

Brain Death under Attack

Thaddeus Mason Pope, JD, PhD, HEC-C
ASBH 2020 (October 15, 2020)

1

Nothing to disclose

2



3



4

September 2020						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

5



6

Procedure Report by King, Staci D, MD at 9/27/2020 1:07 PM

09/27/20

Brain Death Exam:

- Flaccid tone is present and patient is unresponsive to deep painful or auditory stimuli: Yes
- Pupils are midposition or fully dilated and light reflexes are absent in both eyes: Yes
- Corneal reflexes are absent bilaterally: Yes
- Cough reflex is absent: Yes
- Gag reflex is absent: Yes
- Oculovestibular reflexes (Cold Calorics) are absent bilaterally: Yes
- Spontaneous Respirations while on ventilator are absent: Yes
- Apnea test was performed: Yes
- Apnea test start time: 1249
- ABG at start: 7.32/36/-7
- Apnea test end time: 1259
- ABG at end: 7.07/72/-8.8
- Time off ventilator: 10 minutes
- Ancillary test: EEG (9/26/2020) - The EEG background appears diffusely suppressed with no definite cerebral activity >10 microvolts. No spontaneous variability or reactivity to noxious stimulation is observed.

I certify that my examination is consistent with cessation of function of the brain and brainstem.

number: 92429551 - Page 36 of 30

7



8



Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

9



10

3 weeks

11

**Not
unique**

12



13

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

“We can help”

