

Brain Death Bioethics

Fundamental Principles & Emerging Issues

Thaddeus Mason Pope, JD, PhD
Eighth Annual Great Lakes
Palliative Care Conference
Lake Geneva WI • May 3, 2019

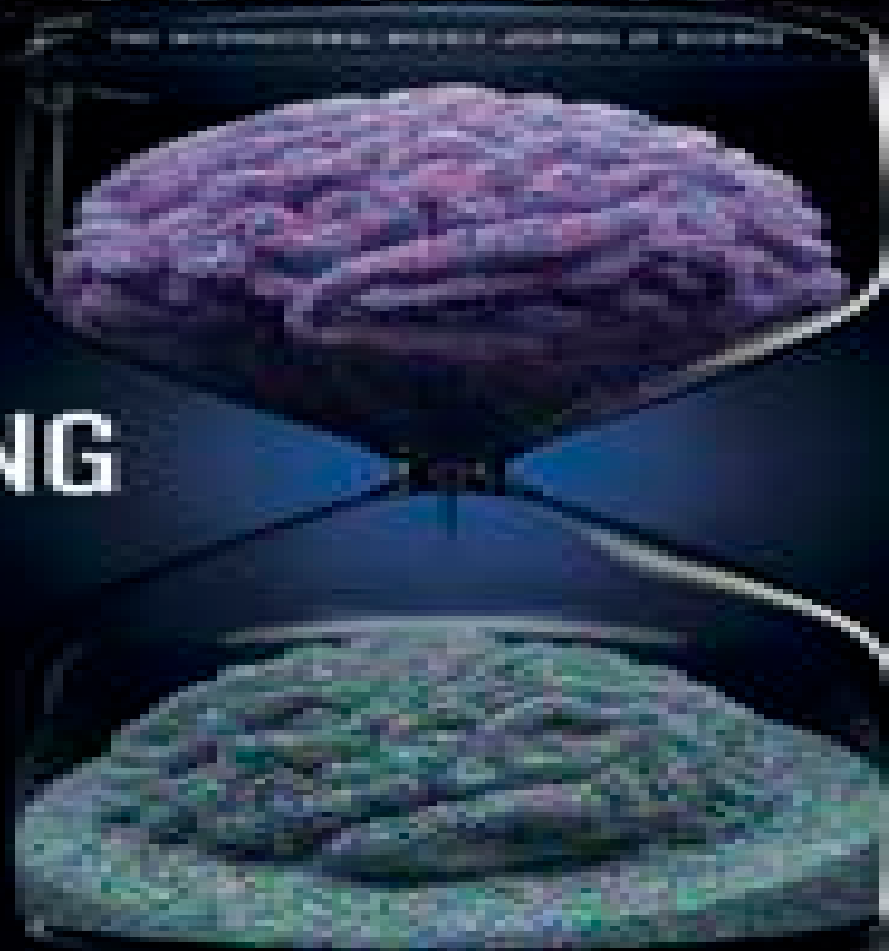
Nothing
to disclose

April 21, 2019



nature

THE INTERNATIONAL WEEKLY JOURNAL OF SCIENCE



TURNING BACK TIME

Cellular functions
reversed in
older brains
after 10 years
after stroke

PHILIP D. SMITH, JOHN A. TAYLOR

EXONIC REVENUE
SPECIAL
Protein structure is a key to understanding
the molecular machinery of life
PHILIP D. SMITH

**CAUGHT IN
A FLASH**
How the brain's visual system
captures the world in a split second
PHILIP D. SMITH

**SALIN
CONCENTRATIONS**
How the brain's visual system
captures the world in a split second
PHILIP D. SMITH

**IN THE
MIND'S
EYE**
How the brain's visual system
captures the world in a split second
PHILIP D. SMITH



“Restoration of
brain circulation
and cellular
functions hours
post-mortem”



Scientists Restore Some Brain Function **After** Death

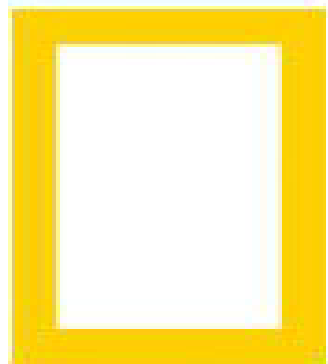
THE WALL STREET JOURNAL.

U.S. Edition ▼ | April 20, 2019 | Print Edition | Video

Can dead
brains come
back to life?

TORONTO STAR

Pig brains partially
revived hours **after**
death—what it
means for people



**NATIONAL
GEOGRAPHIC**

A dead pig's brain
was brought
back to life



**USA
TODAY
NEWS**™

Frankenswine:

Scientists bring
brains of dead pigs
'back to life'



THE SCOTSMAN

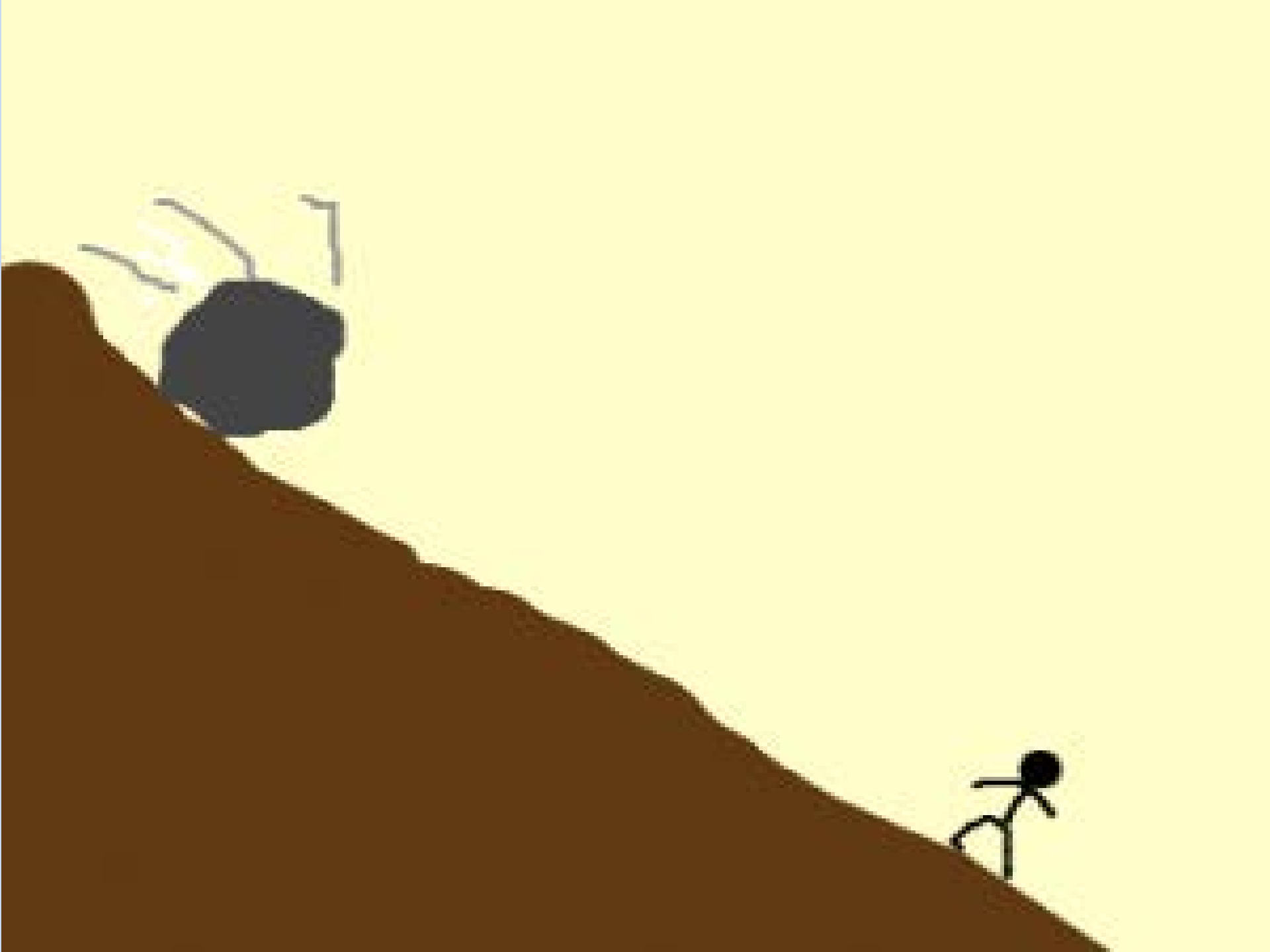
SCOTLAND'S NATIONAL NEWSPAPER

Brain death

=

death

?

