

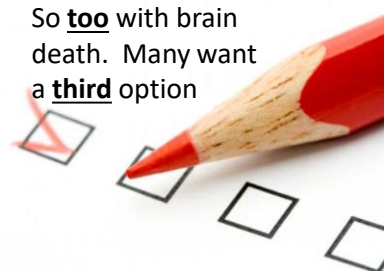
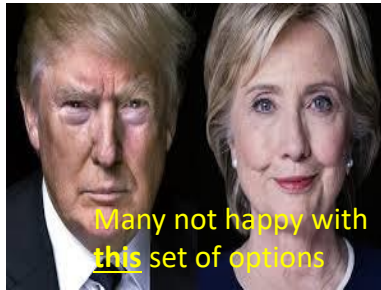
**When Is Your Patient Dead?  
When May You Stop Treating  
Dead Patients? Growing  
Challenges to the Legal Status  
of Brain Death**

Kansas City University of Medicine & Biosciences;  
Center for Practical Bioethics • Nov. 8, 2016

Thaddeus Mason Pope, JD, PhD  
Mitchell Hamline Health Law Institute

# Conflict of interest

Based upon data from the largest  
ongoing prospective cohort study in  
history, there is a very high likelihood  
 $(RR = \infty, p < 0.0001)$   
that I will die



“Elect” to  
treat dead  
as alive

# 6 parts

# 1

**What** is  
brain death

2

Clinician  
**duties** at BD

3

Growing  
**resistance**  
to BD

4

**Reasons** for  
resistance

5

Responding  
to **objections**

6

3 legal attacks on BD

Part 1 of 6

Brain Death

1968

JAMA, Aug 5, 1968 • Vol 205, No 6

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.

Wrong



# 1970

## Kansas' brain death law held up as example for all states

WASHINGTON (UPI) — It was Webster's 1970s decade of 1970, a decade of economic warfare, rising up over the globe, rising by raising.

The Kansas law, for instance, states that, in general, will be considered dead only if the brain is in total silence of a physician, based on a variety of standards of medical practice.

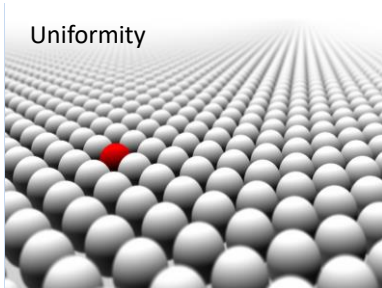
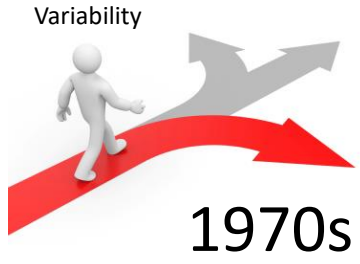
Cornea was a member of the American Medical Association which was the largest professional organization of doctors and other state legislators together with the traditional medical society. It was the only one that kept its doors open when the world was in a state of economic warfare.

Cornea was the first to propose that the brain be used as the standard for death, instead of the heart. He was the first to propose that the brain be used as the standard for death, instead of the heart. He was the first to propose that the brain be used as the standard for death, instead of the heart.

The fact is that the medical community did not want to accept the concept of irreversible cessation of all functions of the entire brain.

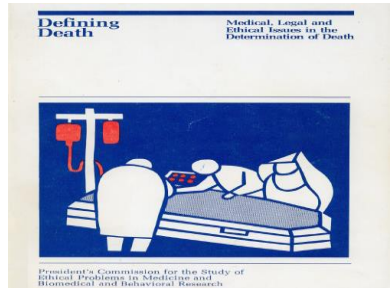
The Harvard panel's report said that the law was a good example for distinguishing life from death.

