

**Brain Death: Expanding
Duties to Accommodate
Objections**

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4 parts

1

Clinician
duties at BD

2

Growing
resistance
to BD

3

Responding
to objections

4

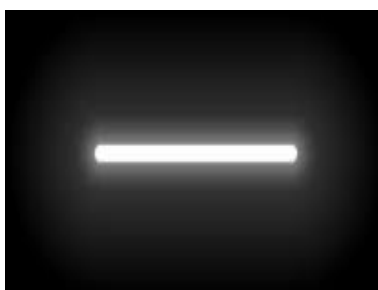
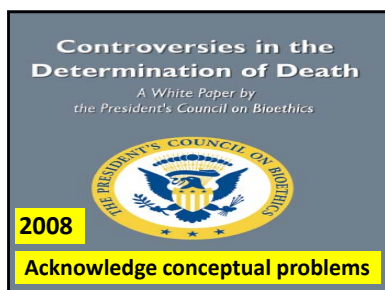
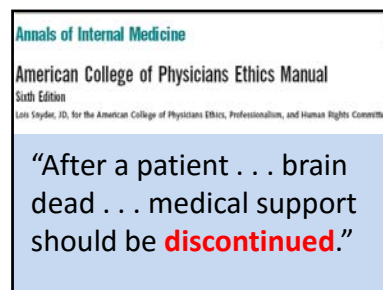
2 legal attacks on BD

Clinician duties after BD

total brain = death failure



Consent is **not** required to stop physiological support



Surrogate resistance is growing

More families dispute DDNC



13 ethics consults "because family members asked clinical caregivers to deviate from standard procedures following brain death"
Al Flamm et al. "Family members' requests to extend physiologic support after declaration of brain death: a case series analysis and proposed guidelines for clinical management," J Clin Ethics (2014) 25(3):222-37.



"in recent months . . . the **families of two patients** determined to be dead by neurologic criteria have **rejected** this diagnosis"
JM Luce, "The Uncommon Case of Jahi McMath," Chest (2015) 147(4):1144-51.



Responses

Diagnostic confusion

1

Do **not** use the term "brain death"

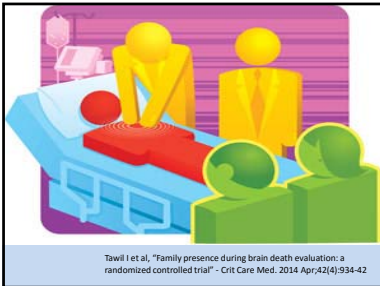
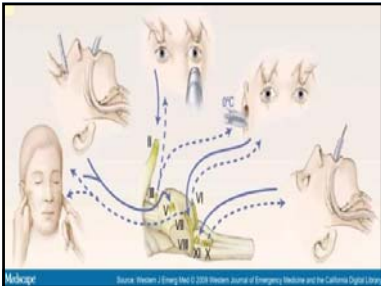
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Brain Death article snippet with anatomical diagrams and clinical criteria.

Mistrust

1



2

Independent second opinion



Religion



Dead → No duty treat

Dead → Temp duty treat

Expand duty of accommodation to other states

1

BD **imposes** on profound beliefs

2

Accommodation has **worked** for decades in 3 populous states



3

Rare

Brain death
< 1%
hospital deaths

Objections

< 2%

US population

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

Minimal net
marginal
burden

4

Limited
in type

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

5

Limited duration

24 h

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

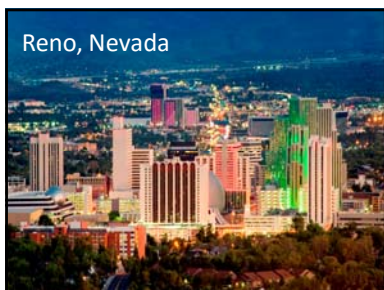
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Conceptual flaws

Value laden judgment about when it is **worthwhile** to continue physiological support

2 legal challenges

Aden Hailu



April 1, 2015
Catastrophic anoxic brain injury during exploratory laparotomy

May 28, 2015
Met AAN criteria for brain death

Jan. 4, 2016
Still on organ support in hospital

Dead
7 months
in ICU

Court **injunctions** pending litigation



Aden's father
Argued she is **not** dead

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

Aden's father
 Appeals to Nevada
 Supreme Court

Irrelevant if Aden
 meets AAN criteria
 They are **not** the
 "right" criteria

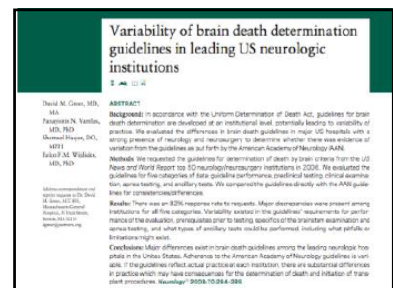


DDNC requires
 "irreversible cessation .
 . . **all** functions of the .
 . . **entire** brain"
 Nev. Rev. Stat. 451.007(1)

Trial court did **not**
consider whether
 AAN measures
 "irreversible cessation . . .
all functions of the . . .
entire brain"

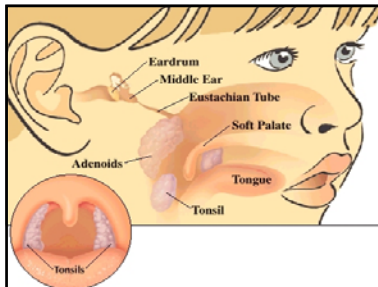
DDNC "must be
 made in accordance
 with **accepted**
medical standards."
 Nev. Rev. Stat. 451.007(2)

Trial court did **not**
consider whether
 AAN are
 "accepted medical
 standards"





**Jahi
McMath**

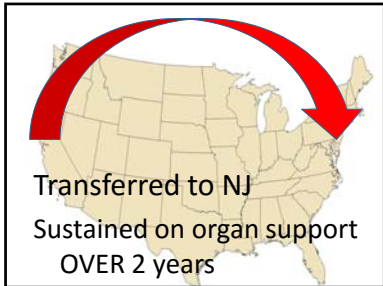


Dec. 12, 2013
Declared dead



Lost lawsuits
against
hospital

COUNTY OF ALAMEDA
002357979
EXHIBIT



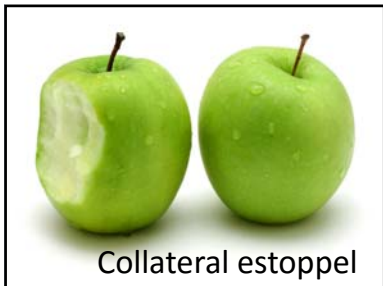

Mar. 2015
Med Mal lawsuit

Seeking
future medical
expenses

Dead people do
not have medical
expenses

Re-litigate
status as
alive

Defendants
Demurrer

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

If true, allegations
are sufficient





Federal lawsuit against state – to revoke death certificate

Court to rule on motions to dismiss

Upshot



AAN criteria may be insufficient

Legal standard may demand more than **medical** criteria

Must **reexamine** medical criteria for DDNC



Does not attack the AAN criteria themselves



If alive, must
reexamine
medical criteria
for DDNC

**Accuracy
is essential**



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.

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References

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 over **1 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

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