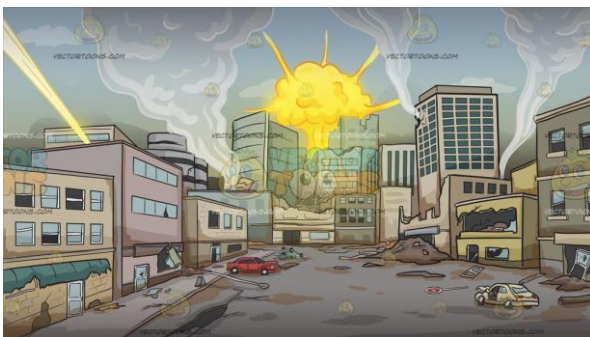
14



15



16



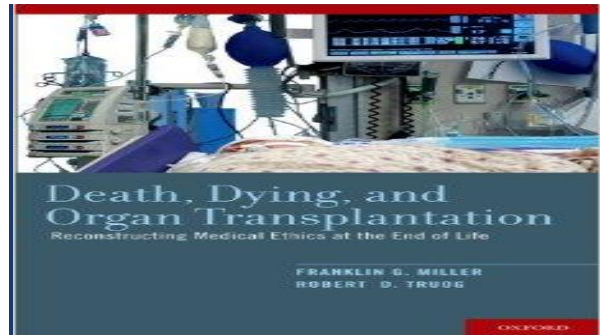
17



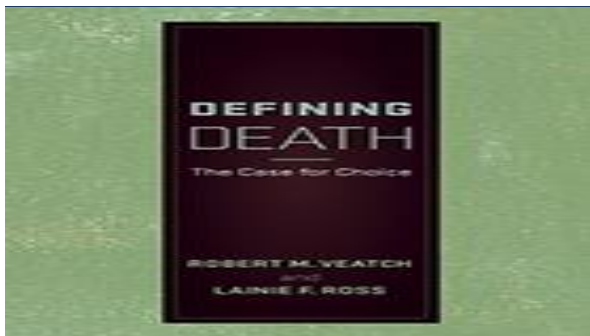
18



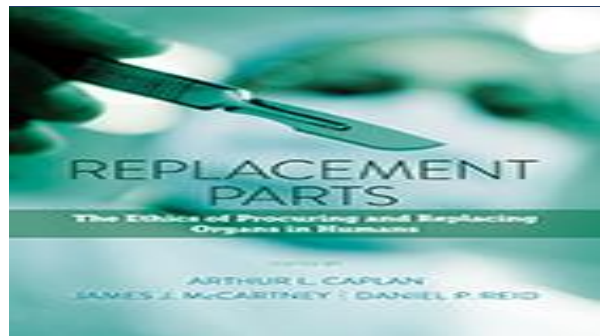
19



20



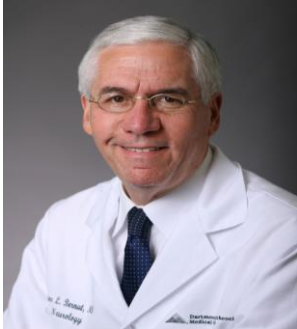
21



22

Not just academic debate

23



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

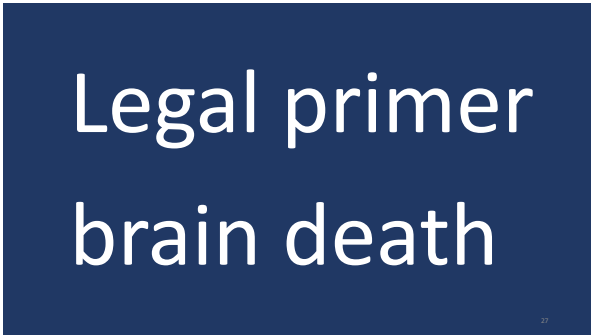
24



25



26



27



28



29



30

individual ... **dead** ... **either**

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

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

31

Brain death
=
Death

32

Dead
↓
w/d OST

33

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.**”

34

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.**”

35

Legally **settled**
since 1980s

36



37



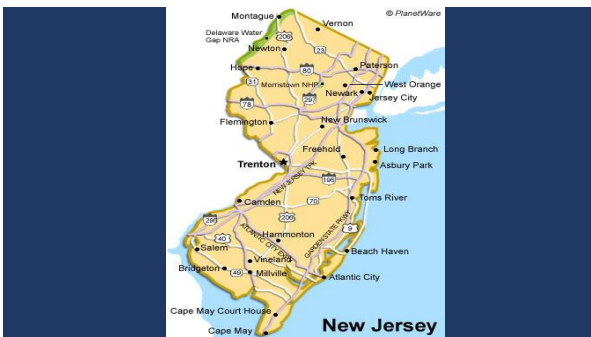
38

Attack 1

39

Want
religious
exemption

40



41

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

42

Religious objection  No death by BD

43

Pt may **satisfy** BD criteria

44

BUT

45

May **not** declare death

46

Until death by CP criteria

47

Rejected **everywhere** outside NJ

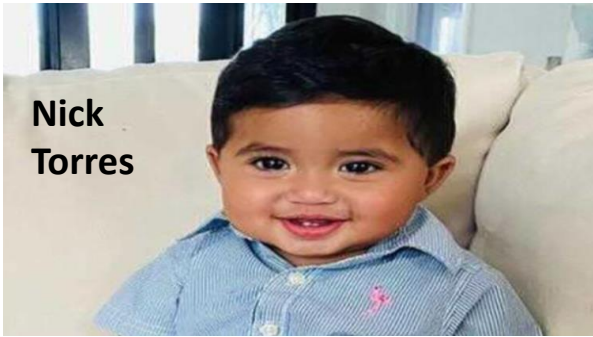
48

Still
asked for

49



50



51



52



53



54

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 Does
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**