The Salina Journal (Salina, Kansas) · Sun, Jan 12, 1975 · Page 16



Uniformity

# 1981



# 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

# 2016

UDDA

All 56 US jurisdictions

(narrow exception in NJ)

Legally settled since 1980s

Remains settled (legally)

“durable worldwide consensus”

2008

Bernat, 2013

Controversies in the Determination of Death

A White Paper by the President's Council on Bioethics



Acknowledge conceptual problems

Total brain = death failure



# Part 2 of 6

# Clinician duties after BD

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

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\*

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

Guidelines for Physicians: Forgoing Life-Sustaining Treatment for Adult Patients

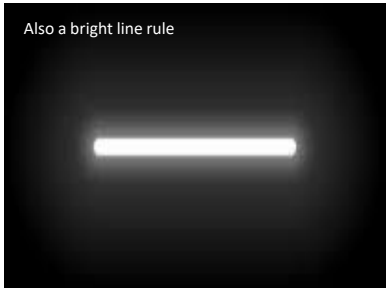
Joint Committee on Biomedical Ethics  
of the  
Los Angeles County Medical Association  
and  
Los Angeles County Bar Association

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

Approved by the Los Angeles County Medical Association February 15, 2006  
Approved by the Los Angeles County Bar Association March 22, 2006

Dead → Not a patient

Not a patient → **No** duty to treat



**BUT**

**Part  
3 of 6**

**Surrogate  
resistance  
is growing**

**More** families  
dispute DDNC

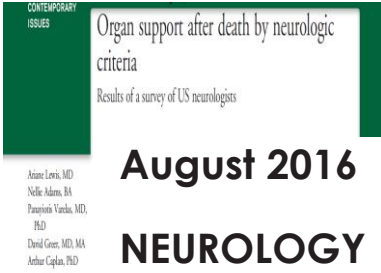


**13 ethics consults** "because family members asked clinical caregivers to deviate from standard procedures following brain death"  
AL Flamm et al, "Family members' requests to extend physiologic support after declaration of brain death: a case series analysis and proposed guidelines for clinical management," 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.

  
**56 DDNC 2014-2016  
Conflicts in 10%**



**50%** report families request continued organ support **after** DNC

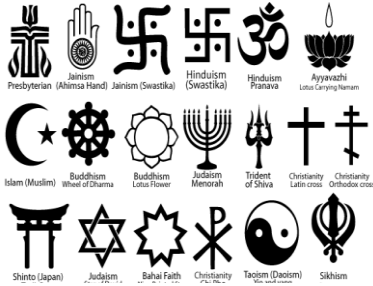
Many cases going to **court**



**Part 4 of 6**

Why do these families resist





1

Diagnostic confusion

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

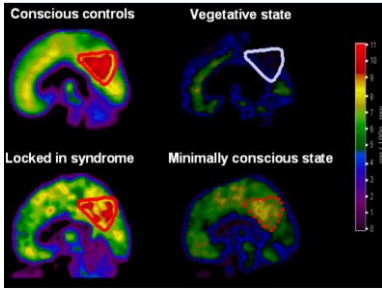
“He’s in a **coma**.”  
 “With rehab/time he’ll get better.”



2

Linguistic Confusion

“Brain dead” implies not **really** “dead”



Brain-Dead Canadian Woman Dies After Giving Birth to Boy

The New York Times  
Friday, February 23, 2007

Health

WORLD U.S. N.Y. REGION BUSINESS TECHNOLOGY SCIENCE HEALTH SPORTS C

FITNESS & NUTRITION HEALTH CARE POLICY MEN

Brain-Dead Florida Girl Will Be Sent Home on Life Support

PUBLISHED FEBRUARY 19, 1994

"she is **'brain dead'** and . . . being **kept alive** by life support to enable the family to say their goodbyes."

