES	NO
California Kansas Montana	Georgia Nevada New York Texas Virginia

179

Conflict
continues

180



181



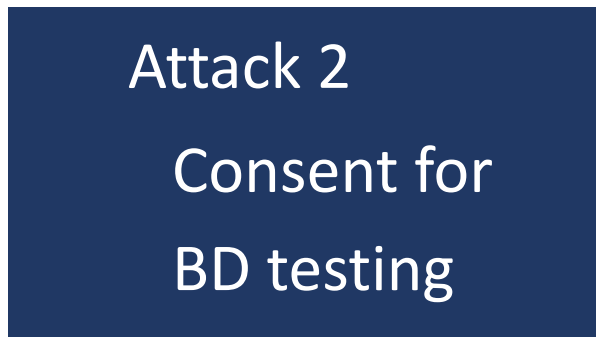
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183



184



185



186

What are **accepted medical criteria** for determining death?

187

UDDA

188

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

189

BUT

190

variability

191

Research

Original Investigation

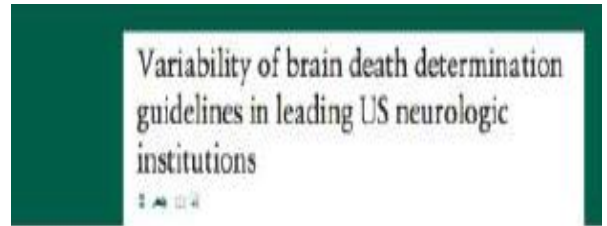
Variability of Brain Death Policies in the United States

David M. Greer, MD, MA; Hilary H. Wang, BA; Jennifer D. Robinson, APRN; Panayiotis N. Varelas, MD, PhD; Galen V. Henderson, MD; Eelco F. M. Wijdicks, MD, PhD

192



Hilary H. Wang, MD ABSTRACT
193



David M. Green, MD, MA
Professor N. Vanla, 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
194

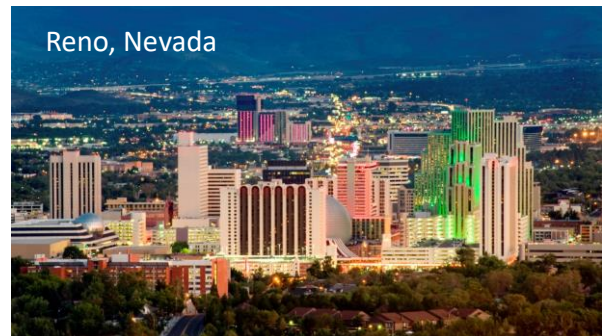
Neurology®

February 26, 2019; 92 (9) ARTICLE

Variability in reported physician practices for brain death determination

Sherri A. Braksick, Christopher P. Robinson, Gary S. Gronseth, Sara Hocker, Eelco F.M. Wijdicks, Alejandro A. Rabinstein

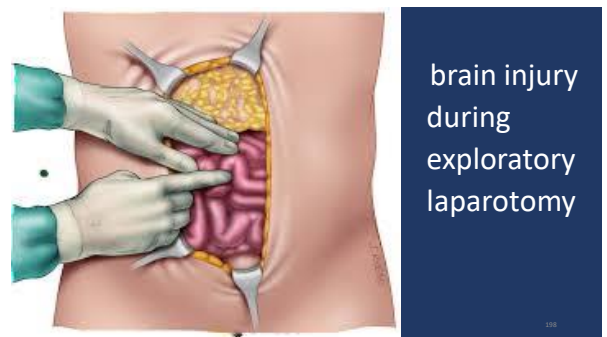
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196



197



198

Met AAN criteria
for brain death

199



200



201

Dad
loses

202

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

203



204

Dad
wins

205



206

Irrelevant if Aden
meets AAN criteria

NOT the
“right” criteria

207

Unclear they are
“accepted medical
standards” as UDDA
requires

208

Attack 3
Which medical
standards

209

Attack 4

210



211

AAN does **not**
measure what
UDDA requires

212

UDDA

213

irreversible cessation
all functions
entire brain

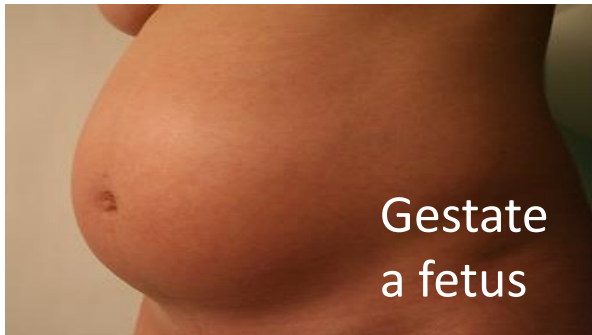
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BUT

