Prefatory Remarks

4 CME objectives

No relevant conflicts to declare

Brain Death: Clinician Duties to Accommodate Objections and "Treat" the Dead?

University of Minnesota Center for Bioethics
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Thaddeus Mason Pope, J.D., Ph.D.
Hamline University Health Law Institute

1. Understand the legal status of brain death in the United States
2. Describe recent conflicts over how to "treat" brain dead individuals

Roadmap

1. Legal duties after DDNC
2. Recent conflicts over DDNC

3. Identify 4 U.S. jurisdictions that legally mandate hospitals to accommodate objections to brain death
4. Appreciate ethical & legal arguments for expanding accommodation duties

No relevant conflicts to declare
2. **History** of laws requiring accommodation

3. **Reasons** to extend such laws

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**Determination of Death by Neurological Criteria**

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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
Controversies in the Determination of Death

- Total brain failure = death
- Legally settled since 1980s

- Remains settled (legally)
- All 56 US jurisdictions (narrow exception in NJ)
- “durable worldwide consensus”

- Consent not required to stop LSMT
- Dead → Not a patient
- Not a patient → No duty to treat
“After a patient . . . brain dead . . . medical support should be discontinued.”

“Once death has been pronounced, all medical interventions should be withdrawn.”

The rule almost everywhere

Narrow exceptions in 4 states

DDNC in Minnesota

1977

1979
No law, but medical practice

1989

January 31, 1989
“The legislature is now in session and we trust it shares our sense of urgency.”

Gov. Perpich signs May 9, 1989

UDDA
Minn. Stat. 145.135

Resurrected Interest

Legally settled since 1980s
DDNC Conflicts

8 big causes of conflicts
Clinicians want to stop. Family does not.

Taphophobia
1 of 8
"Since there is a heartbeat (and he is warm), he is alive."

“He’s in a coma.”

"With rehab/time he’ll get better."

“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
Variability
Heterogeneity
4 of 8

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”

Prognostic
Mistrust
5 of 8
Clinicians were correct in McMath
But many other times, wrong

Close call in death ruling of potential organ donor
(April 12, 2007)
John Foster at Fresno Community

They were declared brain dead. It was written in their chart as such. And here they are, sitting up talking to me.
Religious objection
8 of 8
Orthodox Jews
Japanese Shinto
Native Americans
Buddhists

NY, NJ, IL have *laws*

But *custom & practice* of accommodation in other states

1986

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

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

Sheldon Silver bill
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Religious **exemption** from DDNC

Mario Cuomo

**NEW YORK**

Mario Cuomo

Sheldon Silver bill
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Religious **exemption** from DDNC
"Each hospital shall establish and implement a written policy . . . a procedure for the reasona**ble accommodation** of the individual's religious or moral objection to the determination . . . ."

10 N.Y.C.R.R. § 400.16(e)(3)

Dead → No duty treat

Dead → No duty treat

NY

Changes duties to treat after DDNC

Did what NY originally planned:
Religious exemption

<table>
<thead>
<tr>
<th>New York</th>
<th>Accommodation</th>
<th>Dead but ongoing rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Exemption</td>
<td>Not dead</td>
</tr>
</tbody>
</table>

1991
“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.”

Dead → No duty treat

NJ changes this

NJ
Changes definition itself

Assures payment
Also directly required

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

1. Only religious objections
2. Only objections of the individual

Barnert Hospital v. Moreno (NJ. Sup. 1998)

2007
“Every hospital must adopt policies and procedures to . . . take into account the patient's religious beliefs concerning the patient's time of death.”

History of DDNC Accommodation
Laws in CA

1983

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

Obiter dictum
“by the way”
“said in passing”

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 . . . .”

1986
Would have made CA = NJ

1987

AMENDED IN ASSEMBLY APRIL 10, 1988
CALIFORNIA LEGISLATURE—1988-89 REGULAR SESSION
ASSEMBLY BILL
No. 3211

Introduced by Assembly Member Katz
February 18, 1988

An act to amend Section 1255.5 of the Welfare and Institutions Code, relating to identification of the Uniform Determination of Death Act.

LEGislative COUNCIL REPORT

2008

AMENDED IN ASSEMBLY APRIL 6, 1988
CALIFORNIA LEGISLATURE—1988-89 REGULAR SESSION
ASSEMBLY BILL
No. 1390

Introduced by Assembly Member Katz
March 4, 1987

An act to add Section 1255.5 to the Health and Safety Code, relating to health facilities.

LEGISLATIVE COUNCIL REPORT
AB 1390, as amended, Katz. Health facilities general acute care hospitals.

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.

Mike Eng

Richard Katz
1254.4

Made CA like NY

CA broader duty accommodation

NY & NJ: moral & religious objections
CA: other objections too

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
<table>
<thead>
<tr>
<th>Plain language</th>
<th>Accommodation</th>
<th>What</th>
</tr>
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<tbody>
<tr>
<td>1254.4 on non-moral objections</td>
<td>What (type) How long (duration)</td>
<td></td>
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</tbody>
</table>

“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”

“How 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”

CHO
Usual: 2-3 days
Actual: 8 days

Hiram Lawrence
CHO
> 1 week

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

Deferece

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”

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

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)

Theresa Koochin
Utah 2004

A Debate Over Life After Death
February 10, 1997
10-year old girl

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 announcement).

Treatment for an indefinite period of time after the determination of death is not required.
Court rulings

1254.4 on moral objections

Title VII, Civil Rights Act of 1964

RFRA

Religious objectors may demand exemptions from generally applicable laws that substantially burden the objectors’ religious practice.
But RFRA applies only to federal law

DDNC is state law

State must demonstrate compelling governmental interest to overcome religious objection to autopsy.

Denied accommodation requests
Should they have been accommodated

Societal need for uniformity

1

Imposes on profound beliefs

2
1% hospital deaths

Small hospital
1-5/year

Large hospital
25/year

Just cardiopulmonary standard

Not individually determined

3

TYPE
Ventilator only
Permit rituals

LENGTH
24 hours
Unless HTO

4

5

Worked for decades in 4 populous states

6
Value laden judgment about when it is worthwhile to continue physiological support

Thaddeus Mason Pope
Director, Health Law Institute
Hamline University School of Law
1536 Hewitt Avenue
Saint Paul, Minnesota 55104
T 651-523-2519
F 901-202-7549
E Tpope01@hamline.edu
W www.thaddeus pope.com
B medicalfutility.blogspot.com

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 775,000 direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like Westlaw, Bioethics.net, Wellsphere, and Medpedia.


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