Daily Mail, 03-18-09



3

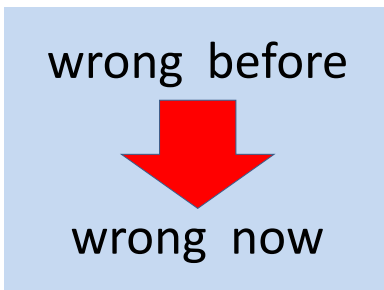
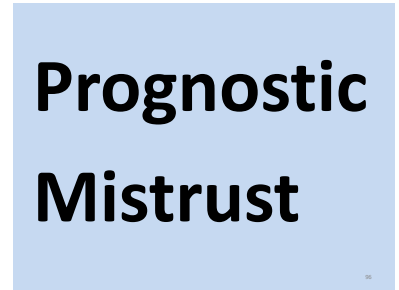
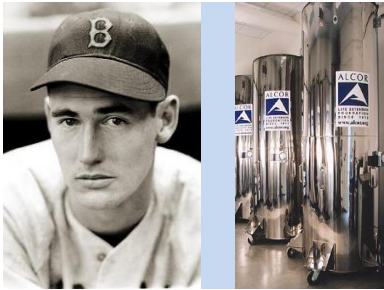
Miracles

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 57.4

Trauma Death  
Views of the Public and Trauma Professionals on Death and Dying From Injuries  
Lorenth M Jacobs, MD, MPH; Kayl Burns, RN, PhD; Barbara Bennett Jacobs, RN, MPH, PhD, CHRN  
Arch Surg. 2008;143(8):730-735

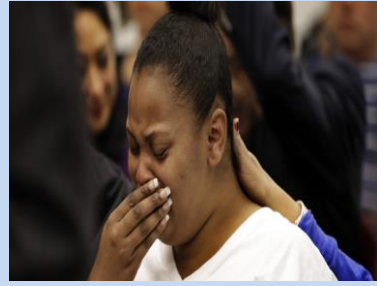





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 5 Second Floor  
 6 Torrance, California 90503  
 7 (310) 793-1400  
 8 Attorneys for Plaintiffs

9  
 10  
 11  
 12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 13 FOR THE COUNTY OF ALAMEDA  
 14

12 LATASHA NAILAH SPEARS WINKFIELD,  
 13 MARVIN WINKFIELD, SANDRA CHATMAN,  
 14 and JAHl McMATh, a minor, by and  
 through her Guardian Ad Litem,  
 LATASHA NAILAH SPEARS WINKFIELD, }  
 COMPLAINT FOR DAMAGES FOR  
 MEDICAL MALPRACTICE

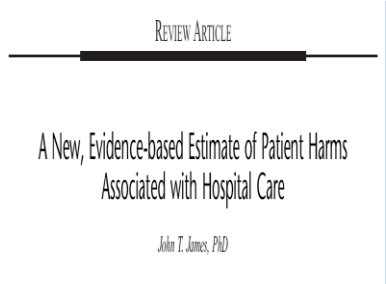
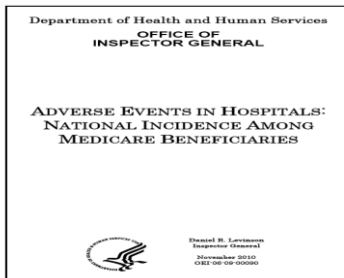
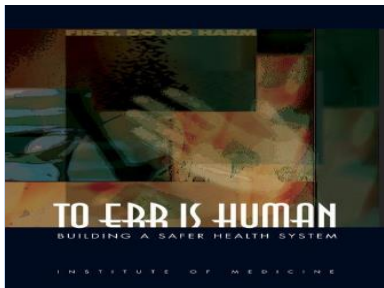