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Brain dead
people
do stuff

216



217



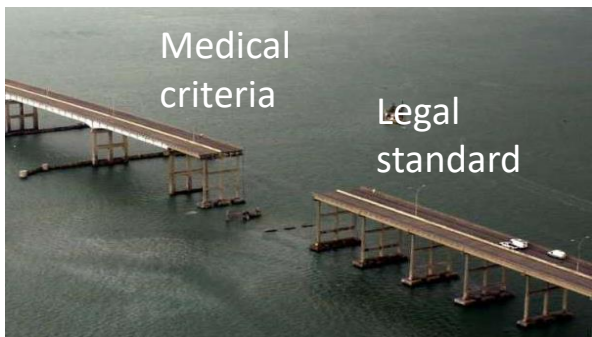
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AAN measures only
cessation
some functions
part of brain

219

UDDA requires:
“**all** functions”
“**entire** brain”

220



221



222

SPECIAL ARTICLE

Brain death, the determination of brain death, and member guidance for brain death accommodation requests

AAN position statement

James A. Russell, DO, MS, Leon G. Epstein, MD, David M. Greer, MD, MA, Matthew Kirschen, MD, PhD, Michael A. Rubin, MD, MA, and Ariane Lewis, MD, on behalf of the Brain Death Working Group

Neurology® 2019;92:1-5. doi:10.1212/WNL.0000000000006750

Correspondence

J.A. Russell
james.a.russell@lahey.org

223

Patient can
satisfy BD
guidelines

224

Dead

225

Yet...

226

“neuro-endocrine
function **may be
present**”

227

Okay to declare dead
despite functions of
pituitary gland &
hypothalamus

228

“not inconsistent
with the whole brain
standard of death.”

229



230

UDDA

requires

231

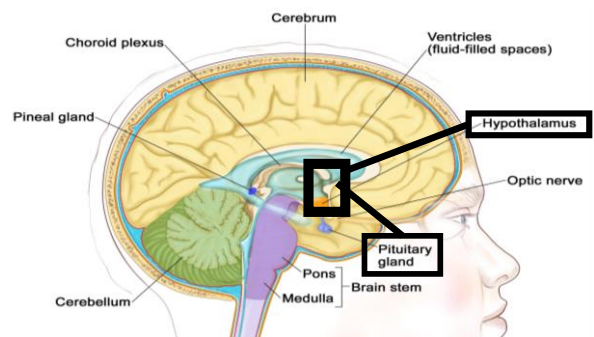
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irreversible
cessation of

232

“all functions”
of the
“entire brain”

233



234

Medically dead



Legally dead

235

Medical criteria
do not require
cessation of
all functions

236

Require cessation
of **critical** functions

237



238

SPEED LIMITS
DAY — REASONABLE & PRUDENT
TRUCK — 65
NIGHT — ALL VEHICLES — 65

239



240

Attack 4
Mismatch
Med – Leg

241

Recap

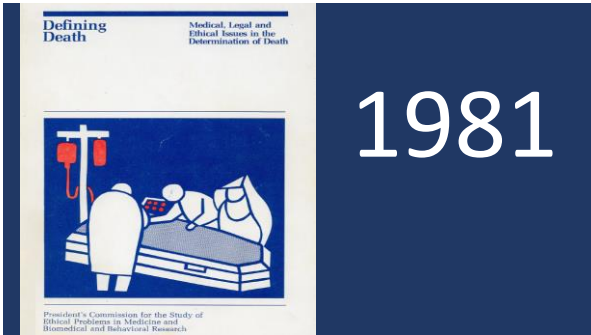
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4 attacks →
Variability
Uncertainty