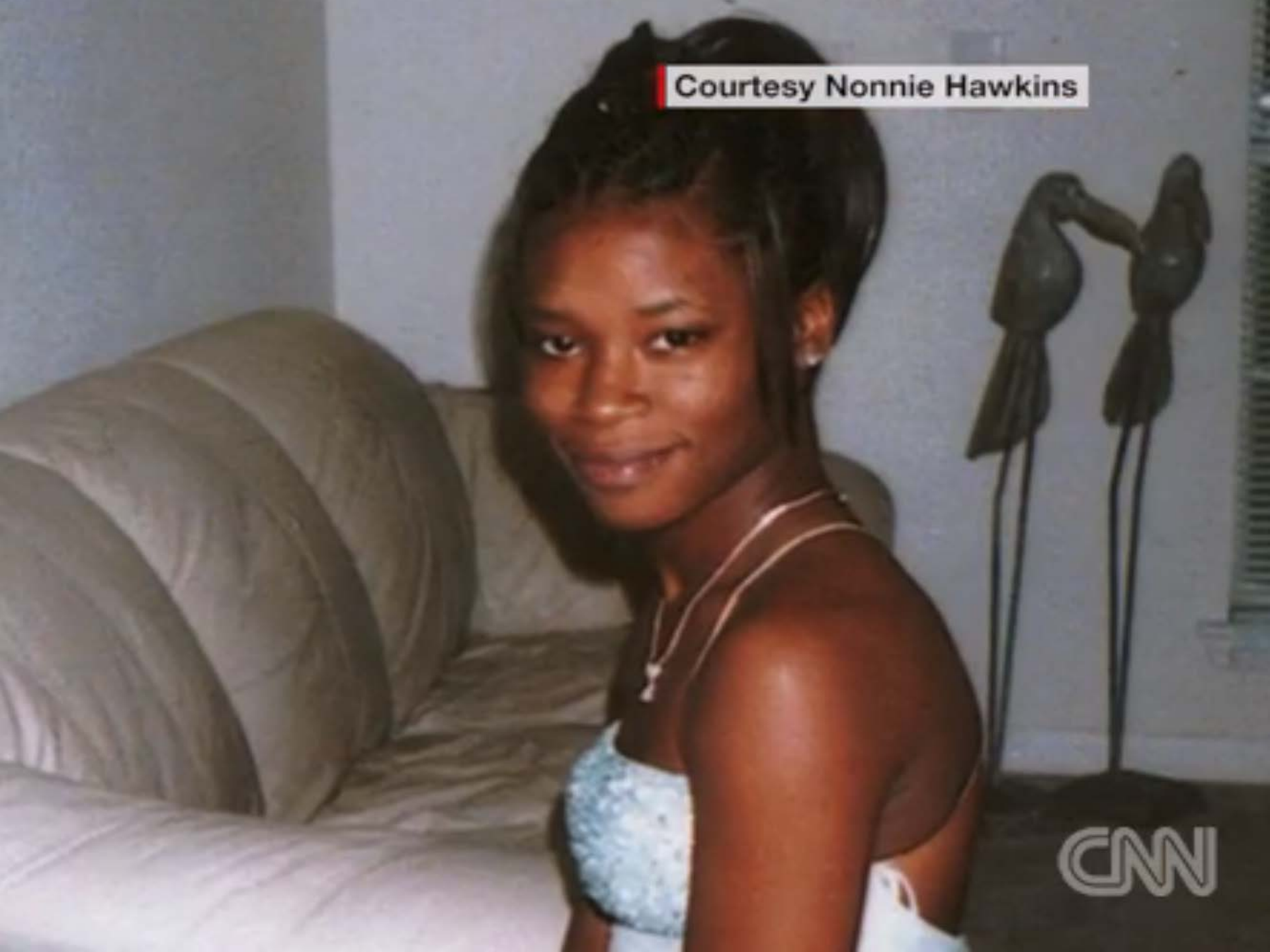


Case



Tara Marie Bottoms-Hawkins

Courtesy Nonnie Hawkins



CNN

November

2003



Georgia Perimeter College
Clarkston Campus

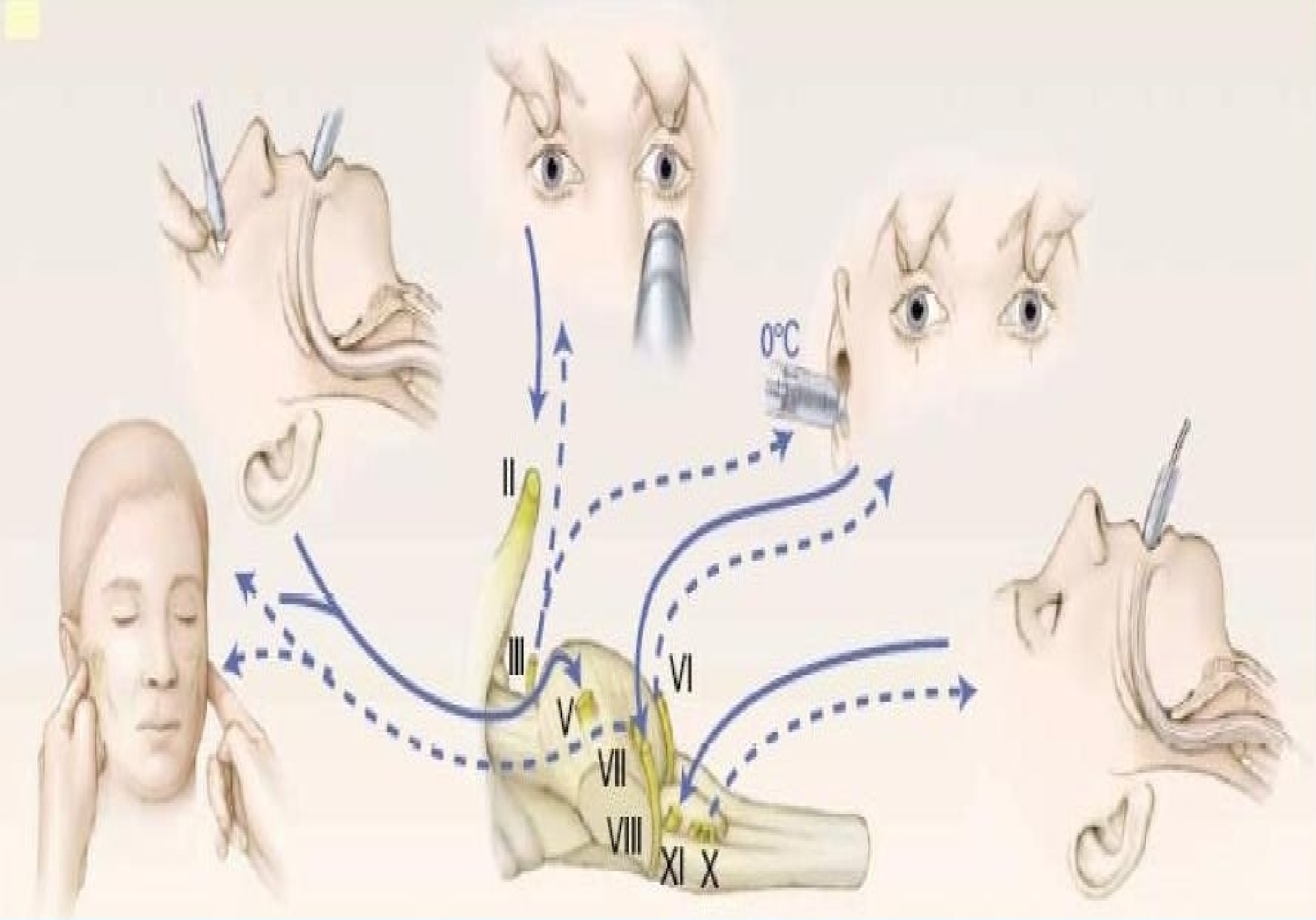
A TWO YEAR UNIT OF THE UNIVERSITY SYSTEM OF GEORGIA



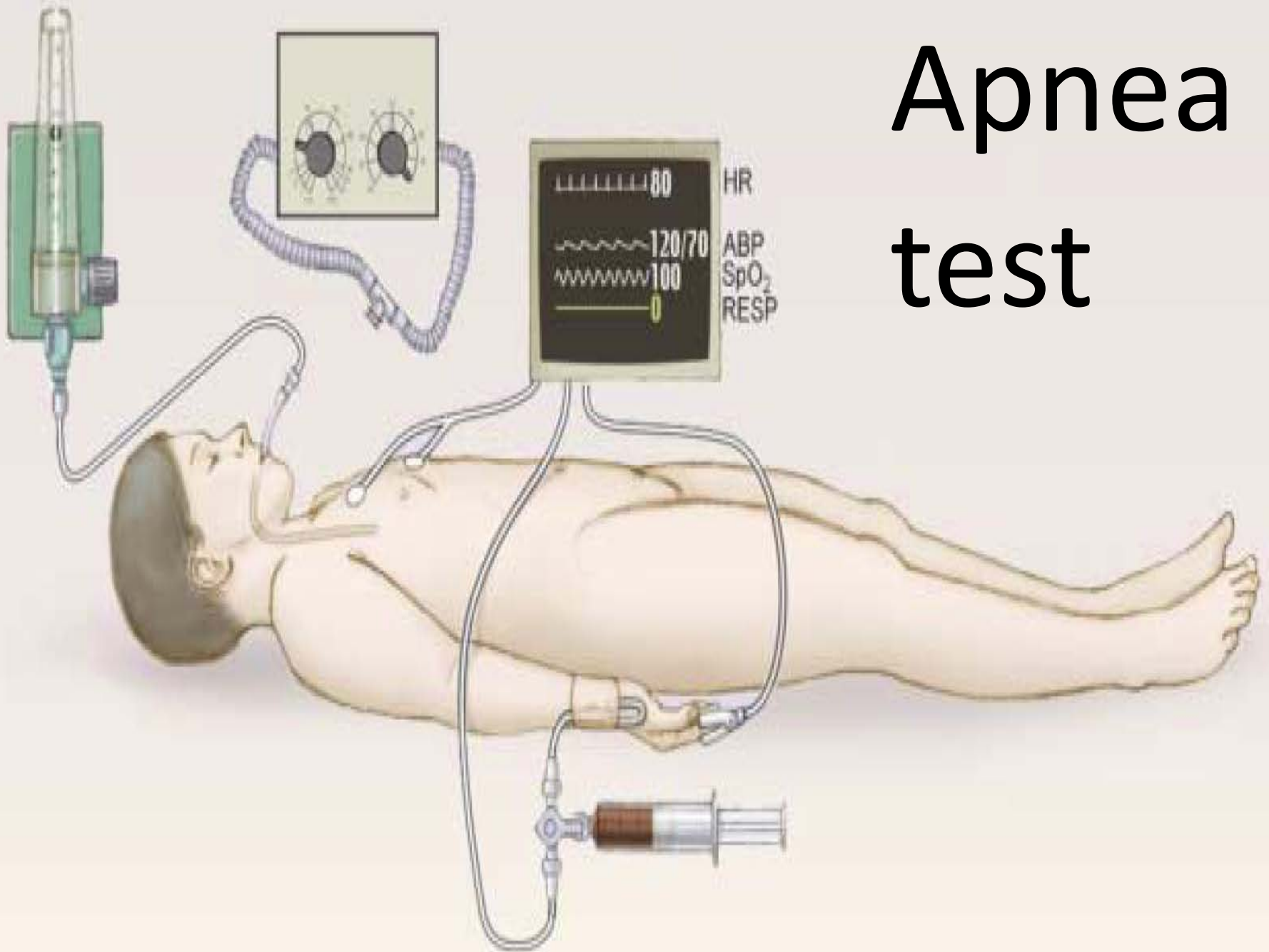
DeKalb Medical







Apnea test



Plan

w/d organ-
sustaining Tx



Without
consent



2006

“tortuous
termination
of life support”

A photograph of the Georgia Supreme Court building, a large, light-colored, multi-story structure with many windows. The building is partially obscured by a semi-transparent grey banner that contains the text "GEORGIA SUPREME COURT". In the foreground, there are trees and a street with traffic lights and a street sign.

GEORGIA SUPREME COURT

Alive

Dead

Alive

Medical futility conflict

Family decision

Dead

Straightforward

Clinician control

MERITER HOSPITAL

Madison, WI

GUIDELINES REGARDING DECISIONS TO WITHHOLD, USE OR WITHDRAW LIFE-SUSTAINING TREATMENT

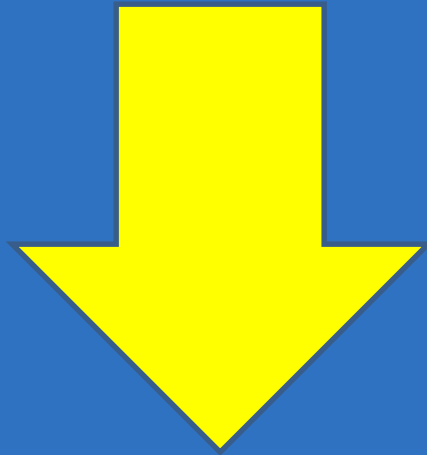
SECTION	4 THE DECISION-MAKING PROCESS	PAGE 7
4.1	Diagnosis, Prognosis and Uncertainties	7
4.2	Patient/Surrogate Makes the Decision in Dialogue with the Physician	7
4.3	Discussion of Benefits and Burdens	8
4.4	When Patient Capacity is Uncertain or Fluctuates	8
4.5	When the Patient Clearly Lacks Capacity	8
4.6	Deciding Whether to Withhold and Brain Death Definition	9 10
4.7	Care of Infants and Minors with Life-Threatening Conditions	10
4.8	Documenting the Decision	11

**“decision-making
process is unnecessary
when the patient meets
... brain death” (4.63)**



Tara Marie Bottoms-Hawkins

Dead



w/d okay

2006 -

2011

May

2019

What's
different
today?

Roadmap

4 parts

Part 1

Intro to BD

Part 2

Resistance
to BD is
growing

Part 3

Consequences

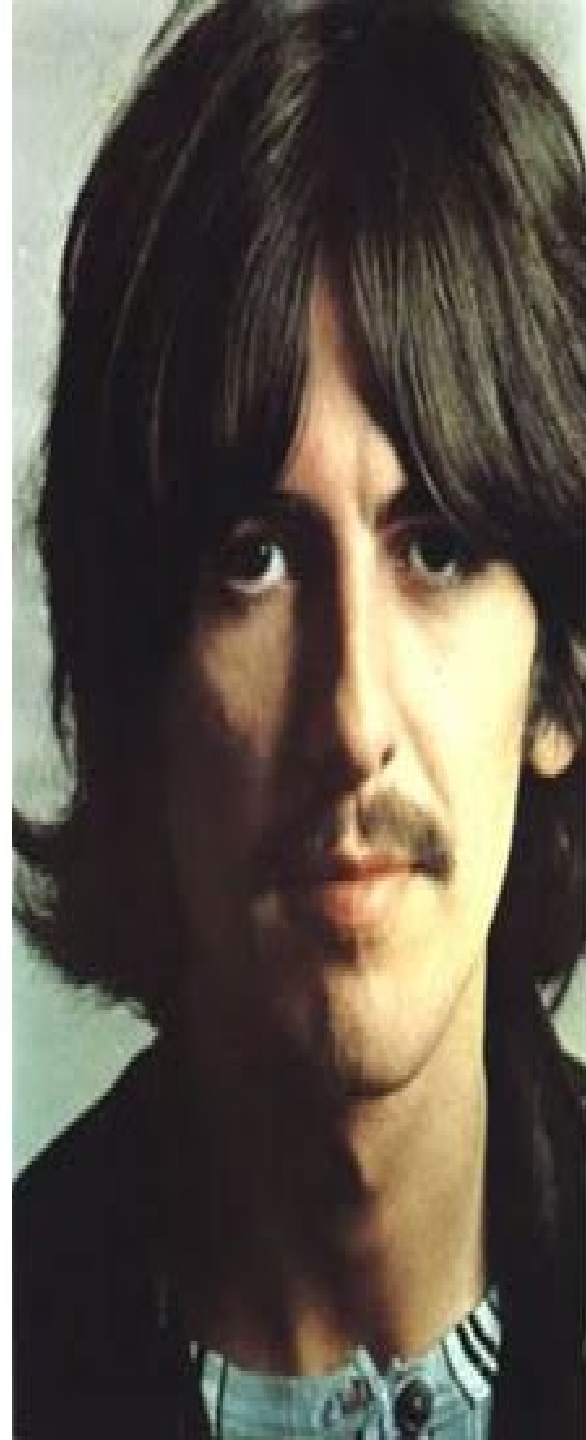
of resistance

Part 4

5

legal
attacks
on BD

1968



LIFE

*SPECIAL
DOUBLE
ISSUE*

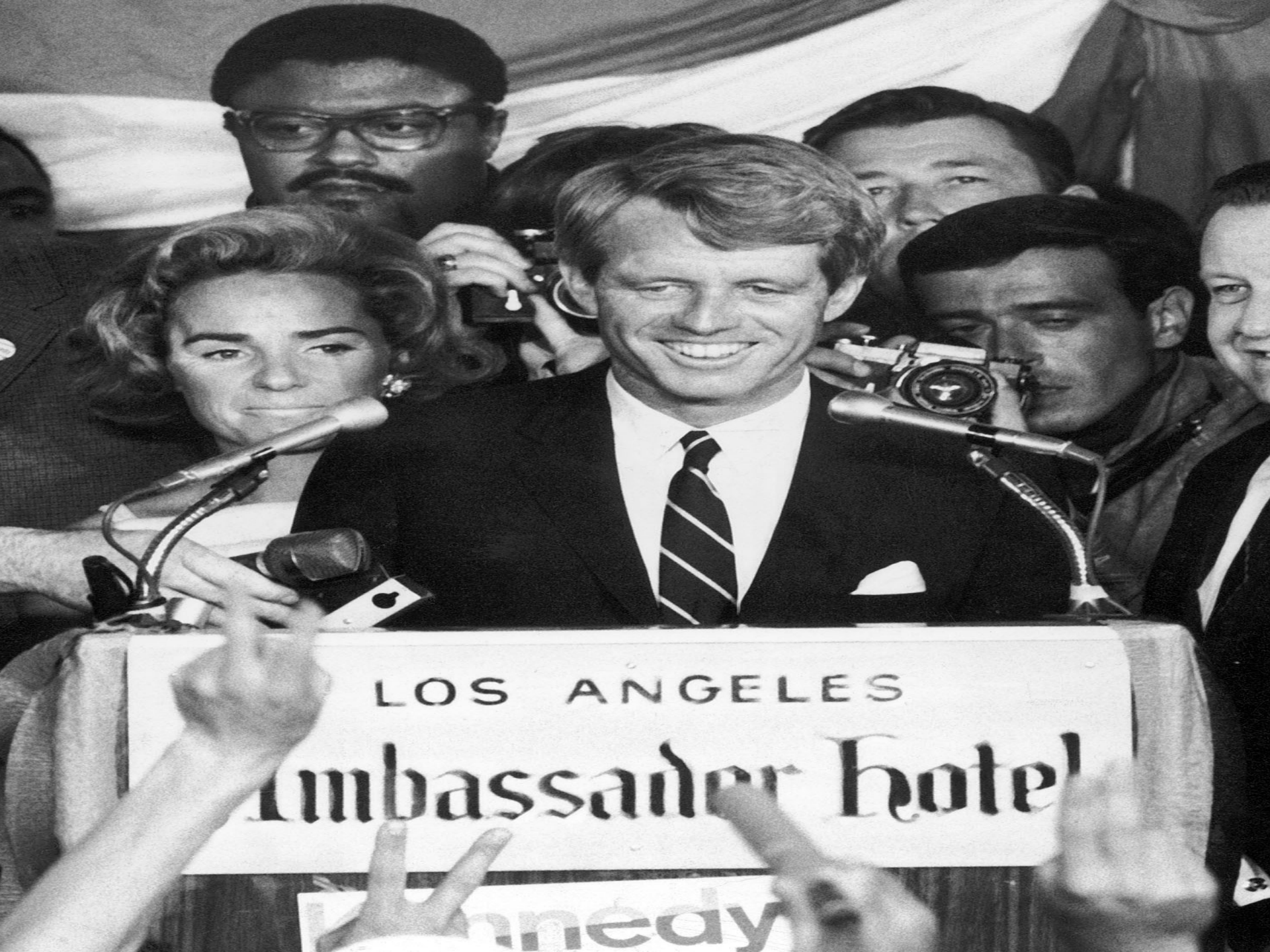
Picasso













1968

Only **1 way**
to determine
death

irreversible cessation
of **circulatory &**
respiratory functions

BUT

JAMA

VOL 205, NO 6

AUGUST 5, 1968

THE JOURNAL
of the
American Medical Association

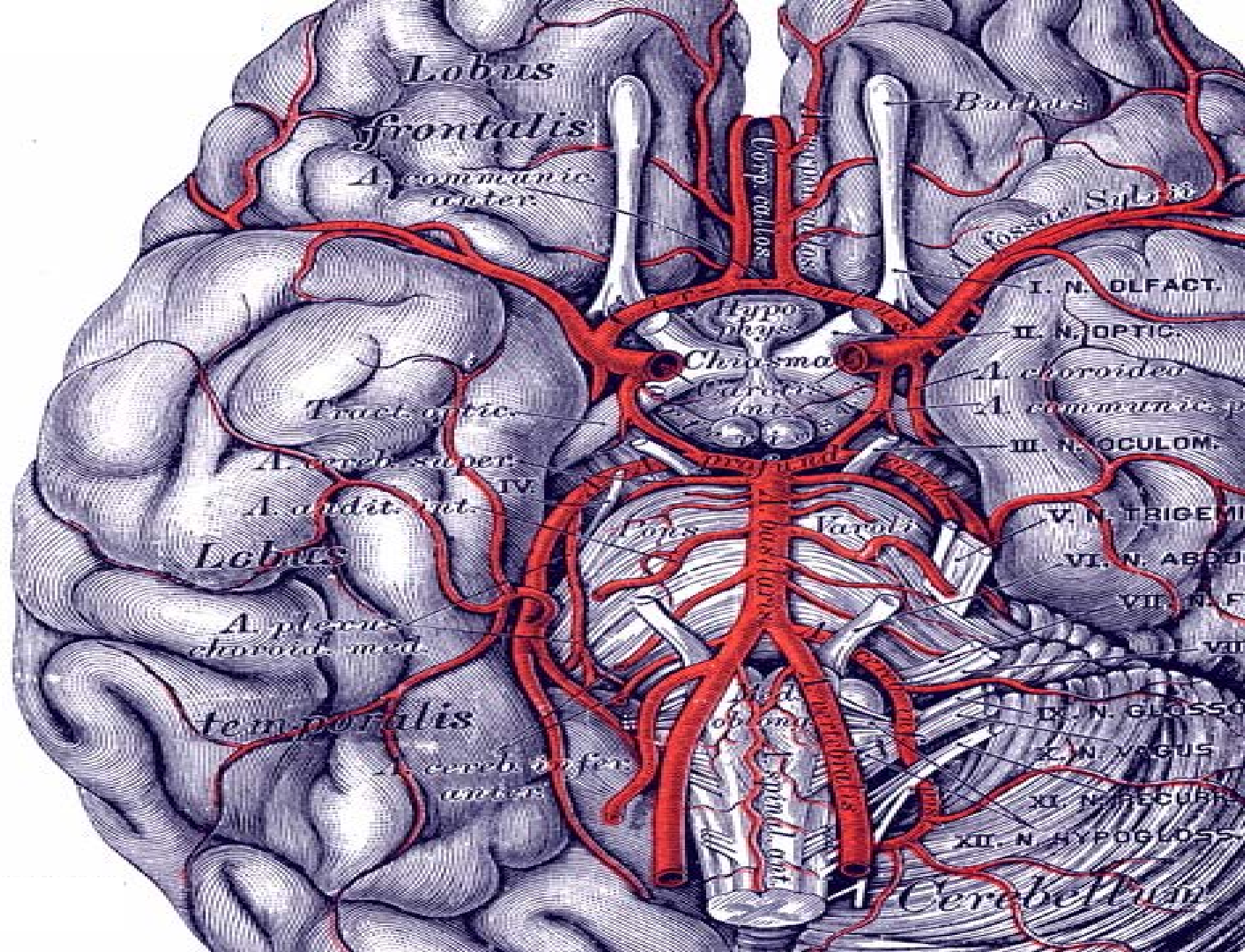
*Continuing Education
Courses for Physicians*



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



Lobus

frontalis

A. communic. anter.

Bulbus

Fossae Sylv.

I. N. OLFACT.

II. N. OPTIC.

A. choroidea

A. communic. p.

III. N. OCULOM.

Tract. optic.

A. cereb. super.

IV

A. audit. int.

Lobus

A. plexus choroide. med.

temporalis

A. cereb. infer. anter.

V. N. TRIGEMI

VI. N. ABDU.

VII. N. F.

VIII

IX. N. GLOSSO

X. N. VAGUS

XI. N. RECURR.

XII. N. HYPOGLOSS.

Cerebellum

Corp. callos.

Hypophys.

Chiasma

Carotid. int.