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 4 Attorneys for Plaintiff  
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 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 9 FOR THE COUNTY OF ORANGE  
 10  
 11 LISA AVILLA, ROBERTO CHAVEZ, Case No. 30-2018-00774798-CO-104-CXC  
 12 Plaintiff, Judge: Kimberly Colaw  
 13 vs. COMPLAINT FOR DAMAGES  
 FOR MEDICAL MALPRACTICE  
 14 AHMC ANAHEIM REGIONAL MEDICAL 1. Negligence  
 CENTRE, L.P., a Partnership, doing business as 2. Loss of Consortium  
 15 AHMC ANAHEIM REGIONAL MEDICAL  
 CENTRE, AHMC HEALTHCARE INC., a  
 16 California Corporation; FREDERICK  
 DIETBERG, M.D.; FREDERICK W.  
 17 DIETBERG, M.D., A PROFESSIONAL  
 CORPORATION, a California Corporation;  
 18 BANSARI SHAH, M.D.; BANSARI SHAW, MD

wrong before  
  
 wrong now

Clinicians were correct  
 But many other times, **wrong**

Medical error





BMJ 2016;353:f2139 doi:10.1136/bmj.f2139 (Published 3 May 2016) Page 1 of 5

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**ANALYSIS**

**Medical error—the third leading cause of death in the US**

Heart disease	600,000
Cancer	600,000
<b>Medical error</b>	<b>400,000</b>
COPD	140,000
Stroke	130,000
Accidents	120,000

**DDNC**  
**medical error**

abc NEWS HOME VIDEO U.S. WORLD POLITICS ENTERTAINMENT TV *Biggest*

**Arizona College Student Bounces Back From the Dead After Nearly Giving Organs**  
 May 16, 2014

By SUSAN DONALDSON JAMES on GOOD MORNING AMERICA

1:04 1.1K 81 95 295 Comments

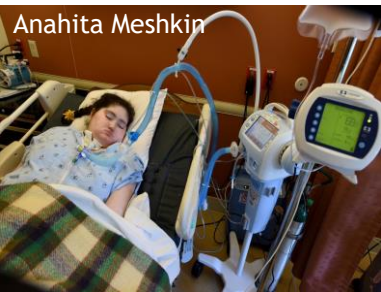



**ST. JOSEPH'S**  
 Hospital Health Center  
 A HIGHER LEVEL OF CARE

**Los Angeles Times**

Close call in death ruling of potential organ donor (April 12, 2007)

John Foster at Fresno Community



**Alvarado**

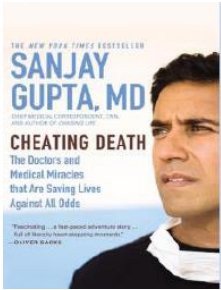
- Sept. 15, 1989 DDNC
- Sept. 21 social worker
- Sept. 22 parents file
- Oct 13 independent expert
- Oct 18 order
- Appeal dismissed (not dead)



Dorinda Elmer/Getty

THE DAILY BEAST POLITICS ENTERTAINMENT WORLD U.S. NEWS

WRITTEN BY **What It's Like to Wake Up Dead**



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

5

Negligent errors

More culpable errors

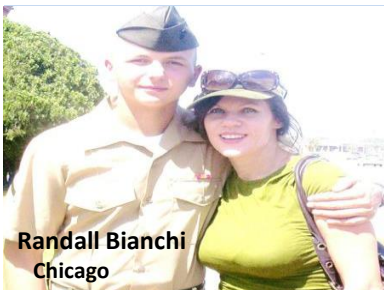


Hootan Roozrokh



post-gazette.com  
Pittsburgh Post-Gazette

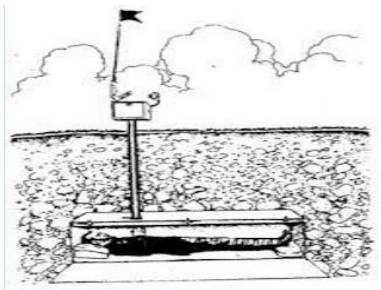
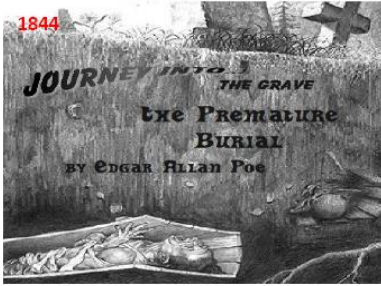
\$1.2 million settlement in 'organ harvest' case  
November 19, 2012 12:00 AM