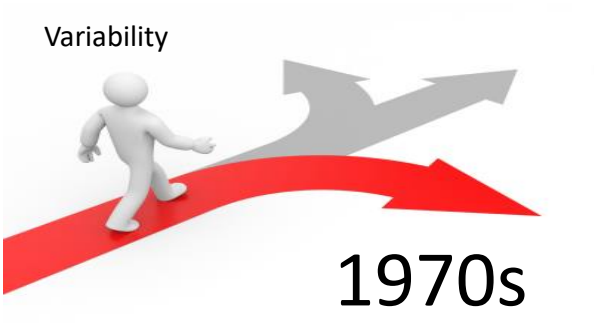
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UDDA

244



245



246



247



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249



Uniform Law Commission

250



251



252

July 2021

253

Step 2

Drafting
committee

254

1. Med-Leg “gap”
2. Accepted criteria
3. Consent required
4. Religious objections
5. Other

255

July 2022

256

Step 3

State
legislatures

257

Reduce

variability

Increase

certainty & trust

258



259



260

WHY the RUDDA

261

Variability in medical standards used for DDNC

262

Mismatch legal criteria to medical standards

263

More **conflict** and litigation

264

Public Trust in DDNC

variability and uncertainty → subjective or arbitrary
rather than as objective and authoritative.

265

optn.transplant.hrsa.gov/data/view-data-reports/national-data

	To Date	2020
All DCD + non-DCD	235,599	11,543
Brain Death Donor	184,232	8,616
DCD Donor	23,820	2,927

266

PLUS

267

Consent for testing

268

Religious exemption or accommodation

269

Conclusion

270



271



272



273



274

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

275

References

276

Materials from this presentation are available

<http://thaddeuspope.com/braindeath>

277

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 nearly **4 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

278

It's Time to Revise the Uniform Determination of Death Act, 173(1) ANNALS OF INTERNAL MEDICINE 75-75 (2020).

Revising the Uniform Determination of Death Act: Response to Miller and Nair-Collins, HASTINGS BIOETHICS FORUM (January 29, 2020) (with Ariane Lewis and Richard J. Bonnie).

279

Why Should We See Brain Death as Socially Situated? 22(12) AMA JOURNAL OF ETHICS E983-985 (December 2020) (guest editor of issue with Ariane Lewis).

Brain Death Testing: Time for National Uniformity, 20(6) AMERICAN JOURNAL OF BIOETHICS 1-3 (2020).

280

Is There a Right to Delay Determination of Death by Neurologic Criteria? 77 JAMA NEUROLOGY (August 3, 2020) (with Ariane Lewis, and Richard J. Bonnie).

Determination of Brain Death / Death by Neurologic Criteria - The World Brain Death Project, 323 JAMA (August 3, 2020) (with others).

281

It's Time to Revise the Uniform Determination of Death Act, 172(2) ANNALS OF INTERNAL MEDICINE 143-144 (2020) (with Ariane Lewis and Richard Bonnie).

Determination of Death by Neurologic Criteria in the United States: The Case for Revising the Uniform Determination of Death Act, 47(4) (Supp.) JOURNAL OF LAW, MEDICINE & ETHICS 9-24 (2019) (with Ariane Lewis, et al.).

282

The 50-Year Legacy of the Harvard Report on Brain Death, 320(4) JAMA 335-336 (2018) (with Robert Truog & David Shumway Jones).

Brain Death and the Law – Hard Cases and Legal Challenges, 48(5) HASTINGS CENTER REPORT (Nov/Dec 2018).

283

Brain Death Rejected: Expanding Clinicians' Legal Duties to Accommodate Religious Objections and Continue Physiological Support, in LAW, RELIGION, AND AMERICAN HEALTHCARE (Cambridge Univ. Press 2017).

Brain Death: Legal Status and Growing Conflict, and Court Challenges, 37 JOURNAL OF LEGAL MEDICINE 265-324 (2017).

284

Legal Standards for Brain Death, 13 JOURNAL OF BIOETHICAL INQUIRY 173-178 (2016).

Brain Death: Legal Obligations and the Courts, 35 SEMINARS IN NEUROLOGY 174-179 (2015) (with Christopher Burkle).

285

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

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

286

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).

287

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