Brain Death
Clinician Duties when Families Object

Center For Bioethics & Medical Humanities
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1985

Roadmap
6 parts
1. Legal **status** of brain death

2. **Non-religious** objections to BD

3. How to **respond**

4. Religious objections to brain death

5. Duties to **accommodate**

6. Reasons to **extend** duties to accommodate

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**Part 1 of 6**

**Legal status of brain death**

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**All 56 US jurisdictions**

(narrow exception in NJ)

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**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

\[
\text{total brain failure} = \text{death}
\]

20 years

Wrong

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.

UDDA

1970s
Legally settled since 1980s

Remains settled (legally)

“durable worldwide consensus”

Clinician duties after death

“After a patient . . . brain dead . . . medical support should be discontinued.”

“Once death has been pronounced, all medical interventions should be withdrawn.”

Consent not required to stop physiological support

Dead → Not a patient
Not a patient \rightarrow No duty to treat

\textbf{13 ethics consults} “because family members asked clinical caregivers to deviate from standard procedures following brain death”


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

Non-religious objections

Diagnostic confusion
- Prognostic mistrust

Diagnostic confusion

“Since there is a heartbeat (and he is warm), he is alive.”

“He’s in a coma.”

“With rehab/time he’ll get better.”

Miracles
If the doctors treating your family member said futility had been reached, would you believe that divine intervention by God could save your family member?
Yes

Trauma Death
Views of the Public and Trauma Professionals on Death and Dying From Injury

Linguistic Confusion
“Brain dead” implies not really “dead”
“she is ‘brain dead’ and . . .
being kept alive by 
life support to 
enable the family 
to say their 
goodbyes.”

Daily Mail, 03-18-09

[Image: Brain-Dead Canadian Woman Dies After Giving Birth to Boy]

[Image: Pirates of the Caribbean: Dead Men Tell No Tales]

[Image: Brain-Dead Florida Girl Will Be Sent Home on Life Support]

Prognostic Mistrust

[Image: Prognostic Mistrust]

wrong before
wrong now
wrong before

 Clinicians were correct

 But many other times, wrong

Alvarado
Sept. 15, 1989  DDNC
Sept. 21 social worker
Sept. 22 parents file
Oct 13 independent expert
Oct 18 order
Appeal dismissed (not dead)
Close call in death ruling of potential organ donor (April 12, 2007)

John Foster at Fresno Community

Negligent errors

More culpable errors

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

Hootan Rozrok

Non-religious objections

Diagnostic confusion

Prognostic mistrust

$1.2 million settlement in 'organ harvest' case

November 18, 2012 12:00 AM

Randall Bianchi
Chicago
Exacerbating factors (3)

Taphophobia

Maria de Jesus Arroyo

Bart (Tampa Bay)
Taphophobia: people want to be **sure**

Variability

Brain death **concept** accepted across USA & world

Irreversible cessation of all brain function including the brain stem

How is irreversible cessation **measured**?

Legal variation

# physicians
Qualifications
How tests performed

“acceptable medical standards”

“ordinary standards”

“usual & customary standards”

Lack of confidence
Conceptual Incoherence

Heal wounds
Fight infections
Gestate fetus
Stress response

Controversies in the Determination of Death
A White Paper by the President’s Council on Bioethics

December 2000

Alan Shewmon

The Beating Heart Donors
They urinate. They have heart attacks and beedores. They have babies. They may even feel pain. Meet the organ donors who are "pretty dead."

UMN, J Neurosurgery 35(2): 211-18
Brain dead subjects sexually responsive

Dr. Paul Byrns
Part 3 of 6

Responses

Diagnostic confusion

Patient decision aids

Brain Death

A summary and analysis of research about the determination and evaluation of brain death. Brain death is an irreversible state of irreversible coma characterized by the absence of brainstem reflexes. The term 'brain death' should only be used after it has been confirmed by an independent expert panel. The panel should be composed of a neurologist, a neurosurgeon, and at least one other specialist. The confirmation should be based on clinical examination and, if necessary, on the results of laboratory tests. The diagnosis of brain death should be made only after the patient has been declared to be brain dead by a patient decision aid team. The diagnosis of brain death should be made only after the patient has been declared to be brain dead by a patient decision aid team.
Do **not** use the term “brain death”

Do not use the term “brain death”.

Mistrust

Independent second opinion

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.
Part 4 of 6

Non-religious objections

总脑死亡 ≠ 死亡

Not dead until heart or breathing stops

Orthodox Jews
Japanese Shinto
Native Americans
Buddhists
Muslim (some)
Part 5 of 6

Duties to accommodate objections

“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 to "treat"

Imposes duties to "treat" after DDNC

Limited

"reasonably brief period"

“amount of time afforded to gather family or next of kin at the patient's bedside"

<24 XXXXX
24 XXXXXXX
36
48 x
72 XXX

NJ

Opposite
Changes definition itself

NJ changes this

Dead → No duty treat

We don’t treat the dead

“[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
Shewmon
80% < 4 weeks
20% > 4 weeks
10% > 8 weeks
5% > 6 months

Narrow exceptions in 4 states

Other transfers
Girl (CA)
Hamilton (FL)
Scoon (NY)
Shively (KS)

Accommodation denied elsewhere
Motl Brody (DC)

Shahida Virk (Mich.)

Beth Israel Deaconess Medical Center

Part 6 of 6

Extend duties to accommodate

4 reasons

1. BD imposes on profound beliefs

Minn. S.F. 1694

no autopsy when religious objection unless compelling state interests
2. Accommodation has **worked** for decades in 4 populous states

3. Duties are **limited**

**Frequency**

3.1 Brain death

- Brain death < 1% hospital deaths

- Frequency of brain death
  
  - Japanese Shinto: 0.3
  - Orthodox Jew: 0.3
  - Native American: 0.3
  - Buddhist: 0.7

4. 1 in 5000 deaths
  
  2% of 1% = 0.0002
  
  400 cases nationwide annually
Most in CA, NY, IL, NJ

“hospital is required to continue only previously ordered cardiopulmonary support. No other medical intervention is required.”

Type

Duration

24 h

“in determining what is reasonable, a hospital shall consider . . . needs of other patients . . . .”

4. Brain death conceptually flawed
**Value** laden judgment about when it is **worthwhile** to continue physiological support

**Total brain failure** = Death

**Only NJ changes** who is dead

CA – IL – NY accommodation does **not** threaten uniformity
uniformity

“practically oriented bioethicist”

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


Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16. 2014) (with Art Caplan).

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