Randall Bianchi  
Chicago

Confusion & mistrust exacerbated

Taphophobia



Taphophobia:  
people want  
to be **sure**



**Part  
5 of 6**

Strategies  
to avoid  
conflict

# Diagnostic confusion

135

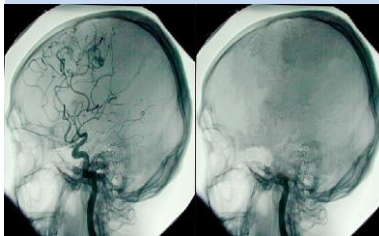
# 1

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

135

# 2

## Use decision aids



JAMA PATIENT PAGE | The Journal of the American Medical Association

### Brain Death

**A** person dies when brain functions cease, the brain stops being, and breathing and blood circulation cease. Because life support techniques have become so advanced, it is possible that even in the face of total and irreversible brain death, the heart can be kept beating with medications, and respiratory (breathing) can be mechanically performed with a ventilator. The concept of brain death developed in response to these advanced medical techniques that can maintain some bodily functions. Brain death, as understood in US law and medical practice, occurs when there are no functions of the entire brain. The brainstem is the area of the brain that controls breathing and circulation and therefore controls essential life functions. Think of the brain, including the brainstem, as a single functional unit. The individual is only dead by medical and legal standards. Thus, brain death is not death. The March 18, 2015, issue of JAMA includes an article about brain death. This Patient Page is based on one published in the May 19, 2015, issue of JAMA.

**CLINICAL CRITERIA FOR BRAIN DEATH**

- No response to any stimuli—no response to painful, grimace, or blinking
- No breathing effort when taken off the ventilator (the apnea test)
- Pupils dilated and not responsive to light
- No eye reflexes, no corneal reflex (flinking when the surface of the eye is touched), and absence of other specific reflexes

**KEY POINTS**

- Computed tomography (CT) scans of the brain may show abnormalities such as bleeding (hemorrhage), masses (tumor), brain injury, or severe brain swelling (edema).
- Electroencephalography (EEG) records electrical brain activity. If brain death is present, the EEG will show no activity.

**FOR MORE INFORMATION:**

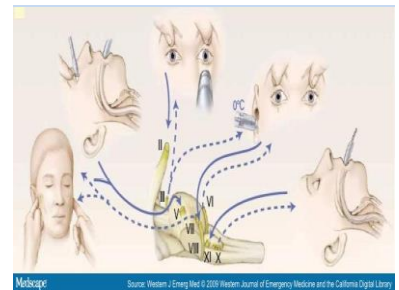
- National Institute of Neurological Disorders and Stroke: [www.ninds.nih.gov](http://www.ninds.nih.gov)
- American Academy of Neurology: [www.aan.com](http://www.aan.com)
- United Network for Organ Sharing: [www.unos.org](http://www.unos.org)

**RELATED WORDS:**  
To find the word you're looking for, click on the word.

# Mistrust

142

# 1







Tawil I et al, "Family presence during brain death evaluation: a randomized controlled trial" - Crit Care Med. 2014 Apr;42(4):934-42

2

**Independent**  
second  
opinion



But **some**  
conflicts are  
intractable

**Part**  
**6 of 6**

**3** attacks  
on brain death

**Attack**  
**1 of 3**

Accommodation  
**after** death

**Not** questioning brain death criteria

**Not** questioning application to this patient

But want **continued** organ support

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\*

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

Religious accommodation



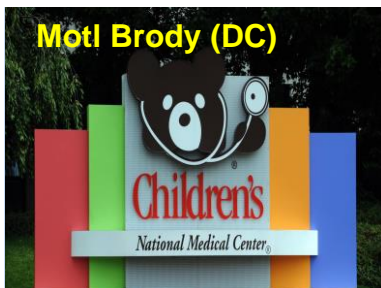
“reasonably brief period”

24 - 48 hours



Indefinite accommodation

(until CP death)



Shahida Virk (Mich.)