55

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

56

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

57



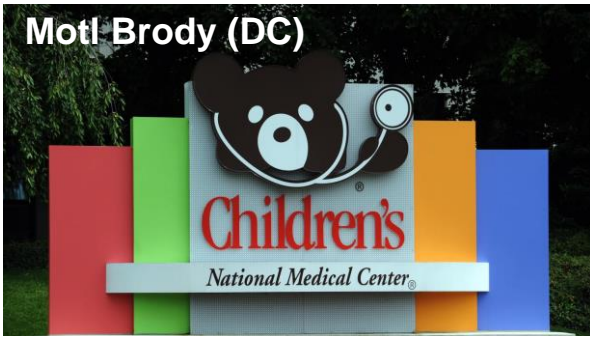
58



59



60



61



62



63



64



65

Will see **more** of these cases

66



67



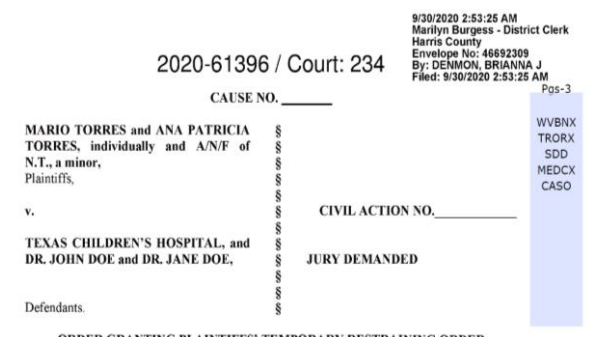
68



69



70



71



72

Clinician
duties
after BD

73

Limited

74

No **post**-BD
treatment rights

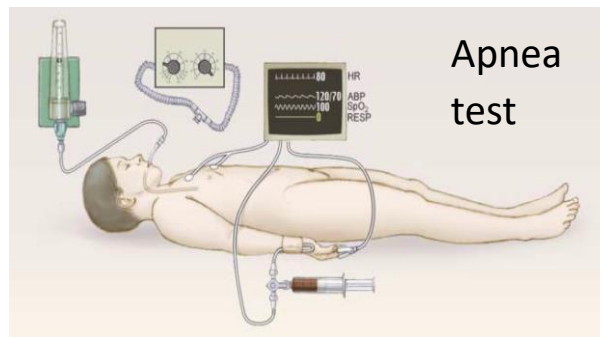
75

So,

76

Focus on
pre-BD
rights

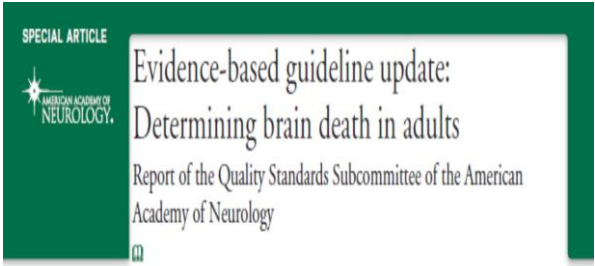
77



78

Final confirmatory test

79



Eelco F.M. Wijdicks, MD, PhD
ABSTRACT
Objective: To provide an update of the 1995 American Academy of Neurology guideline with regard

80

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

Abstract | Thomas A. Nakagawa, MD, Stephen Ashwal, MD, Mudd

81

BUT

82

More family refusals

83



84

Parental refusals

85



86

No apnea test
↓
No BD

87

No BD
↓
Treatment duties continue until CP

88

Practically, same as NJ religious exemption

89

Opt out BD

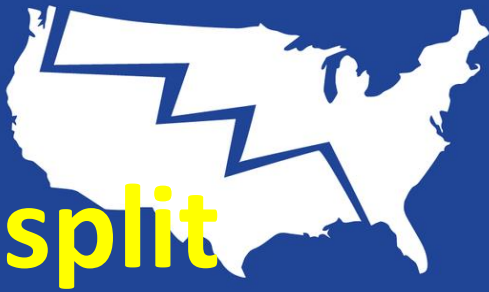
90

Must clinicians
honor the
refusal?

91

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

92



93

Yes

94

Allen
Callaway

95



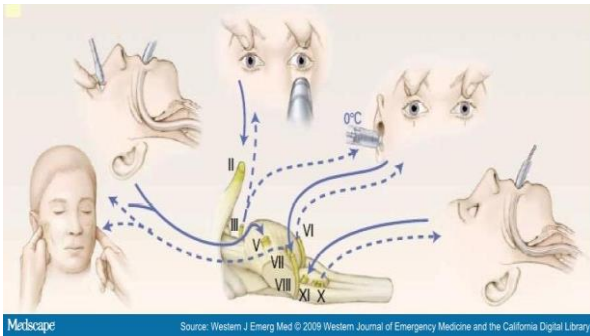
96



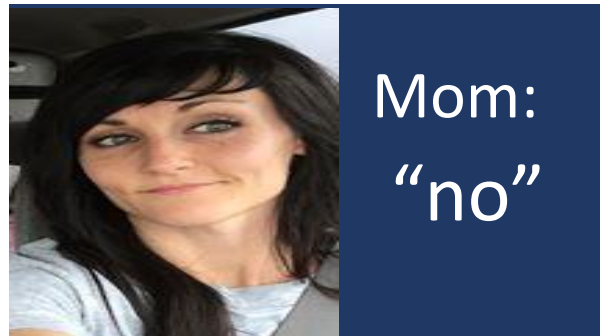
97



98



99



100

MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

IN THE MATTER OF THE GUARDIANSHIP OF A.C.,

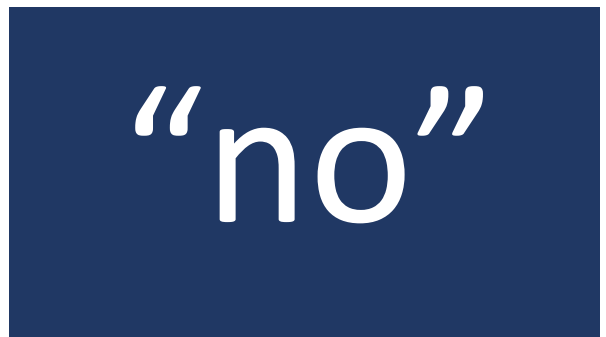
FILED
 SEP 26 2016
 COURT CLERK
 PONDERA COUNTY, MONTANA

a minor.