Pons

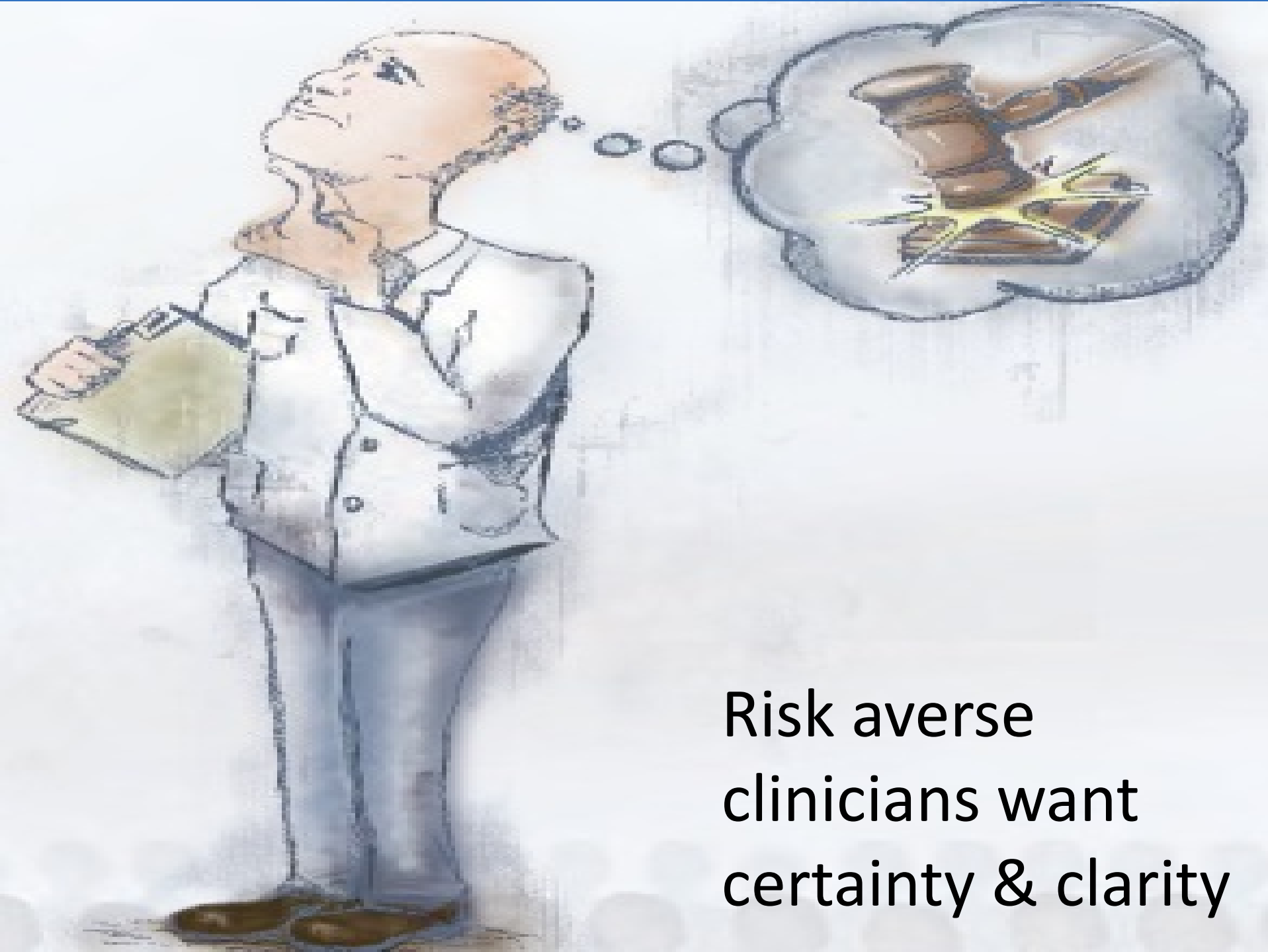
Vagab.

Med. oblong.

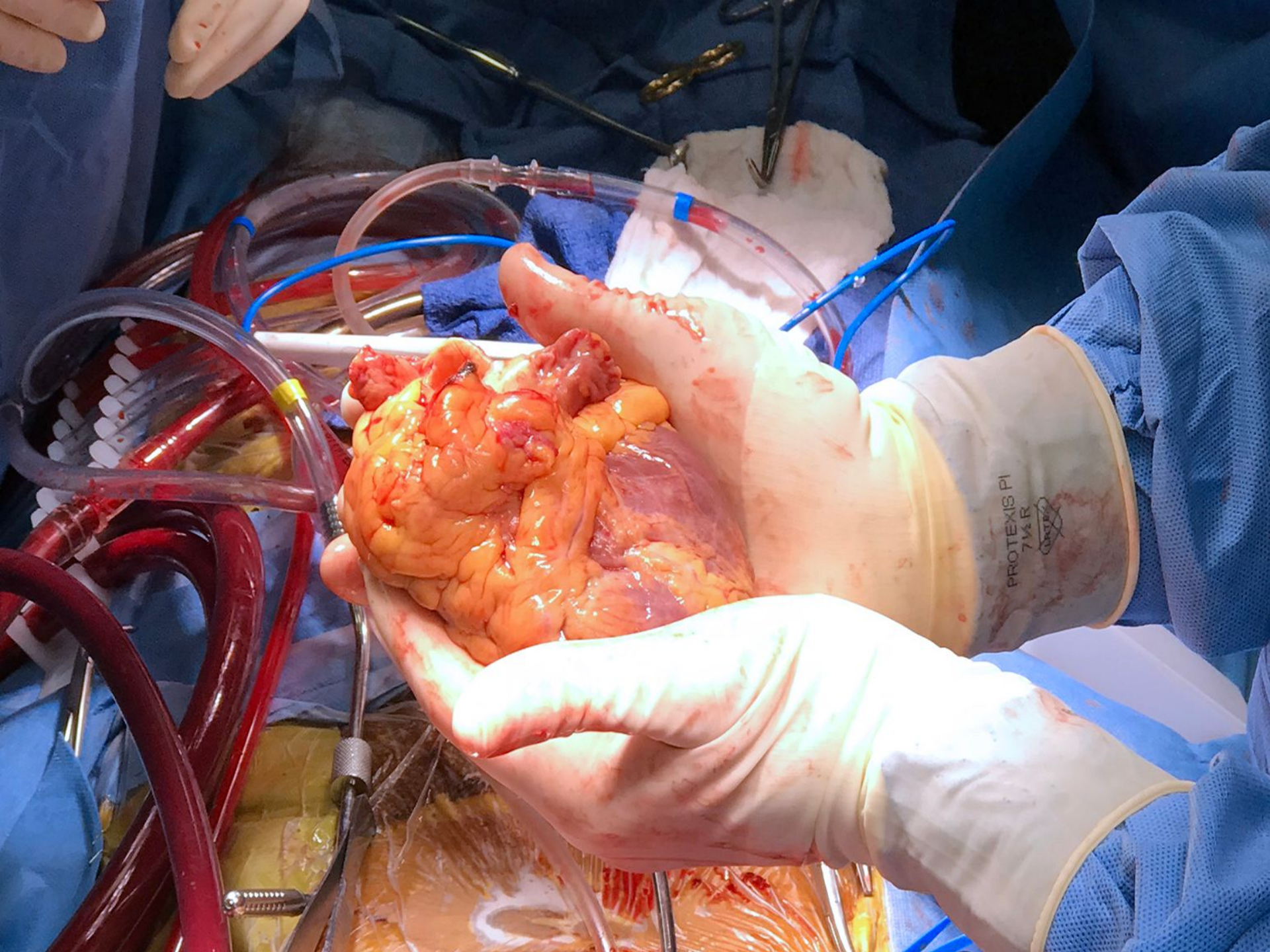
Spinal ant.

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



Risk averse
clinicians want
certainty & clarity



PROTEXIS PI
7 1/2 R

Legislation Proposed to Recognize Brain Death

LOS ANGELES (PTS) — Proposed legislation recognizing so-called brain death will be drafted here, according to Dept. Dist. Atty. John W. Miner. He said it will not define brain death.

Such legislation would be the first in the nation recognizing brain death — death when the brain ceases to function, even though the heart and respiration are continued by artificial means.

The Los Angeles County district attorney's vital organ transplant committee decided that a clear definition of death is needed now that heart transplants have raised the question as to whether the donor is technically dead or alive at the time his heart is taken.

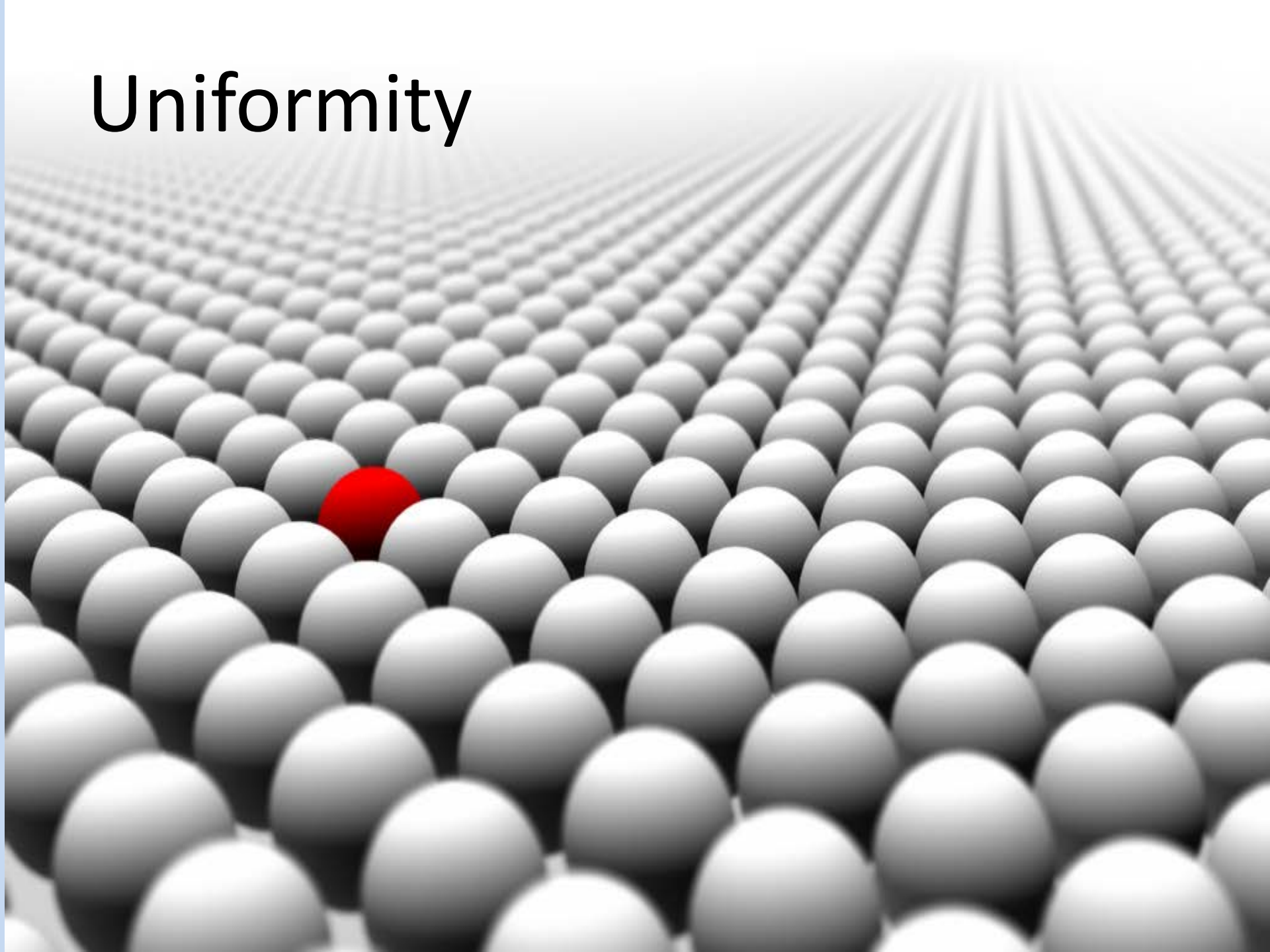
Variability



1970s



Uniformity



1981

Defining Death

Medical, Legal and
Ethical Issues in the
Determination of Death



President's Commission for the Study of
Ethical Problems in Medicine and
Biomedical and Behavioral Research

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

Brain death



Death

Wis. Stat.

146.71

S.B. 327 (1981), Ch. 134

All 56 US

jurisdictions

Legally

settled

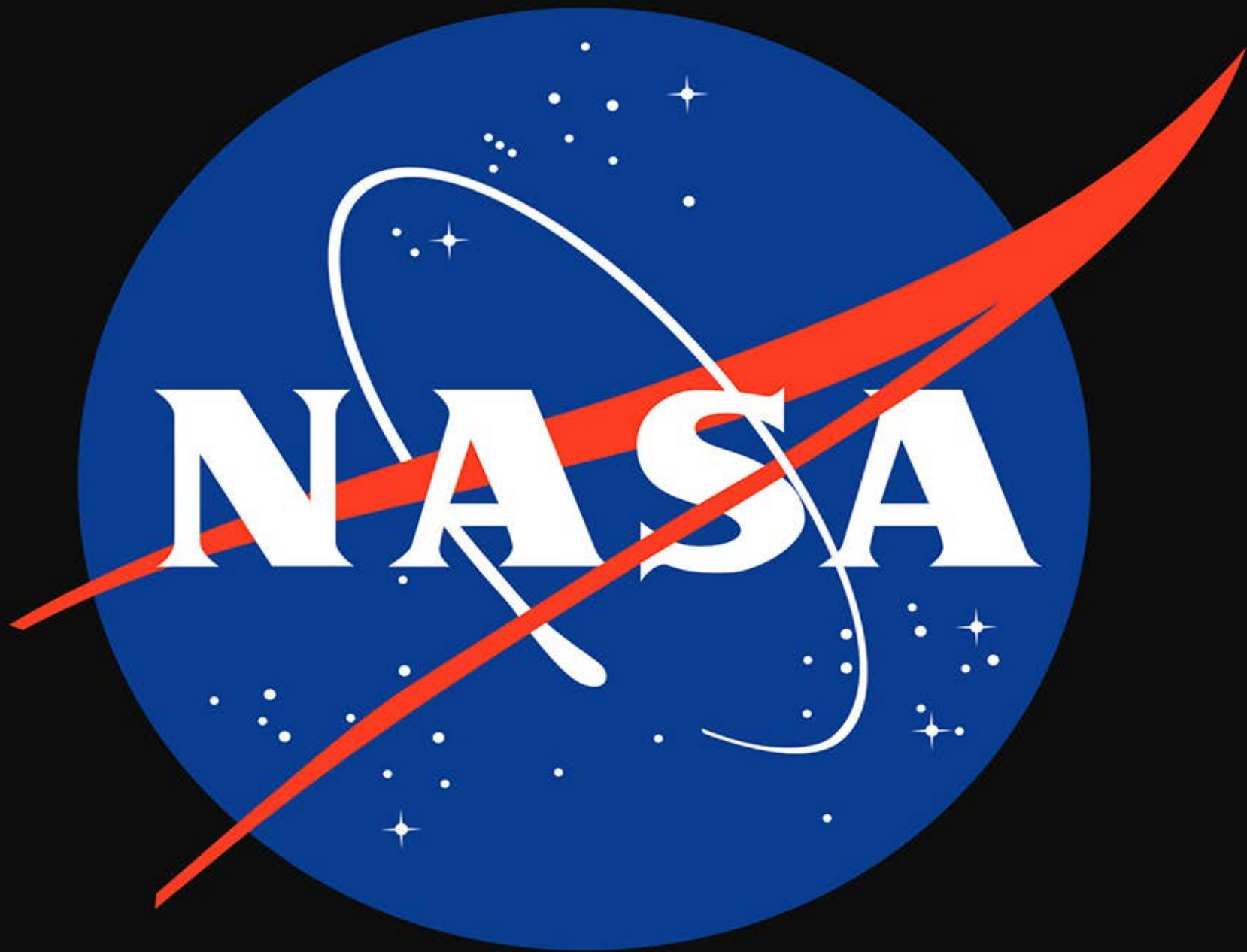
since 1980s

>40 years



Unraveled





"All the News
That's Fit to Print"

The New York Times

LATE CITY EDITION

Weather: Rain, with temperatures ranging from 60 to 70 degrees. Wind: 10 to 15 mph. Humidity: 70 to 80 percent. High: 72. Low: 60. Forecast: Partly cloudy with a chance of rain. Temperature: 60 to 70 degrees. Humidity: 70 to 80 percent. High: 72. Low: 60.

VOL. CXVIII, No. 41,721

© 1969 The New York Times Company

NEW YORK, MONDAY, JULY 21, 1969

10 CENTS

MEN WALK ON MOON

ASTRONAUTS LAND ON PLAIN; COLLECT ROCKS, PLANT FLAG

Voice From Moon: 'Eagle Has Landed'

EDISON (the lunar module) Houston, Tranquility Base here. The Eagle has landed.

Houston: Roger, Tranquility, we copy you on the ground. You're on a batch of guys about to turn blue. We're breathing again. Thanks a lot.

TRANQUILITY BASE: Thank you.

EDISON: You're looking good here.

TRANQUILITY BASE: A very smooth touchdown.

Houston: Roger, you are okay for TV. (The first step is the lunar operation) Over.