Cho Fook Cheng (Mass)



Uniformly denied

**Better response**

**Expand** duty of accommodation to other states



Dead → No duty treat

Dead → **Temp** duty treat

**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** . . . .”

# 6

## Conceptual flaws

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

“reasonably brief period”  
24 - 48 hours



# Attack 2 of 3

## Consent for apnea test

**Final** confirmatory test before declaring death

Remove ventilator

No drive to breathe → dead

No right to treatment **after** death

Other than brief accommodation

**Prevent** from being declared dead



**Refuse** consent to apnea test

No apnea test



No determination of death

No DDNC



Treatment duties do not end

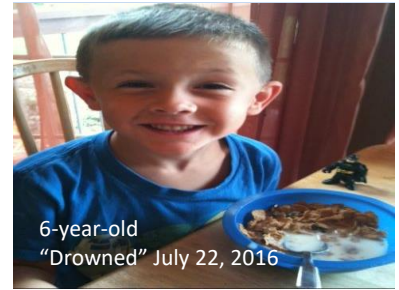
Do clinicians need **consent** for apnea test?

**Yes**

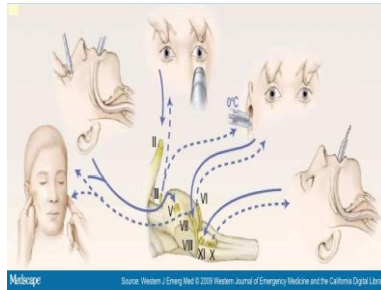
# Allen Callaway



Billings, Montana



6-year-old  
"Drowned" July 22, 2016



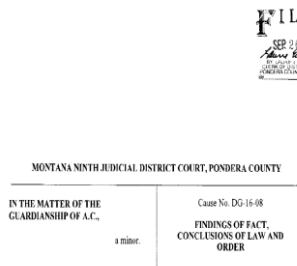
Microscope Source: Western J Emerg Med © 2010 Western Journal of Emergency Medicine and the California Digital Library



Tasha Dawn Stone



Consent required if risks



- I. SVH's request for a judicial declaration permitting SVH to conduct testing on A.C. to determine his brain activity over the guardian's objections is denied.
- II. A.C.'s guardian and mother has the sole authority to make medical decisions on A.C.'s behalf, including the decision as to whether any future brain functionality examinations should be administered.





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

MT said “yes”

KS also said “yes”



18TH JUDICIAL DISTRICT COURT  
SEDGWICK COUNTY, KANSAS

Feb. 1, 2006  
TRO **forbid** brain viability exam  
Discharged home March 17

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

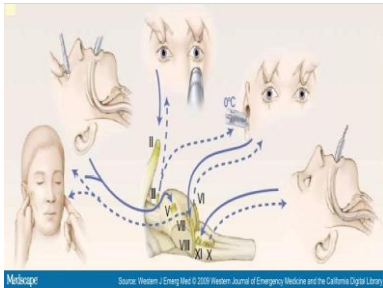
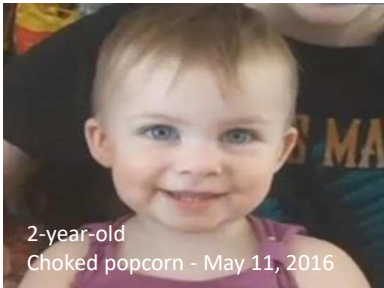
MT & KS said “yes”

CONTEMPORARY ISSUES  
Organ support after death by neurologic criteria  
Results of a survey of US neurologists

**22% neurologists say need consent**

VA said  
"no"

Mirranda  
Lawson



I Alison Lawson and Patrick Lawson  
refuse any sort of "Brain Dead" testing including  
the "Apnea" test on our daughter Mirranda  
Grace Lawson. We do not want the ventilator  
removed or cut-off for any amount of time.  
We are Christians and it is against our  
religious beliefs to remove the ventilator.  
Her heart is still beating. Removing life support  
will cause death. That is murder and is  
against the Christian faith.