Cause No. DG-16-08

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

101



102

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

103

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

104

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

105

MT said
 “**yes**”

106

KS also
 “**yes**”

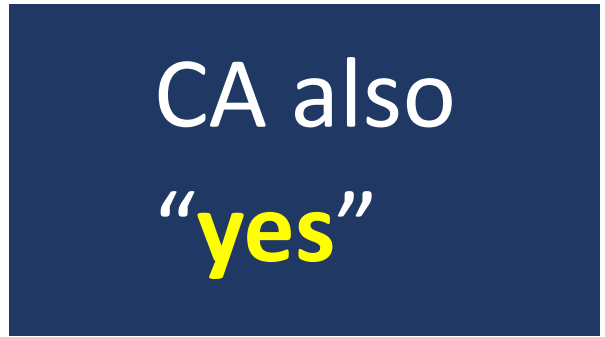
107



108



109



110



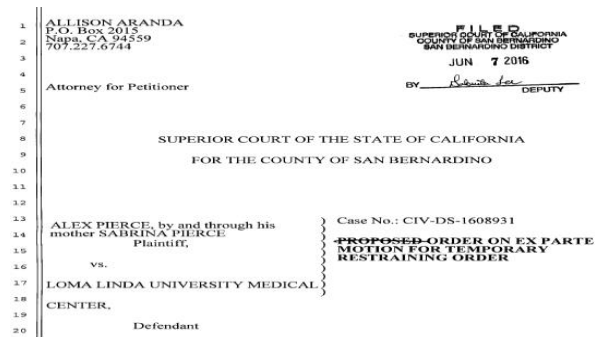
111



112



113



114



115



116

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

117

MT, KS, CA
said "**yes**"

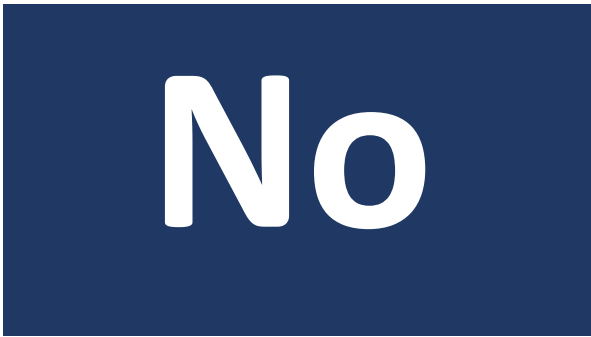
118

Plausible

119

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

120



121



122



123



124



125



126

YES	NO
California	Georgia
Kansas	Nevada
Montana	New York
	Texas
	Virginia

127

Conflict continues

128



129



130



131



132

Attack 3

133

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

134

UDDA

135

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

136

BUT

137

variability

138

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

139

Improving uniformity in brain death determination policies over time

OPEN

Hilary H. Wang, MD ABSTRACT

140

Variability of brain death determination guidelines in leading US neurologic institutions