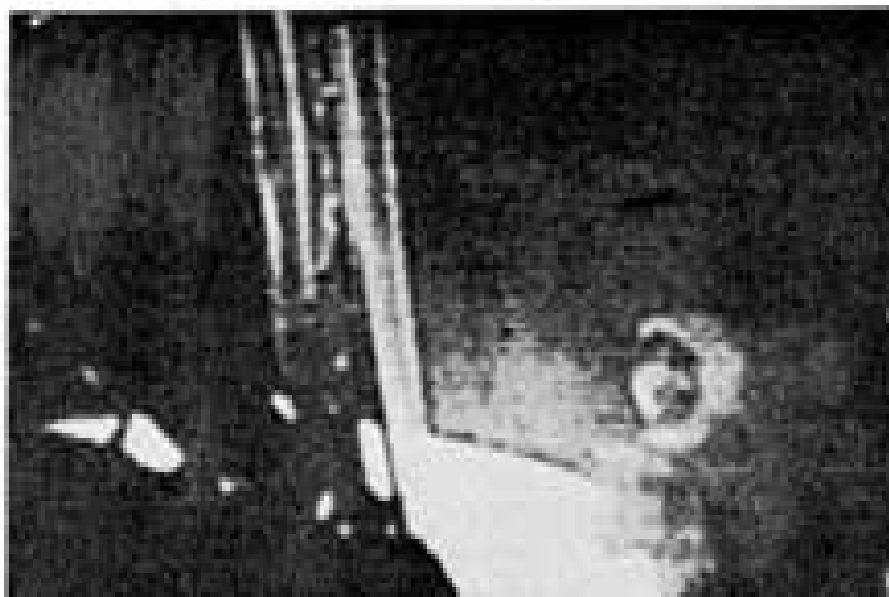
TRANQUILITY BASE: Roger. May be for TV.

Houston: Roger and we are now viewing the us.

TRANQUILITY BASE: Roger.

Columbia (the command and service module) How do you read me?

Houston: Columbia, he has landed Tranquility



A Powdery Surface Is Closely Explored

By JOHN HOBART WALTON
Special to The New York Times

Houston, Monday, July 21—After hours of contact and waiting on the moon.

Two Americans, astronauts of Apollo 11, viewed their fragile four-legged lunar module safely and uneventfully to the lunar landing yesterday at 4:17 A.M. Eastern day-light time.

Neil A. Armstrong, the 39-year-old civilian contractor, walked to earth and the massive control room here.

"Houston, Tranquility Base here. The Eagle has landed."

The first man to reach the moon—Mr. Armstrong and his colleague, Col. Edwin E. Aldrin Jr. of the Air Force—brought their ship to rest on a level, rock-strewn plain near the southwestern shore of the wet line of Tranquility.

About an and a half hours later, Mr. Armstrong opened the landing craft's hatch, stepped slowly down the ladder



Collected 1000 pounds
moon rocks late 1960s



15498

60015

60





**Growing
resistance**

More families

dispute BD

Organ support after death by neurologic criteria

Results of a survey of US neurologists

(200)

Ariane Lewis, MD
Nellie Adams, BA
Panayiotis Varelas, MD,
PhD
David Greer, MD, MA
Arthur Caplan, PhD

NEUROLOGY

Aug. 2016

50% report

families request

organ support

after BD

Chest (2015) 147(4):1144-51



San Francisco
General Hospital

Cleveland Clinic

One of America's Top 4 Hospitals

J Clin Ethics (2014) 25(3):222-37

“**reject** this diagnosis”

“**deviate** from
standard procedures”

Not just

USA



Million

Health Partners

Conflict: **10%**

56 BD cases

2014-2016

More

conflict

Palliative

care

literature

Life Support After Brain Death

Steven J. Baumrucker, MD, FAAHPM, FAAFP¹,
Laura Hutchinson, ANP¹, Matt Stolick, PhD¹,
Gregory T. Carter, MD, MS¹, Rev. Karrie Oertli, DMin²,
Leslie Stilin Schmidt, MSSW, MA¹, and Russell W. Adkins, JD¹

American Journal of Hospice
& Palliative Medicine®

1-7

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DOI: 10.1177/1049909114528065

ajhpm.sagepub.com





Ethics Series

Addressing Religious or Cultural Opposition to Brain Death Diagnosis

Donald O. Johnson, MS, RN ○ Christine G. Westphal, MSN, NP, ACNS, ACHPN, FPCN

Ethical Issues in Palliative Care

Series Editors: Muriel Gillick, MD, and Gregg K. VandeKieft, MD, MA

Brain Death: Ethical Challenges to Palliative Care Concepts of Family Care

Solomon Liao, MD and Shiho Ito, MD

The Death Debate: Penumbra Conundrum

American Journal of Hospice
& Palliative Medicine®

2018, Vol. 35(12) 1473-1476


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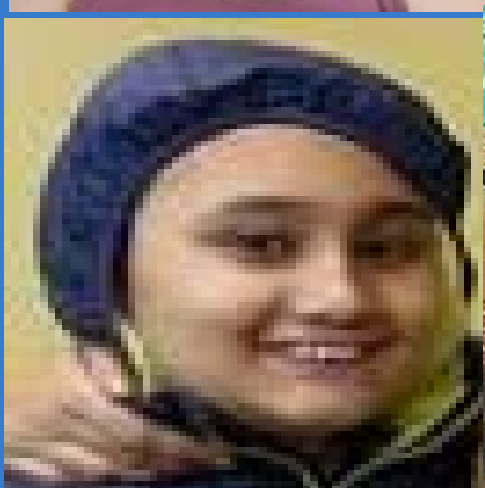
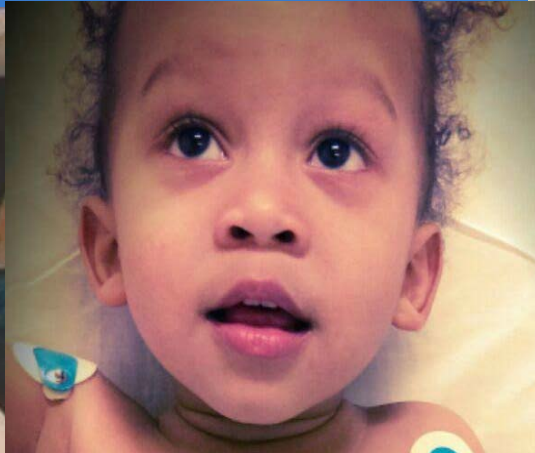
Robert F. Johnson, MD, MEd¹ 



Many cases
to **court**

2016 -

2018



why?

1

Diagnostic
confusion

“looks”
alive



“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

“heart dead”

Brain-Dead Canadian Woman Dies After Giving Birth to Boy

WORLD	U.S.	N.Y. / REGION	BUSINESS	TECHNOLOGY	SCIENCE	HEALTH	SPORTS	OPINION
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FITNESS & NUTRITION HEALTH CARE POLICY MEDICINE

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

Published: February 19, 2004




“She is
brain dead
and being
kept alive..”

Daily Mail



3

Mistrust



FIRST, DO NO HARM

TO ERR IS HUMAN

BUILDING A SAFER HEALTH SYSTEM

I N S T I T U T E O F M E D I C I N E



ANALYSIS



CrossMark
click for updates

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

Heart disease	600,000
---------------	---------

Cancer	600,000
--------	---------

Medical error	400,000
----------------------	----------------

COPD	140,000
------	---------

Stroke	130,000
--------	---------

Accidents	120,000
-----------	---------

Brain death
medical
error

Arizona College Student Bounces Back From the Dead After Nearly Giving Organs

May 13, 2014

By SUSAN DONALDSON JAMES via GOOD MORNING AMERICA

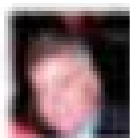


Los Angeles Times

Close call in death
ruling of potential
organ donor

John Foster at Fresno Community
(April 12, 2007)

St. Joe's "dead" patient awoke as docs prepared to remove organs



By John O'Brien

on July 17, 2013 at 2:00 AM, updated July 19, 2013

syracuse.com



THE NEW YORK TIMES BESTSELLER

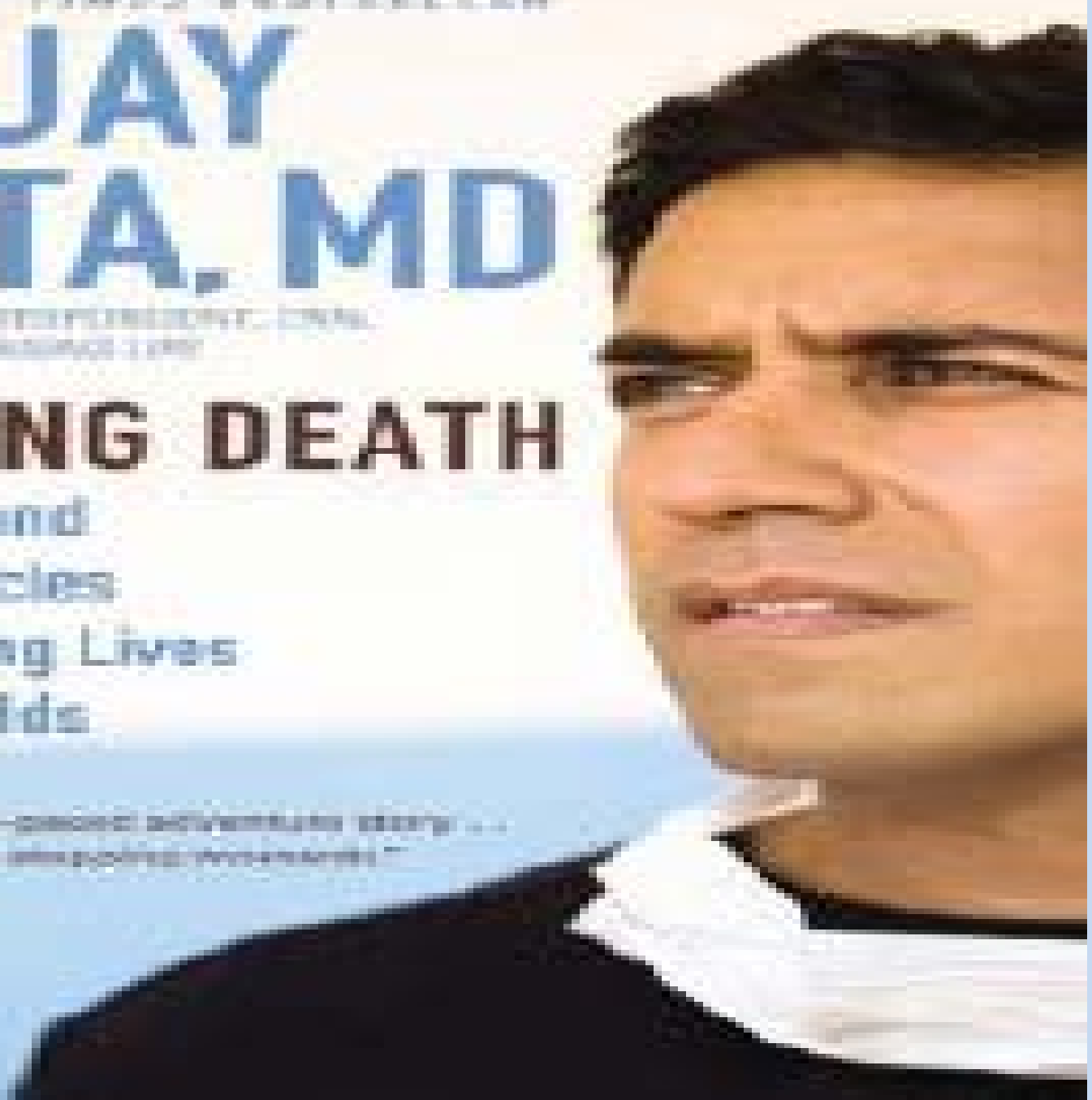
SANJAY GUPTA, MD

DEEP MEDICAL CORRESPONDENT, CNN
AND AUTHOR OF *CONSCIOUS LIFE*

CHEATING DEATH

The Doctors and
Medical Miracles
that Are Saving Lives
Against All Odds

"Fascinating . . . a top-notch adventure story . . .
full of heartwarming and inspiring anecdotes."
—*THE NEW YORK TIMES*



“They were declared
brain dead. It was
written in their
charts . . . here they
are sitting up talking
to me”