Signed Alison Lawson / Patrick Lawson  
Witnessed Kathy Ray / Suzanne  
Witnessed Lynn Riche / Stephanie

**June 10, 2016**

The respondent is hereby allowed to administer the apnea test on the subject infant child, who is two years of age, under such mitigating and supportive measures as may be medically necessary and required for the purpose of a determination of the existence, extent, and viability of brain stem activity and thereafter to make or recommend any treatment or in the alternative, make a determination of death as provided by law pursuant to Va. Code § 54.1-2972.

IN THE  
SUPREME COURT OF VIRGINIA  
Record No. 161321  
PATRICK B. LAWSON and  
ALISON J. LAWSON,  
Appellants,  
v.  
VCU MEDICAL CENTER, d/b/a  
CHILDREN'S HOSPITAL OF RICHMOND  
AT VCU, and d/b/a VCU HEALTH SYSTEM  
Appellee.  
IN RE: MIRRANDA GRACE LAWSON  
Appeal From The  
Richmond Circuit Court - Case No.: CL16-2358  
VCU HEALTH SYSTEM AUTHORITY'S  
BRIEF IN OPPOSITION



# Upshot

Dead → No  
duty  
treat

~~Dead~~ → No  
duty  
treat

US ICUs will have  
**more** (probably)  
dead kids

Often full  
Others **denied**  
opportunity of  
ICU benefit

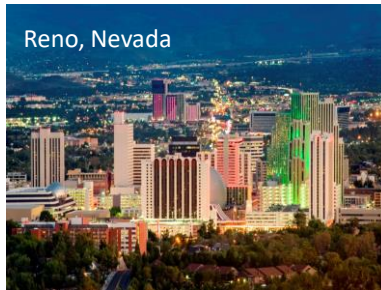
# Attack 3 of 3

**Most**  
troublesome  
of the 3 legal  
attacks

Are medical  
criteria for  
DDNC **legally**  
sufficient?

**AAN** does **not**  
measure what  
the **UDDA**  
requires

# Aden Hailu



**April 1, 2015**

Catastrophic anoxic brain injury during exploratory laparotomy

**May 28, 2015**

Met AAN criteria for brain death



**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

UDDA

1

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”



Heal wounds  
 Fight infections  
 Gestate fetus  
 Stress response



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

FROM THE MAY 2012 ISSUE

### The Beating Heart Donors

They urinate. They have heart attacks and bedsores. They have babies. They may even feel pain. Meet the organ donors who are “pretty dead.”

By Dick Teresi | Wednesday, May 02, 2012

RELATED TAGS: ORGAN TRANSPLANTS, SENSES

2

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”

251

Variability of brain death determination guidelines in leading US neurologic institutions

David M. Green, MD, MSc  
 Paraskevi N. Varelas, MD, PhD

**ABSTRACT** 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

Research

**Original Investigation**  
 Variability of Brain Death Policies in the United States

David M. Green, MD, MSc, Harry H. Wang, BA, Jennifer D. Robinson, MPH, Paraskevi N. Varelas, MD, PhD, Galen V. Henderson, MD, Eric C. M. Wijdicks, MD, PhD

**IMPORTANCE** Brain death is the irreversible cessation of function of the entire brain, and it is [available for free at \*permed.org\*](#)