David M. Greer, MD, MA; Panayiotis N. Varelas, MD, PhD

ABSTRACT

In compliance 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

141

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

142



Supreme Court of Nevada

143



144

AAN does **not**
measure what
UDDA requires

145

UDDA

146

irreversible cessation
all functions
entire brain

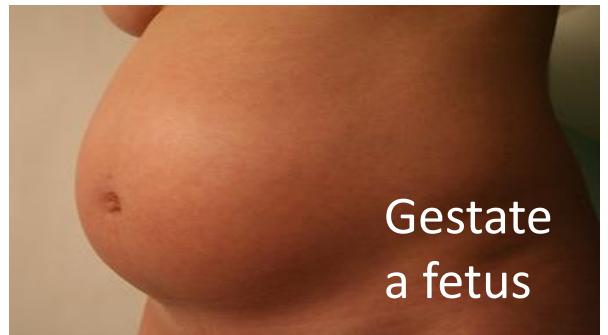
147

BUT

148

Brain dead
people
do stuff

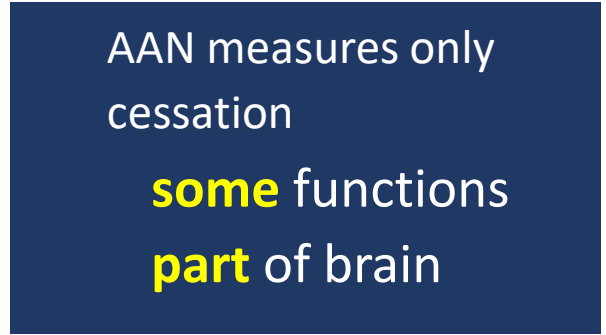
149



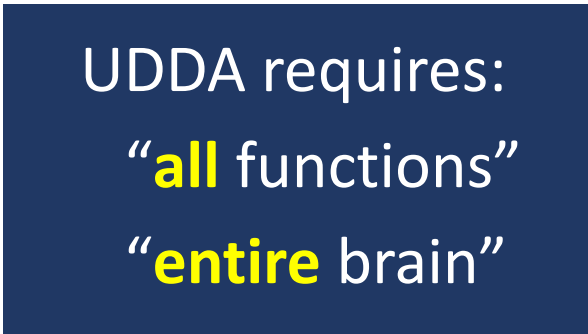
150



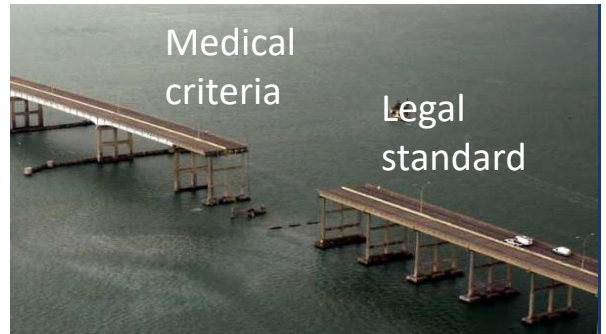
151



152



153



154



155

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

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

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

156

“neuroendocrine
function **may be
present**”

157

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

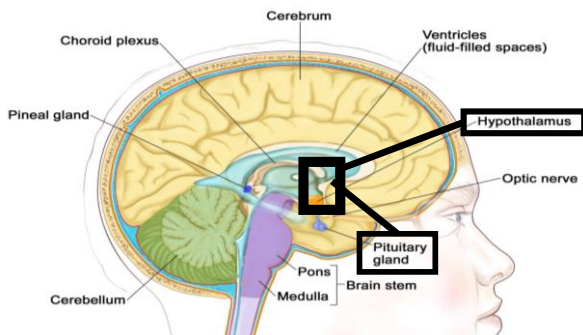
158

UDDA

159

Cessation of
“**all** functions”
“**entire** brain”

160



161

Medically dead



Legally dead

162

Conclusion

163

Life | **Death**

164

Life | **Death**

165

So...

166



Uniform Law Commission

167

UDDA

168



169



170



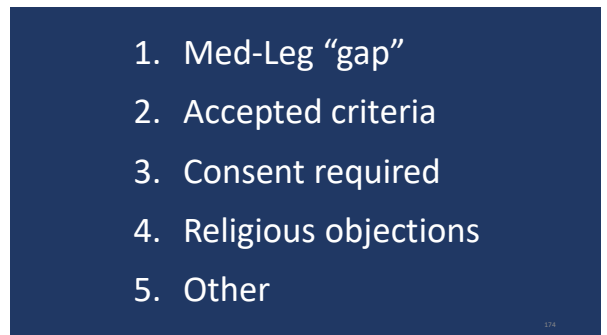
171



172



173



174

July 2022

175

Step 3

State
legislatures

176

Reduce

variability

Increase

certainty & trust

177

Thaddeus Mason Pope, JD, PhD, HEC-C

Director, Health Law Institute
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105

T 651-695-7661

C 310-270-3618

E Thaddeus.Pope@mitchellhamline.edu

W www.thaddeuspope.com

B medicalfutility.blogspot.com

178

178

References

179

Materials from this
presentation are available

<http://thaddeuspope.com/braindeath>

180

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.

181

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).

182

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

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).

183

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.).

184

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).

185

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).

186

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).

187

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).

188

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).

189

Thaddeus Mason Pope, JD, PhD, HEC-C

Director, Health Law Institute
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105

T 651-695-7661

C 310-270-3618

E Thaddeus.Pope@mitchellhamline.edu

W www.thaddeuspope.com

B medicalfutility.blogspot.com

190

190