Negligent errors

More
culpable
errors

Hootan
Roosrokh

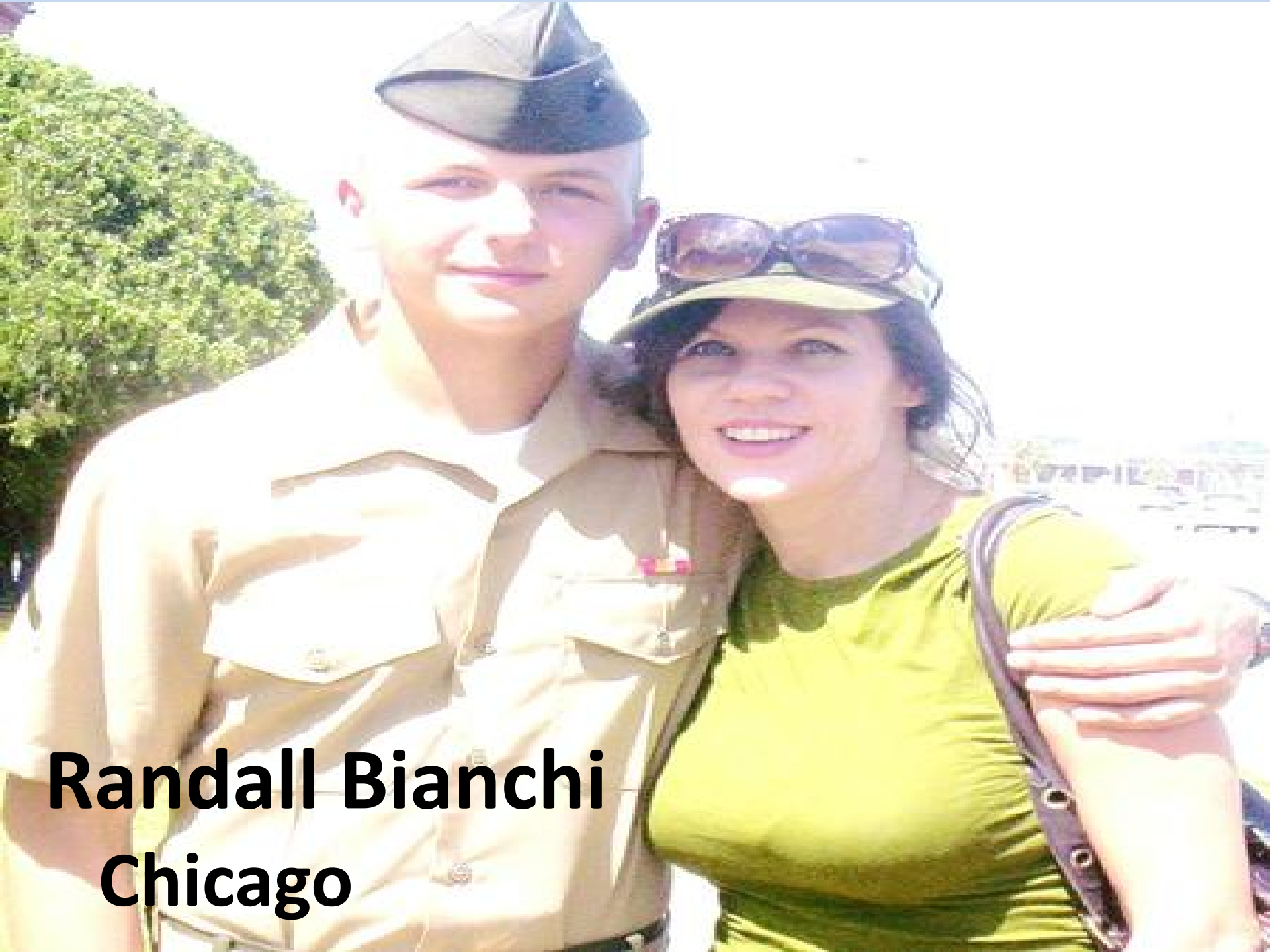




post-gazette.com
Pittsburgh Post-Gazette

\$1.2 million settlement in 'organ harvest' case

November 19, 2012 12:00 AM



Randall Bianchi
Chicago

Mistrust

Confusion

Diagnostic

Linguistic

4

Taphophobia

1844

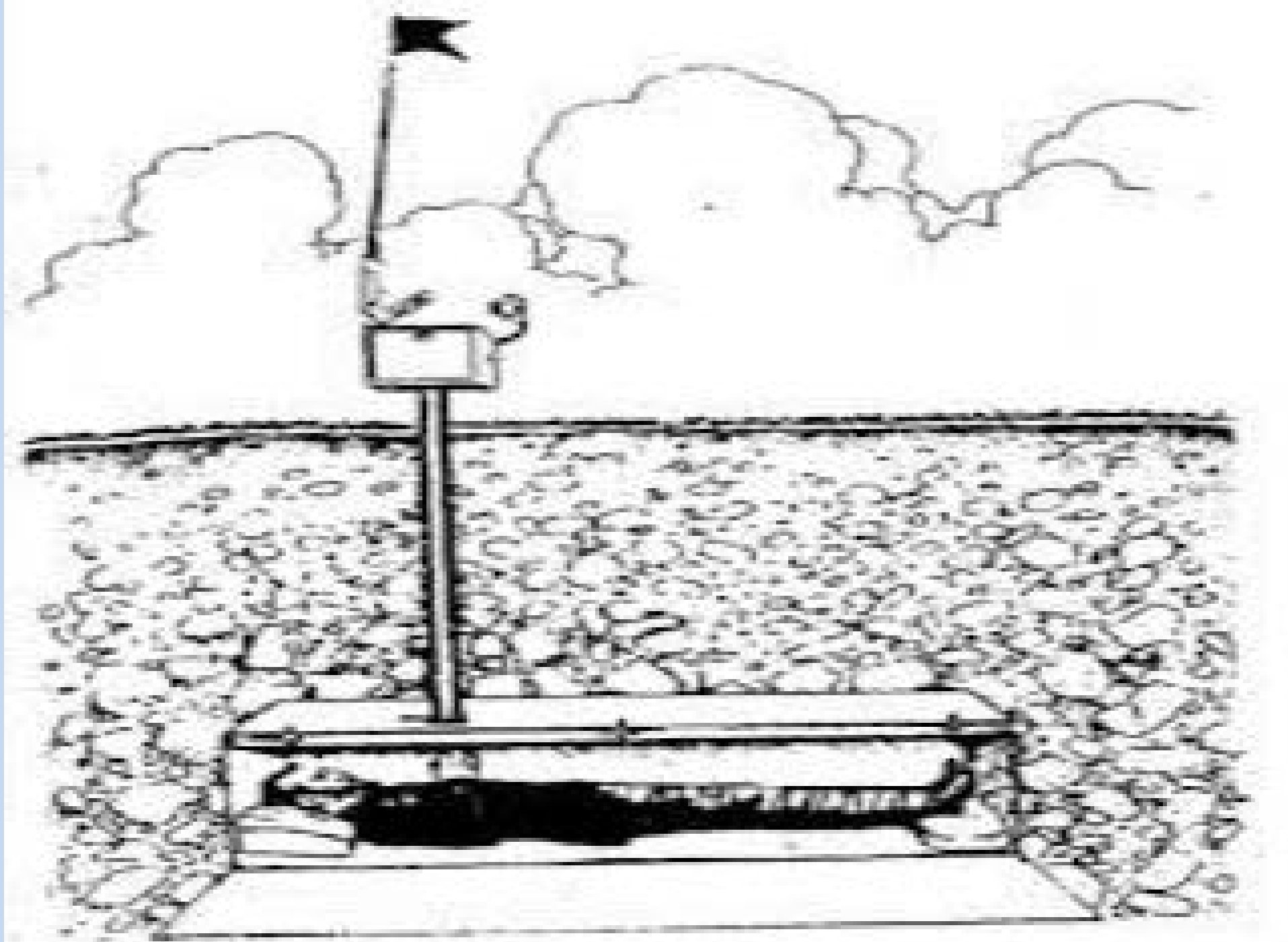
JOURNEY INTO
THE GRAVE
the Premature
BURIAL

BY EDGAR ALLAN POE









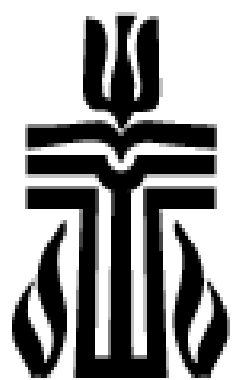


SAVED BY THE BELL

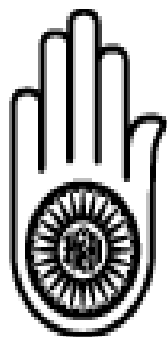
HT: Seema Shah

Taphophobia
people want
to be **sure**

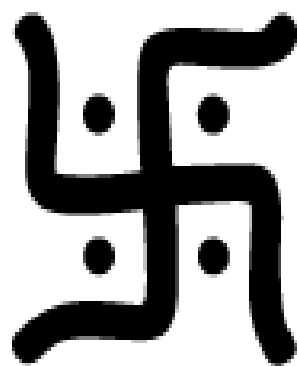
5



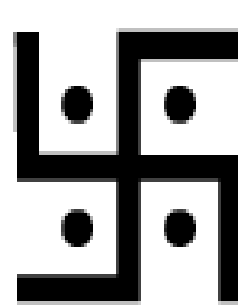
Presbyterian



Jainism
(Ahimsa Hand)



Jainism (Swastika)



Hinduism
(Swastika)



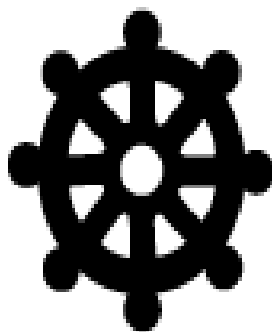
Hinduism
Pranava



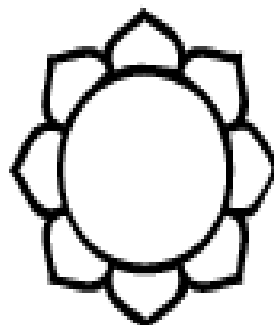
Ayyavazhi
Lotus Carrying Namam



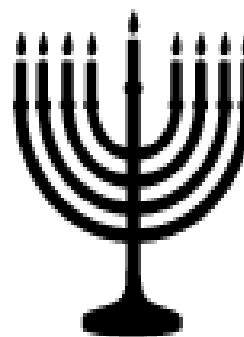
Islam (Muslim)



Buddhism
Wheel of Dharma



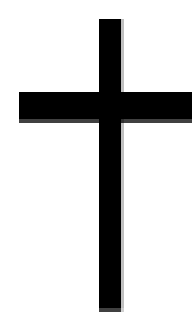
Buddhism
Lotus Flower



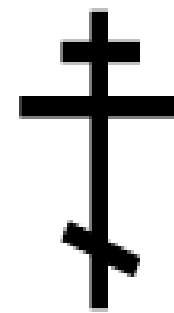
Judaism
Menorah



Trident
of Shiva



Christianity
Latin cross



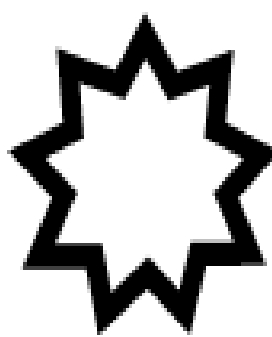
Christianity
Orthodox cross



Shinto (Japan)



Judaism
Star of David



Bahai Faith
Nine-pointed star



Christianity
Chi Rho



Taoism (Daoism)
Yin and yang



Sikhism

6

Miracles



57%

Trauma Death

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

Lenworth M. Jacobs, MD, MPH; Karyl Burns, RN, PhD; Barbara Bennett Jacobs, RN, MPH, PhD, CHPN

Arch Surg. 2008;143(8):730-735

7

More

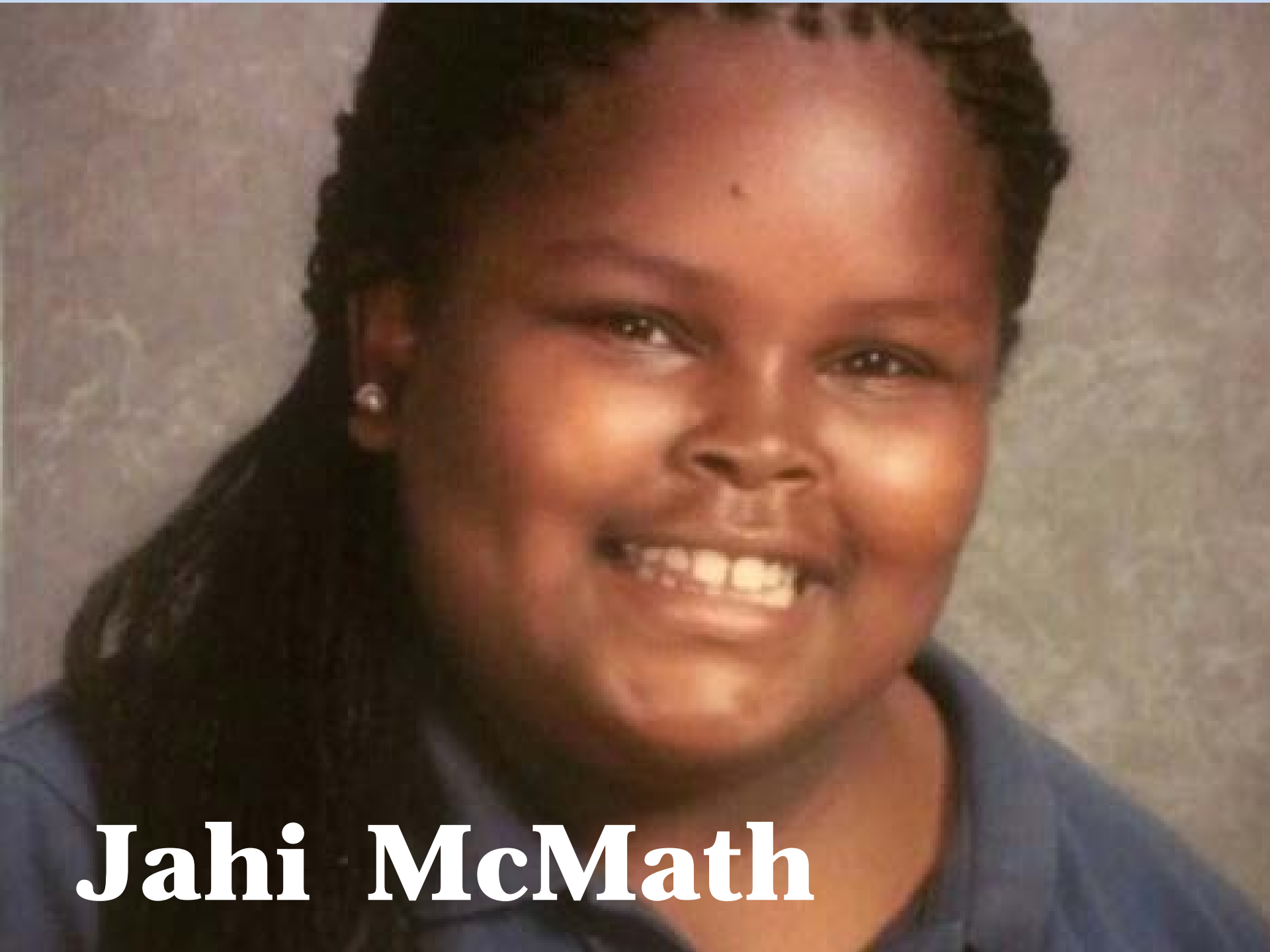
vulnerable

Controversies in the Determination of Death

*A White Paper by
the President's Council on Bioethics*



December 2008



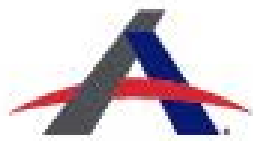
Jahi McMath

8

More

organized

opposition



ALLIANCE DEFENDING
FREEDOM



JACK PHILLIPS

PLANNED PARENTHOOD

CHURCH ALLIANCE

[REQUEST LEGAL HELP](#)

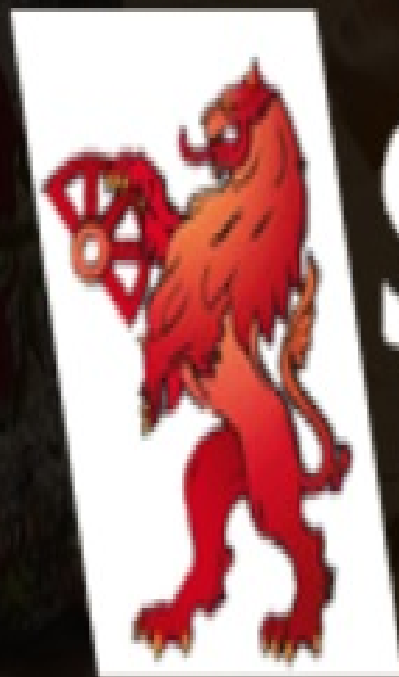
We're Defending You

Request Legal Help



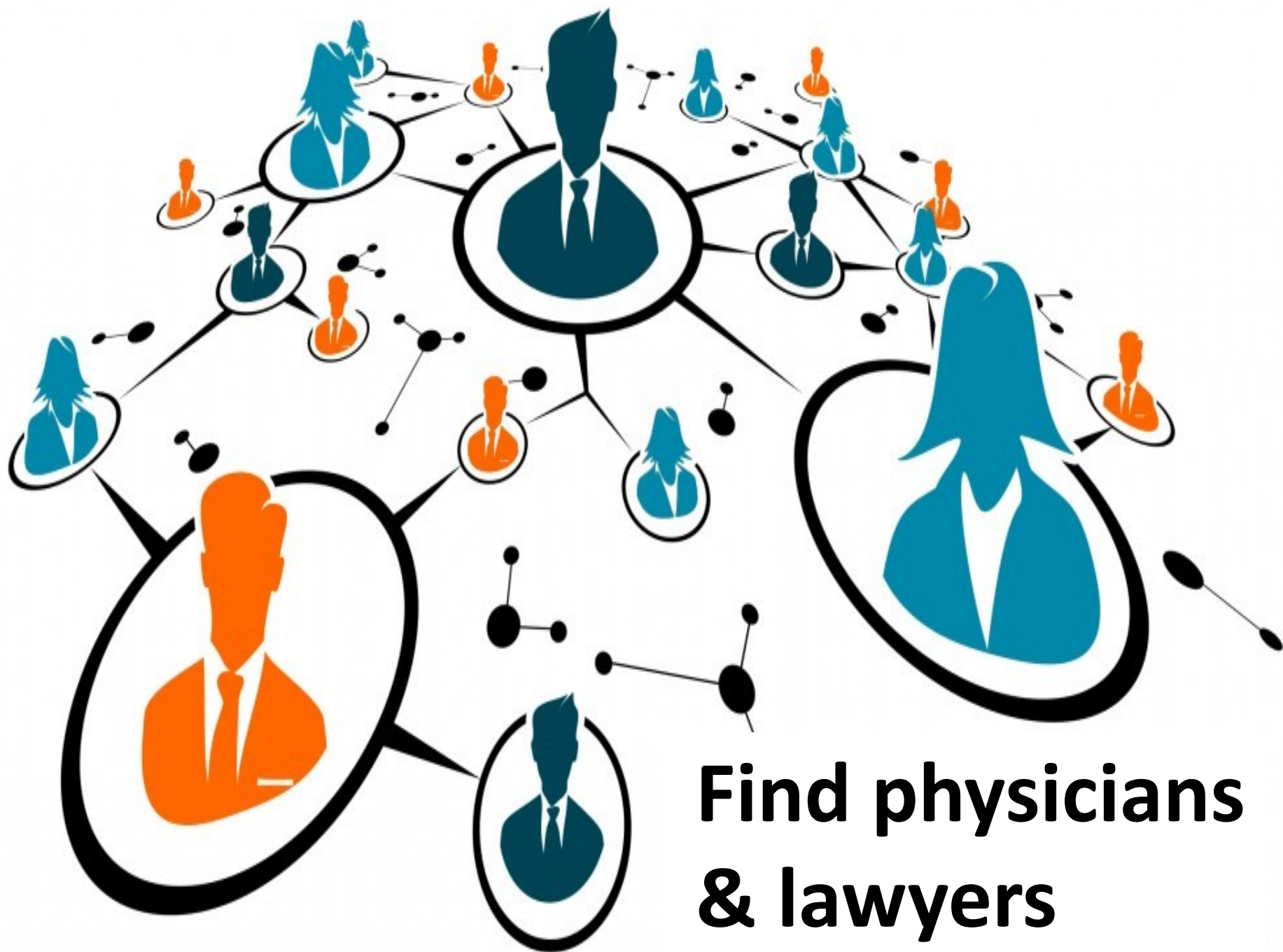
PACIFIC JUSTICE INSTITUTE

Defending Religious Freedom, Parental Rights, And Other Civil Liberties Without Charge