Supplemental content at [permed.org](#)

Number of physicians  
Qualifications  
**How** tests administered

Upshot

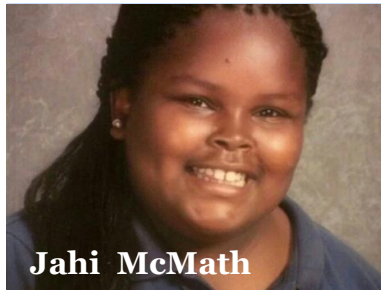
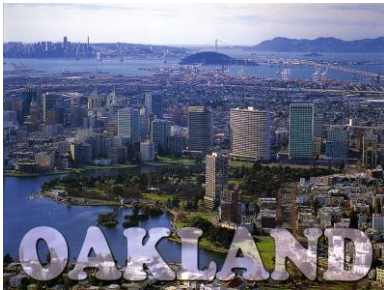
**Legal** standard may demand more than **medical** criteria



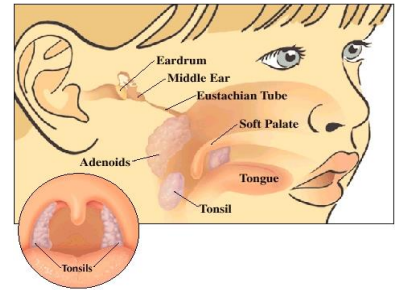
May need to **amend**  
Legal criteria  
Medical criteria  
Both

# Attack 3 of 3 part 2

# Jahi McMath

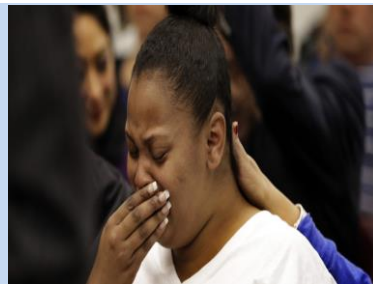


Jahi McMath

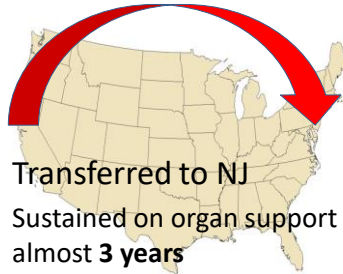
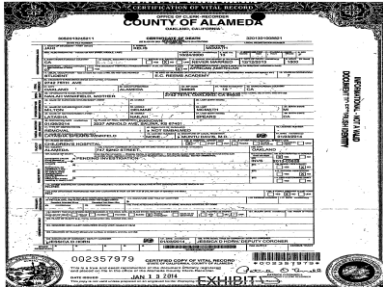


Dec. 12, 2013

Declared dead



**Lost** lawsuits  
against  
hospital



Transferred to NJ  
Sustained on organ support  
almost 3 years

Mar. 2015

Med Mal lawsuit

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Seeking  
**future** medical  
expenses

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Dead people do  
not have medical  
expenses

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Re-litigate  
status as  
alive

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Defendants  
Demurrer

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Collateral estoppel



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

**If** true, allegations  
are sufficient





**Upshot**

Does not attack the AAN criteria **themselves**



Contrast  
Aden Hailu

Hailu = AAN  
AAN **≠** UDDA

AAN = UDDA  
Jahi **≠** AAN

Argument over **facts**, not law

If alive, must **reexamine** medical criteria for DDNC

Death  
should be  
**irreversible**

**Accuracy  
is essential**

One final case  
from **Kansas**



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.

**Conclusion**

“well settled  
yet still  
unresolved”

Debate has  
been  
**academic**



**Now** it is a  
public policy  
question

**Not** just  
more scrutiny  
more debate

Fundamental  
reassessment  
of settled laws  
& practices

## References

### Medical Futility Blog

Since July 2007, I have been blogging, almost daily, to [medicalfutility.blogspot.com](http://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 **2 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

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