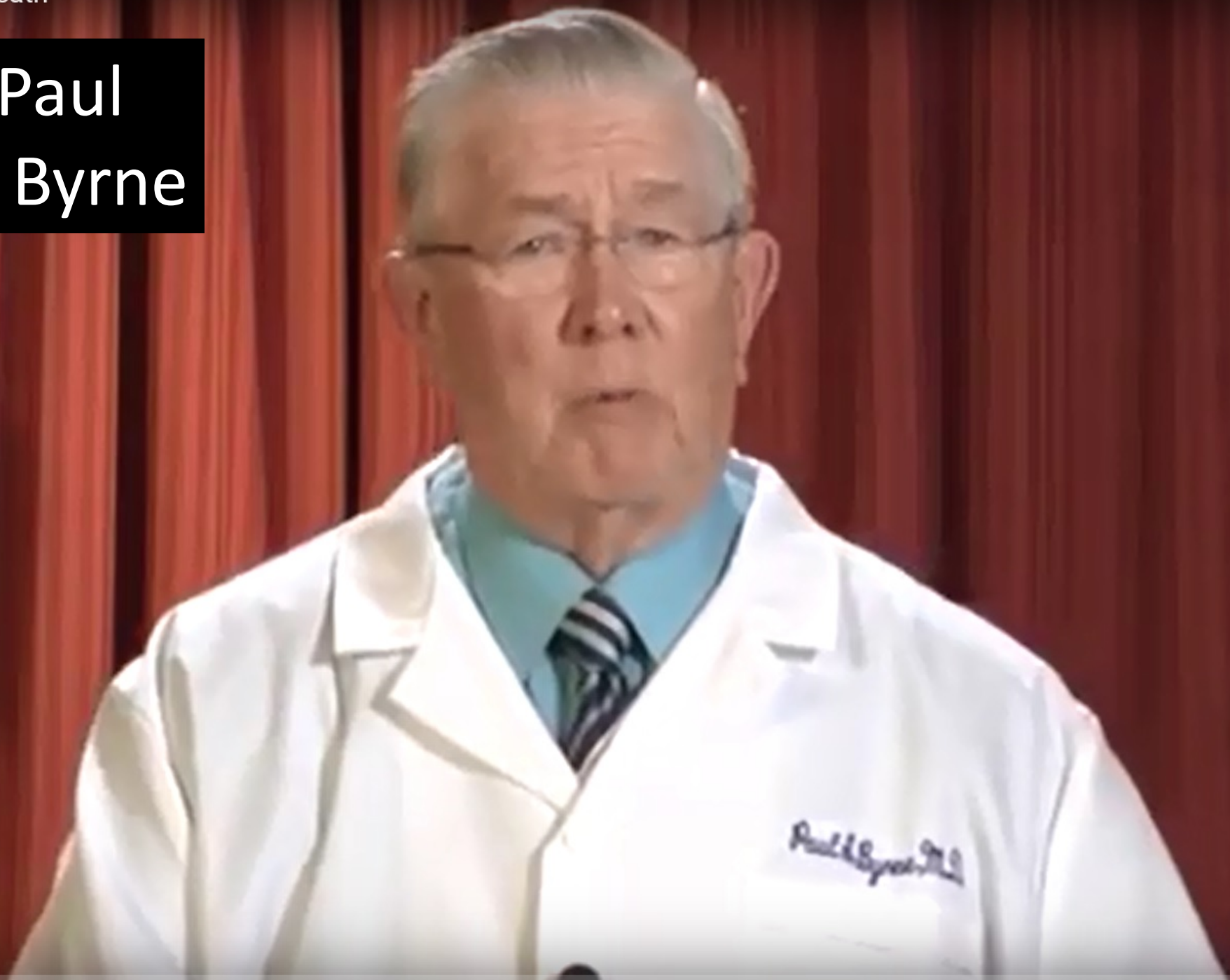
Steadfast Onlus

Edificare e Servire



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& lawyers**

Paul
Byrne



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pro bono

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San Francisco Weekly's

Best Personal Injury Lawyer



Chris Dolan
Dolan Law Firm

TRIAL LAWYER OF THE YEAR WINNER
California, San Francisco & Marin



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sf | 415.421.2800

More

crowdfund



£1,195,224 of £1.2M goal

Raised by 78,106 people in 2 months

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Created 30 January 2017



Connie Yates

Medical

Bedfont Ward, ENG

Recent Donations



£10

Trisha Greer

Now

Share

Share

Tweet

104K shares

GoFundMe

Please help to save Charlie's life

help us to save our baby boy!

Consequences of resistance



9+ months

\$10,000

per day

Harm

innocent

3rd parties

1



2

UNOSSM

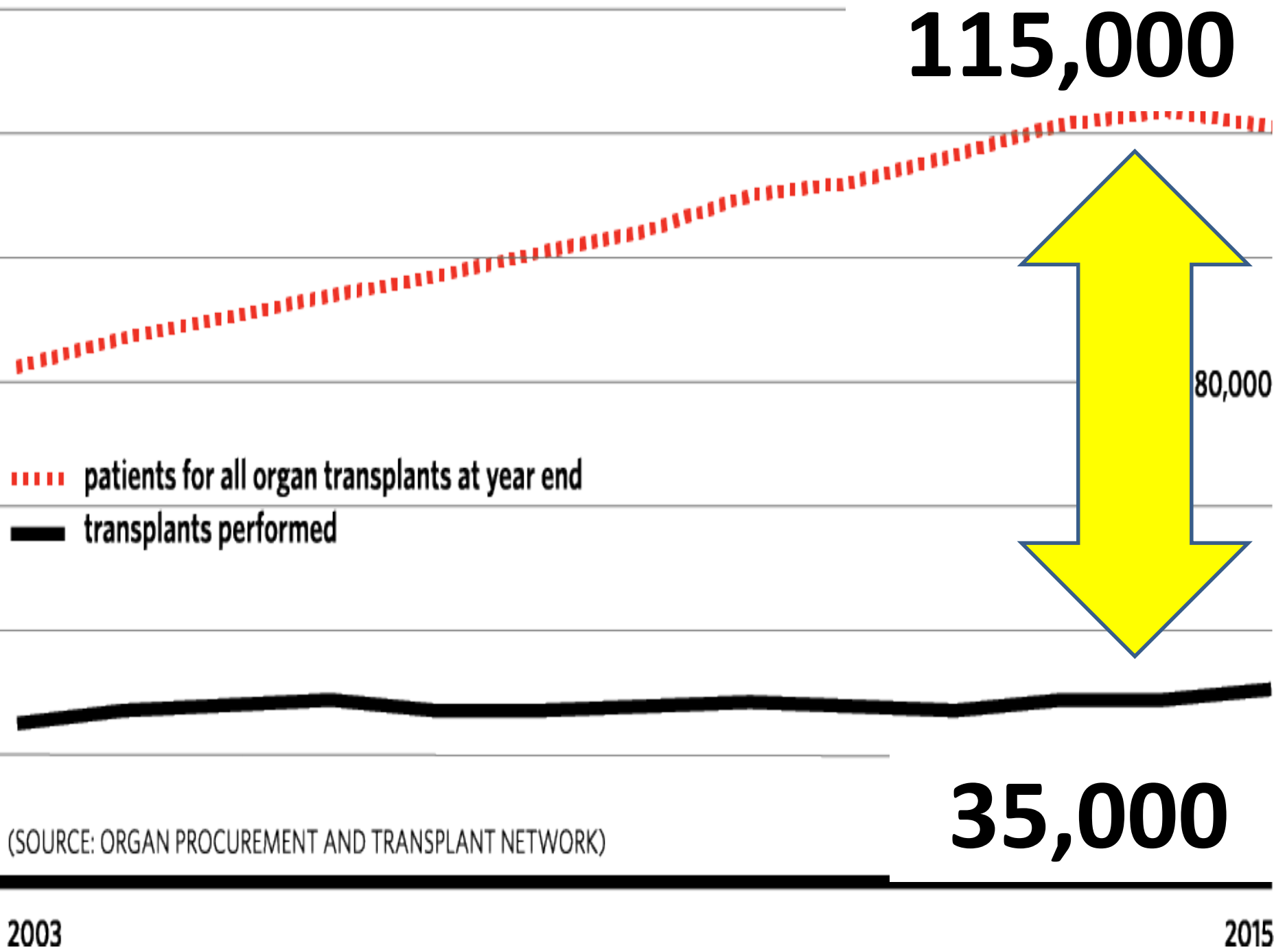
UNITED NETWORK FOR ORGAN SHARING

2018: More transplants than ever



There were more than
10,700 deceased
donors in 2018.

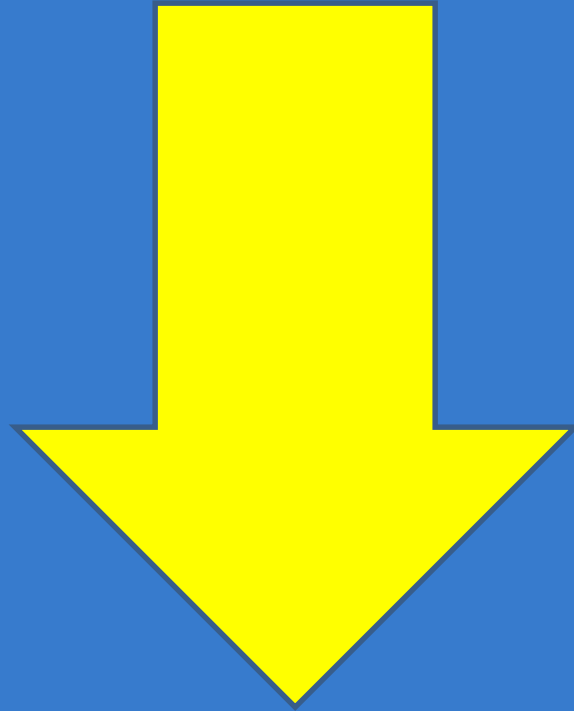
8th consecutive record
breaking year.



5

Types of
dispute

Least



Most serious

Attack

1 of 5

Confusion

Mistrust



Lots of these cases

Just 1

example

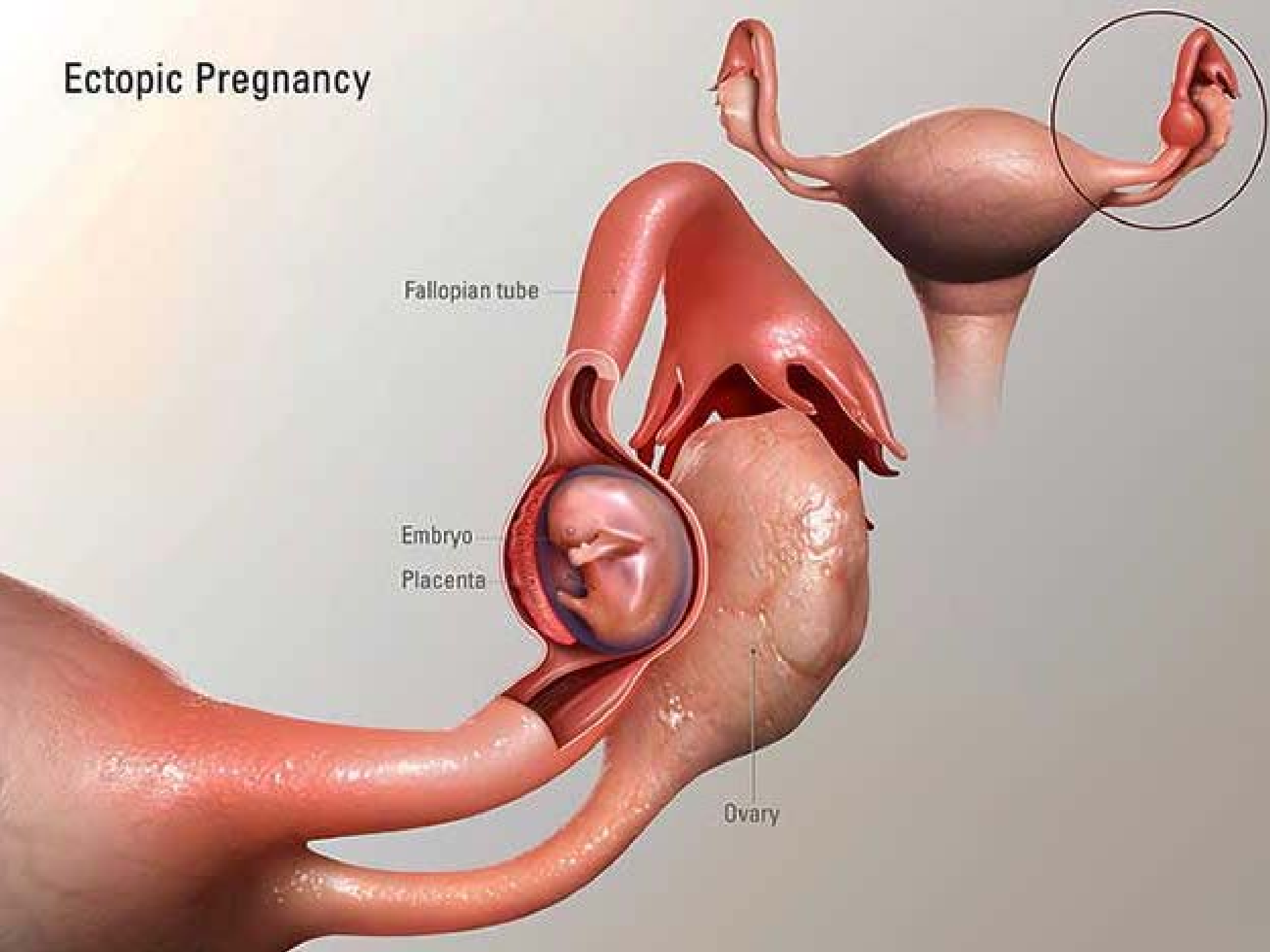


AHMC ANAHEIM REGIONAL
MEDICAL CENTER



Lisa Avila

Ectopic Pregnancy





“No”



FOX 11

ROBERT AVILA
FATHER

Wrong before

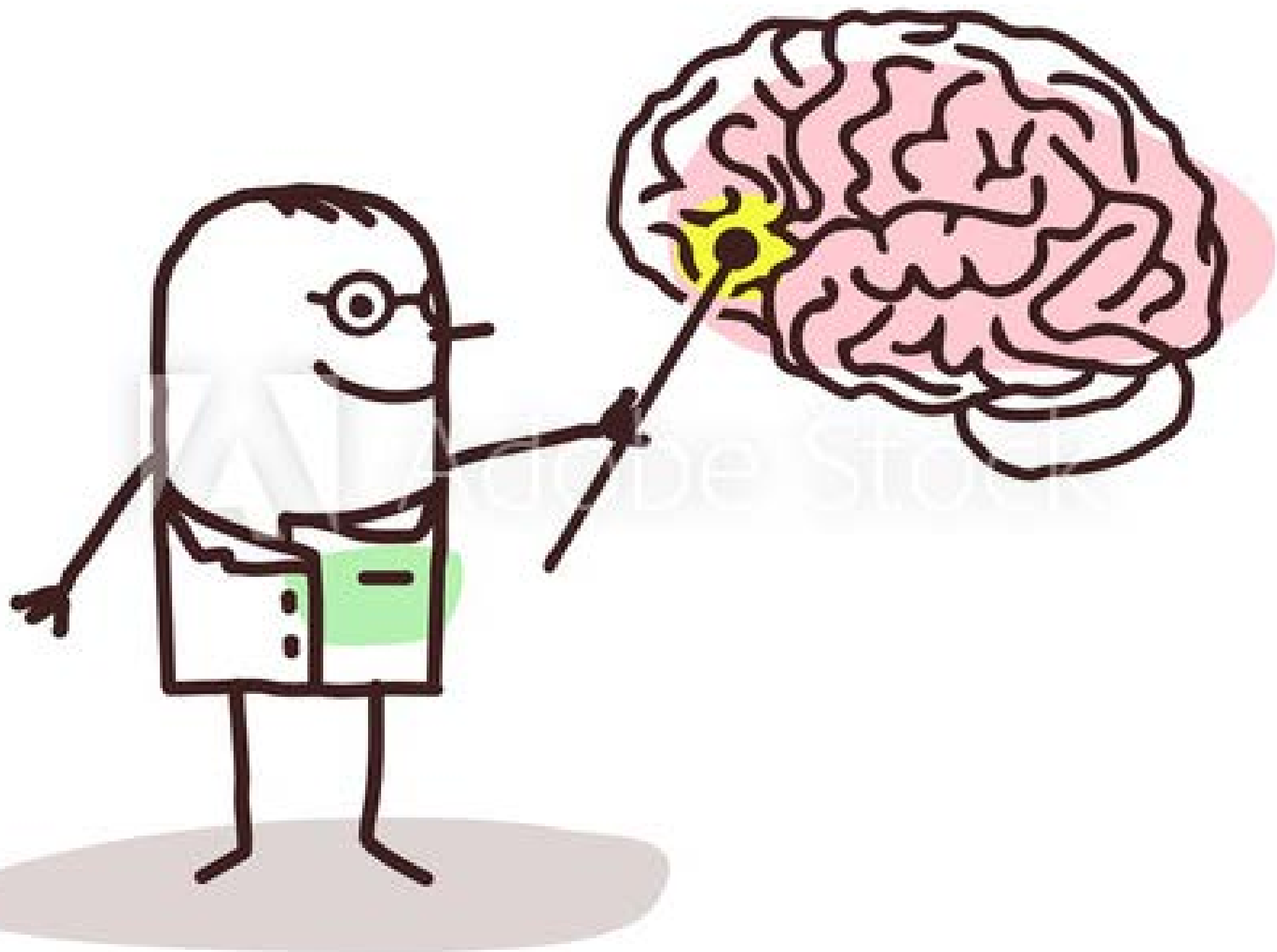
Wrong now



SUPERIOR COURT
OF CALIFORNIA

COUNTY OF ORANGE

Injunction against
removing ventilator



“okay”



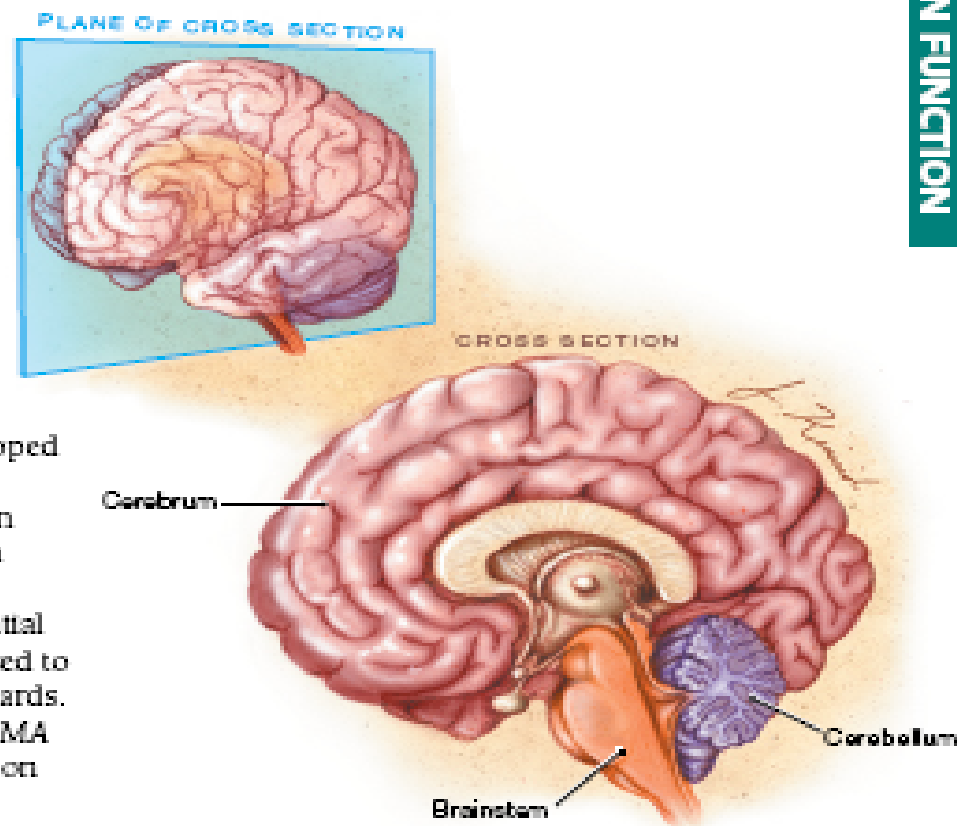
Law buys time - to accept or confirm

Other
tools

Do **not** use
the term
“brain death”

Brain Death

A person dies when brain function ceases, the heart stops beating, and breathing and blood circulation cease. Because life-support techniques have become so advanced, it is possible that even in the face of fatal injury or unrecoverable illness, the heart can be kept beating with medication, and **respiration** (breathing) can be artificially 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 is no function of the entire brain. The brainstem is the area of the brain that controls breathing and circulation and therefore controls essential life functions. When the brain, including the brainstem, has ceased to function, the individual is truly dead by medical and legal standards. Thus, brain death is real death. The March 18, 2009, issue of JAMA includes an article about brain death. This Patient Page is based on one published in the May 14, 2008, issue of JAMA.



CLINICAL CRITERIA FOR BRAIN DEATH

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

TESTING

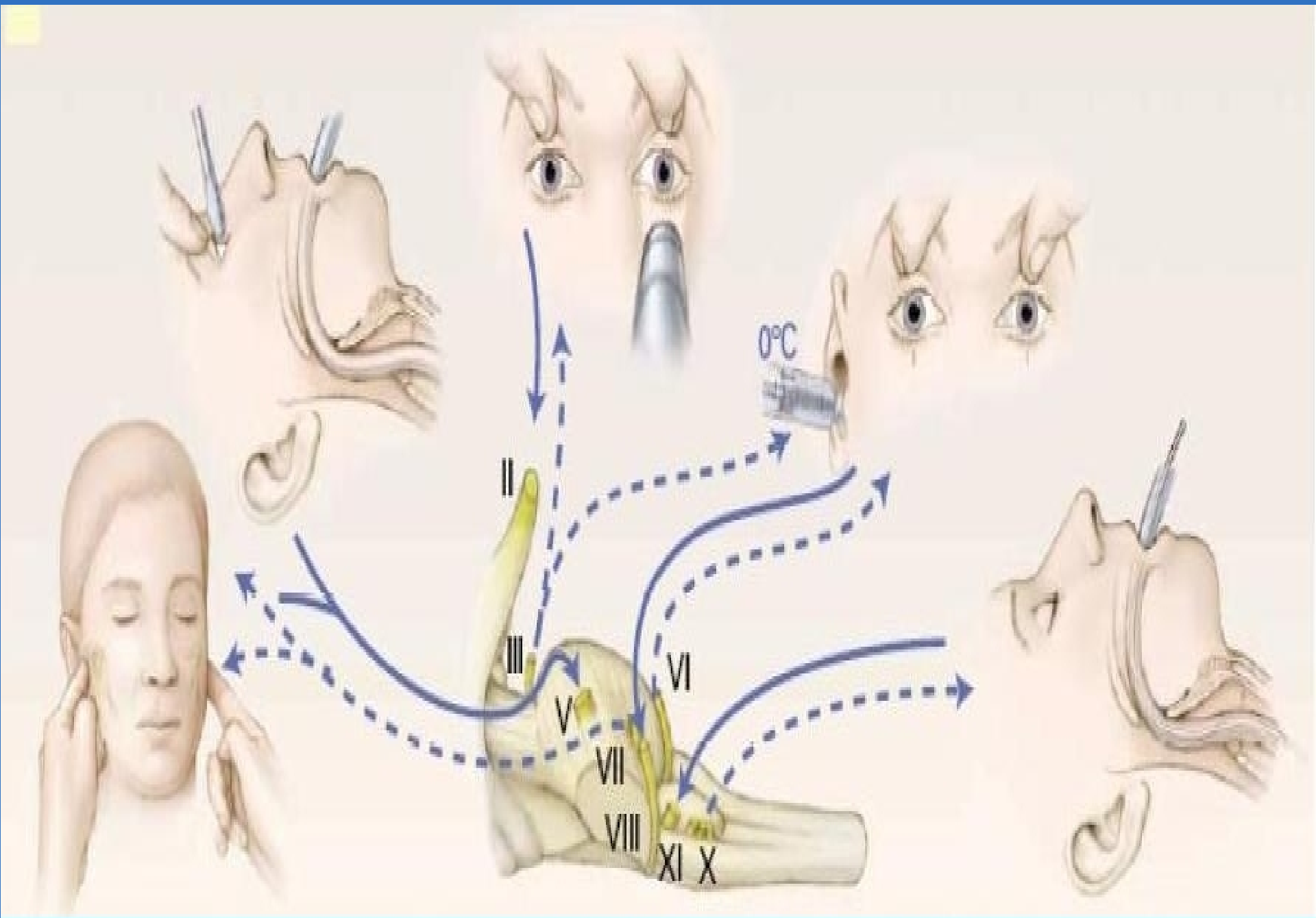
- Computed tomography (CT) scans of the brain may show abnormalities such as bleeding (hemorrhage), massive stroke, brain injury, or severe brain swelling (edema).
- Electroencephalography (EEG) records electrical brain activity. If brain death is present, the EEG will show no activity.

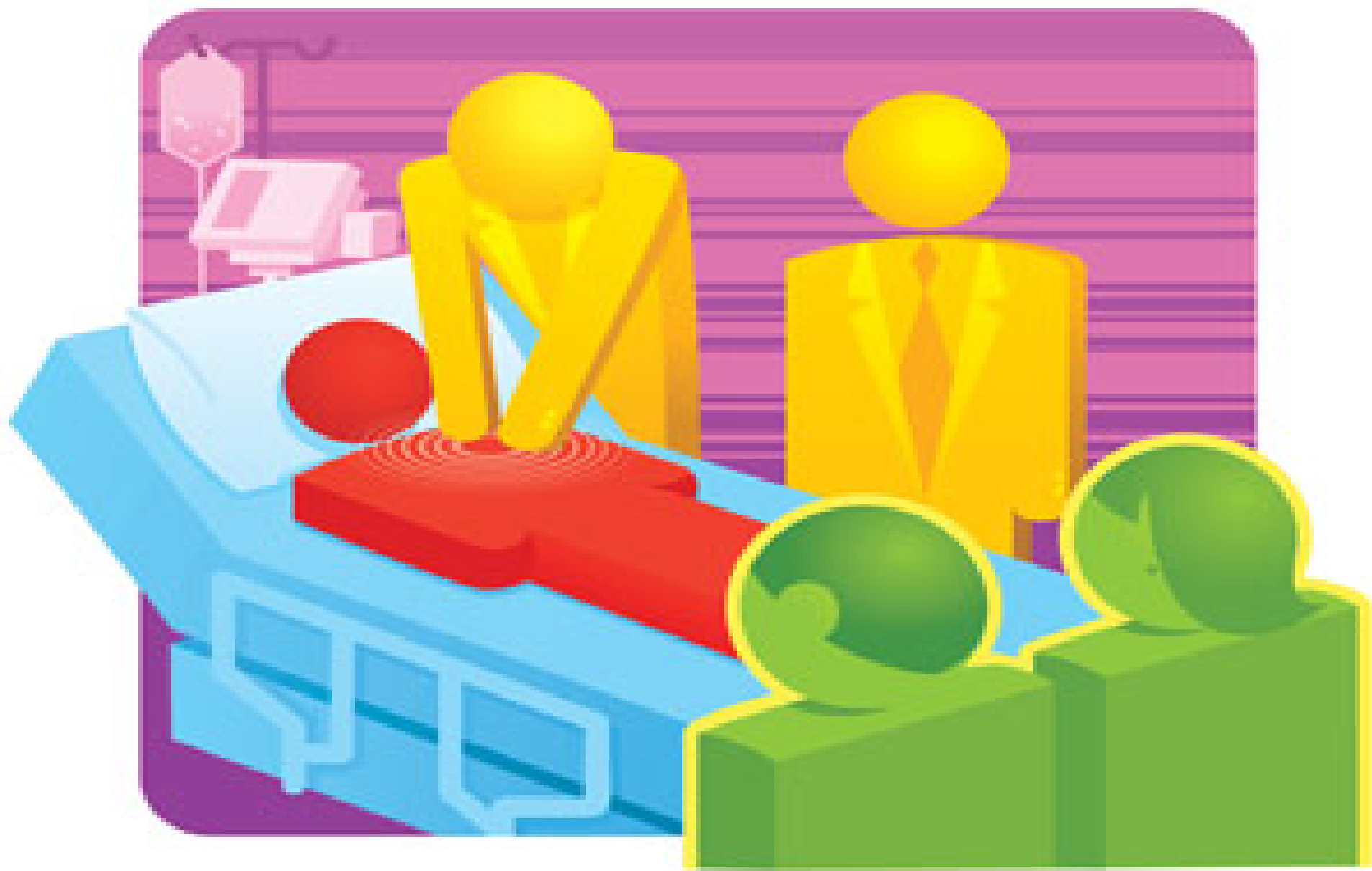
FOR MORE INFORMATION

- National Institute of Neurological Disorders and Stroke
www.ninds.nih.gov
- American Academy of Neurology
www.aan.com
- United Network for Organ Sharing
www.unos.org

INFORM YOURSELF

To find this and previous JAMA





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

That's

1st attack

on BD

Attack

2 of 5

Want

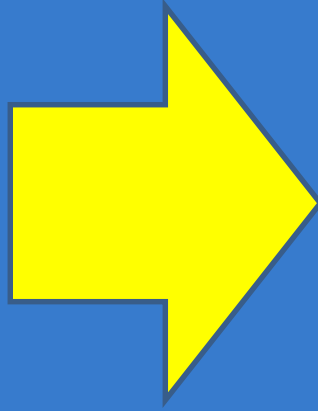
religious

exemption



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

Religious
objection



No
death
by BD

Pt may

satisfy

BD criteria

BUT

May **not**
declare
death

Until

death by

CP criteria

Rejected
everywhere
outside NJ

Still

asked for

CHOP had 2 cases summer 2018



Areen Chakrabarti



FOX 29

10:06 64°

Jayden Auyeing

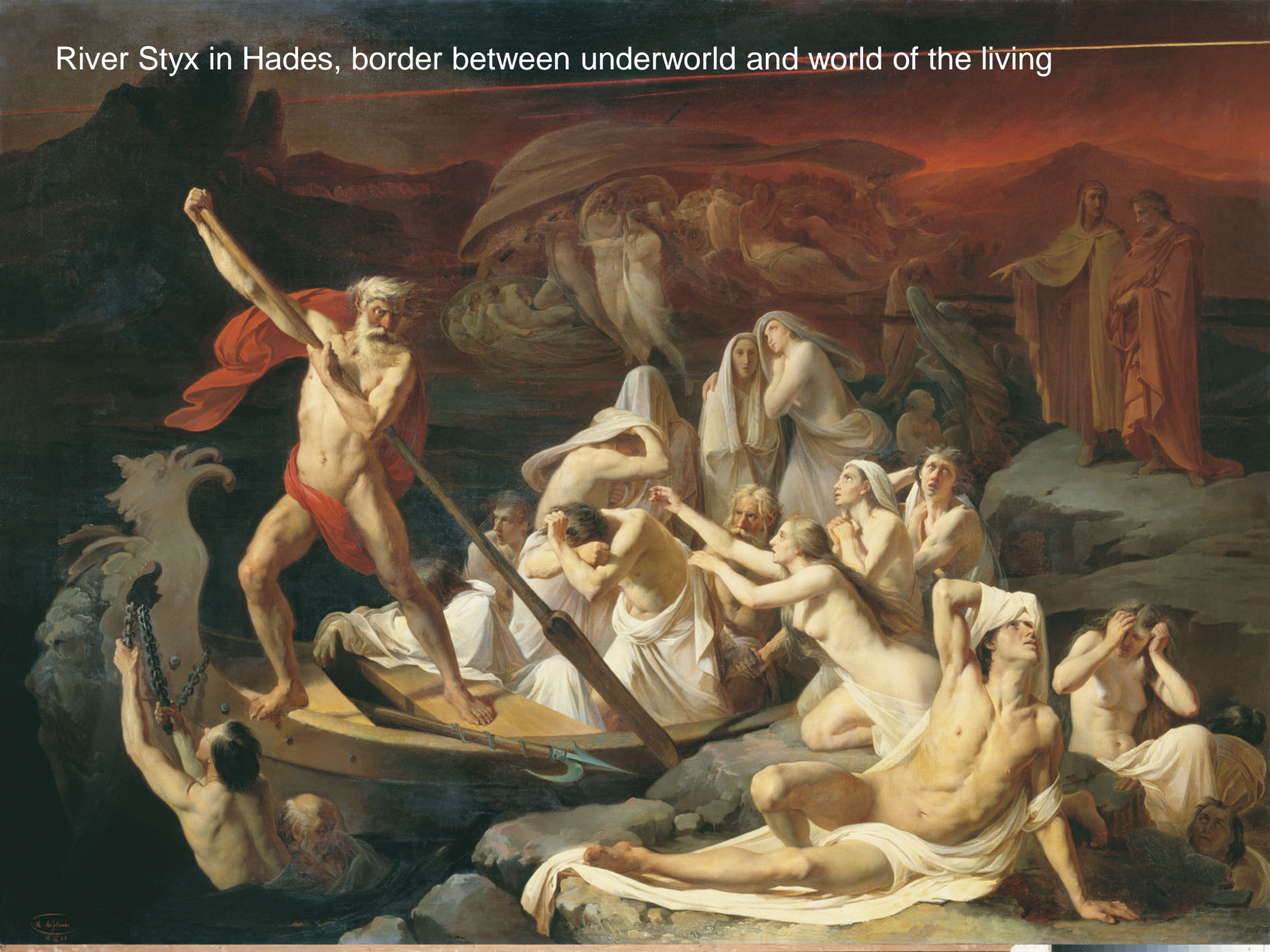


FOX 29

5:08 85°



River Styx in Hades, border between underworld and world of the living



Motl Brody (DC)



Shahida Virk (Mich.)





Cho Fook Cheng (Mass)

AMENDED IN ASSEMBLY APRIL 6, 1987

CALIFORNIA LEGISLATURE—1987–88 REGULAR SESSION

ASSEMBLY BILL

No. 1390

Introduced by Assembly Member Katz

March 4, 1987

California

rejected legislation

Mario
Cuomo



CA

MA

DC

NY

MI

PA





Shalom Ouanounou

Rejected
everywhere
outside NJ

BUT

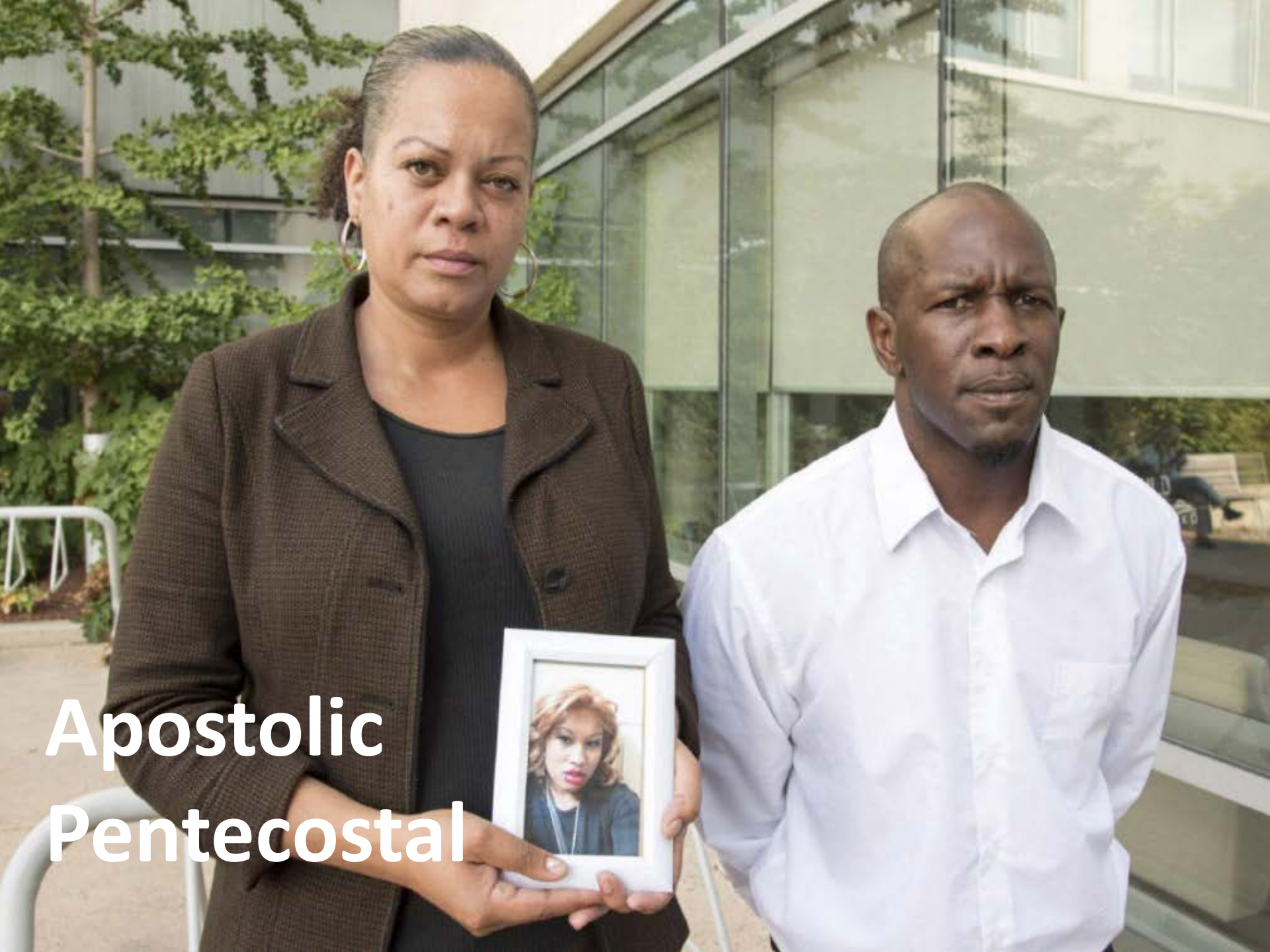
New
cases

1





Taquisha McKitty



**Apostolic
Pentecostal**

BD guidelines “failed
to . . . accommodate . . .
religious beliefs, . . .
violate . . . constitutional
and human rights”



Dec. 12, 2018

2



CALIFORNIA



Israel Stinson

**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
2 through 10, inclusive,

Defendant.

) Case No.: 2:16-cv-00889-KJM-EFB

)

)

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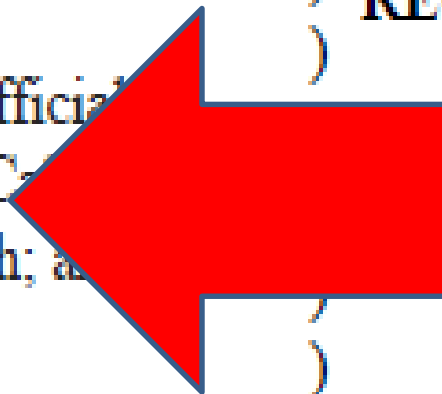
)

)

)

**Second Amended Complaint for
Equitable Relief**

REQUEST FOR JURY TRIAL



**Suing State
of California**

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

“removal of CP support

. . . **unconstitutional** . . .

interferes with . . .

freedom of religion . . .

. first amendment”



UNITED STATES COURTS for the NINTH CIRCUIT

Oral arg. Jan. 14, 2019

3



**NEW YORK STATE
DEPARTMENT OF HEALTH**

**GUIDELINES FOR DETERMINING
BRAIN DEATH**

DECEMBER 2005

“Hospitals must
establish **written**
procedures for
reasonable
accommodation”

Free choice

24 hours

BUT



 New York-Presbyterian

AMAZING
THINGS
ARE
HAPPENING
HERE

May see
more of
these cases

LIFE 
LEGAL
DEFENSE
FOUNDATION

That's

2nd attack

on BD

Attack

3 of 5

Must clinicians
obtain **consent**
for BD tests?

Some try to

prevent

BD diagnosis

why?

this strategy

Clinician

duties

after BD

Limited

American College of Physicians Ethics Manual

Sixth Edition

Lols Snyder, JD, for the American College of Physicians Ethics, Professionalism, and Human Rights Committee*

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

Really, most **SINCERELY** dead

Policy and procedure in the diagnosis of death by neurologic criteria

D.M. Shaner, MD; R.D. Orr, MD; T. Drought, PhD, RN; R.B. Miller, MD; and M. Siegel, MD

“once death . . . diagnosed . .
. **discontinue** support . . .”

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

“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

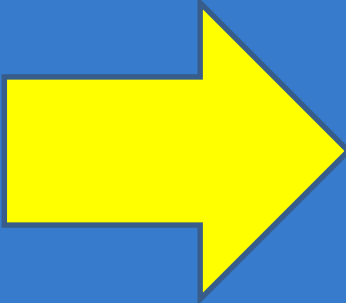
Consent

not

required

Dead → Not a
patient

Not a
patient



No Tx
duty

OFF

Bright line rule



No post-BD

treatment rights

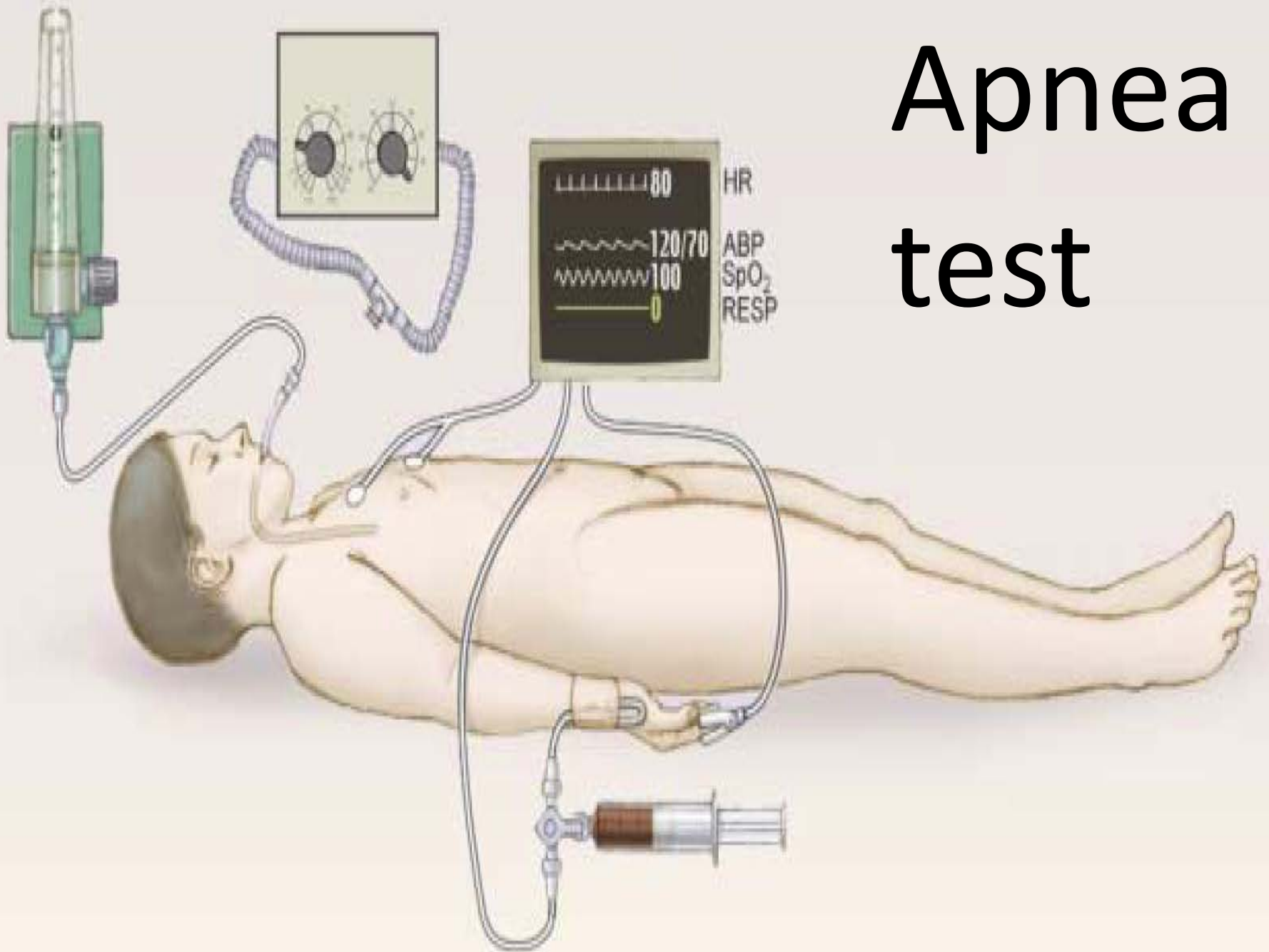
So,

Focus on

pre-BD

rights

Apnea test



Final

confirmatory test



Evidence-based guideline update: Determining brain death in adults

Report of the Quality Standards Subcommittee of the American
Academy of Neurology



Eelco F.M. Wijdicks,
MD, PhD

ABSTRACT

Objective: To provide an update of the 1995 American Academy of Neurology guideline with regard



Clinical Report—Guidelines for the Determination of Brain Death in Infants and Children: An Update of the 1987 Task Force Recommendations

BUT

More family

refusals

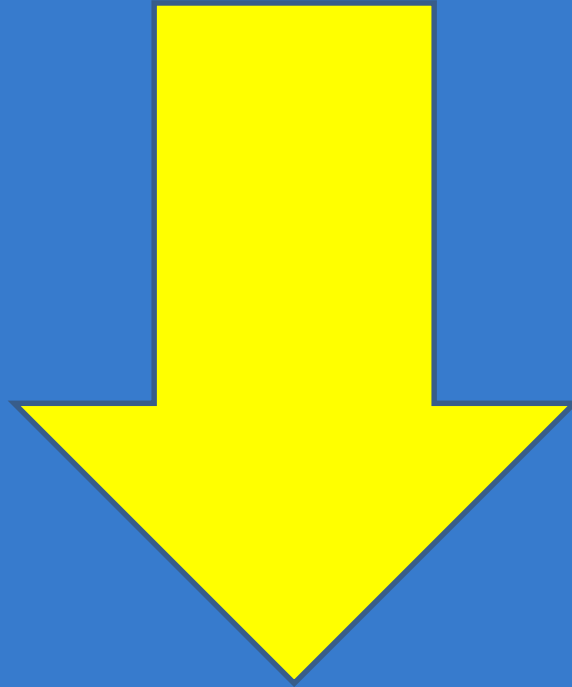


Parental

refusals

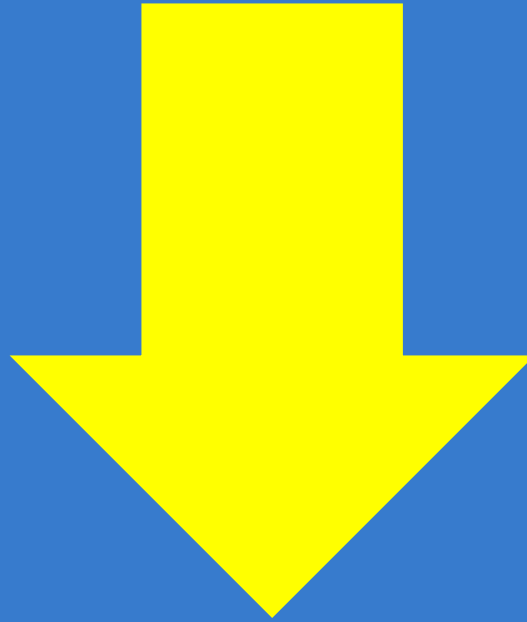


No apnea test



No BD

No BD



Treatment duties
continue until CP

Practically, same
as NJ religious
exemption

Opt out

BD

No apnea test →

ancillary tests

But **same**

consent

question

Must clinicians
honor the
refusal?

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



split

Yes

Allen

Callaway

Billings, Montana





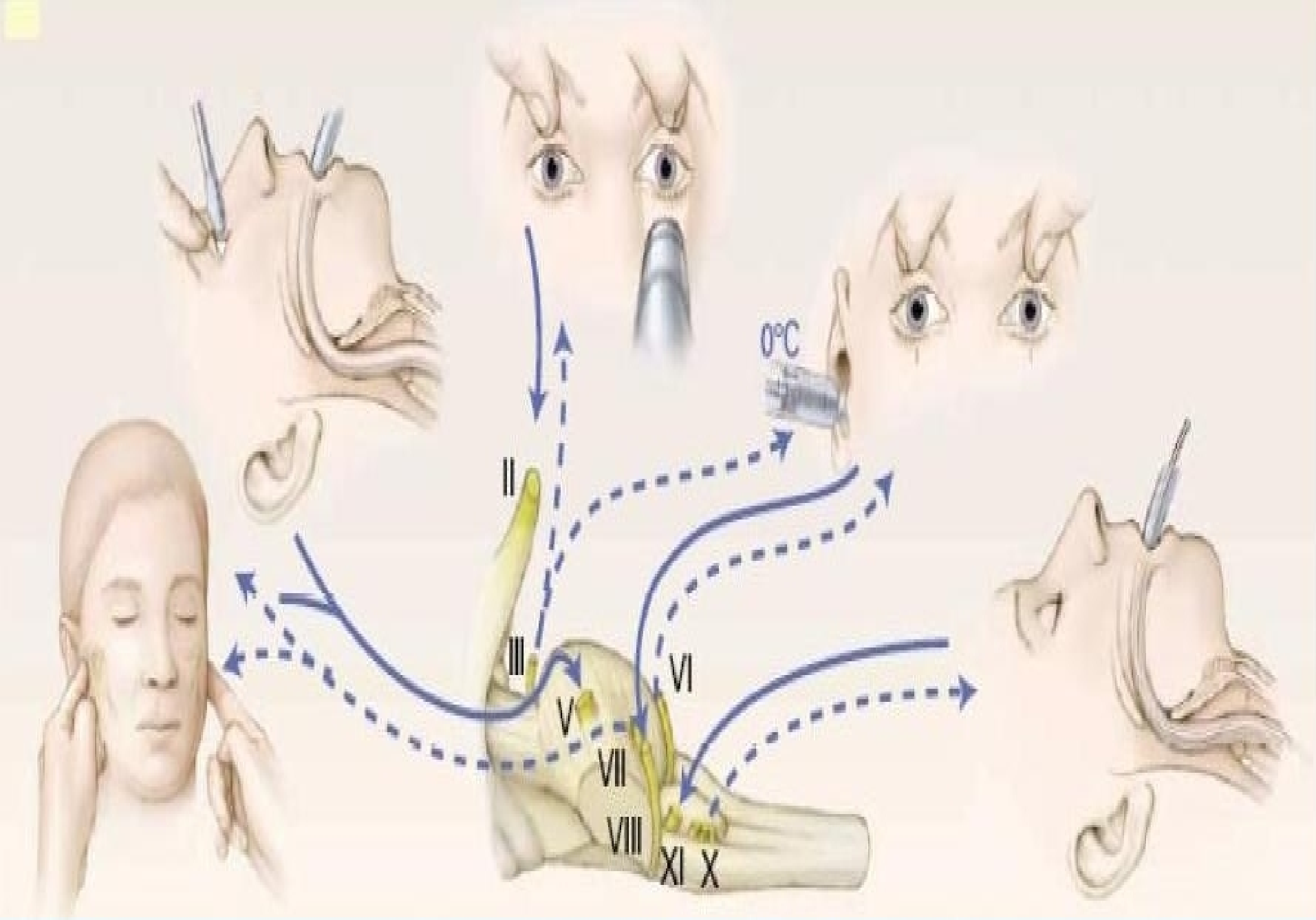
6-year-old
"Drowned" July 22, 2016



St. Vincent

HEALTHCARE

SCL Health





Mom:
“no”

MONTANA NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

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

Cause No. DG-16-08

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

FILED

SEP 26 2016

Laurie E. Isenheimer
BY LAURIE E. ISENHEIMER
CLERK OF DISTRICT COURT
PONDERA COUNTY, MONTANA
By _____ DEPUTY

a minor.

“no”

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

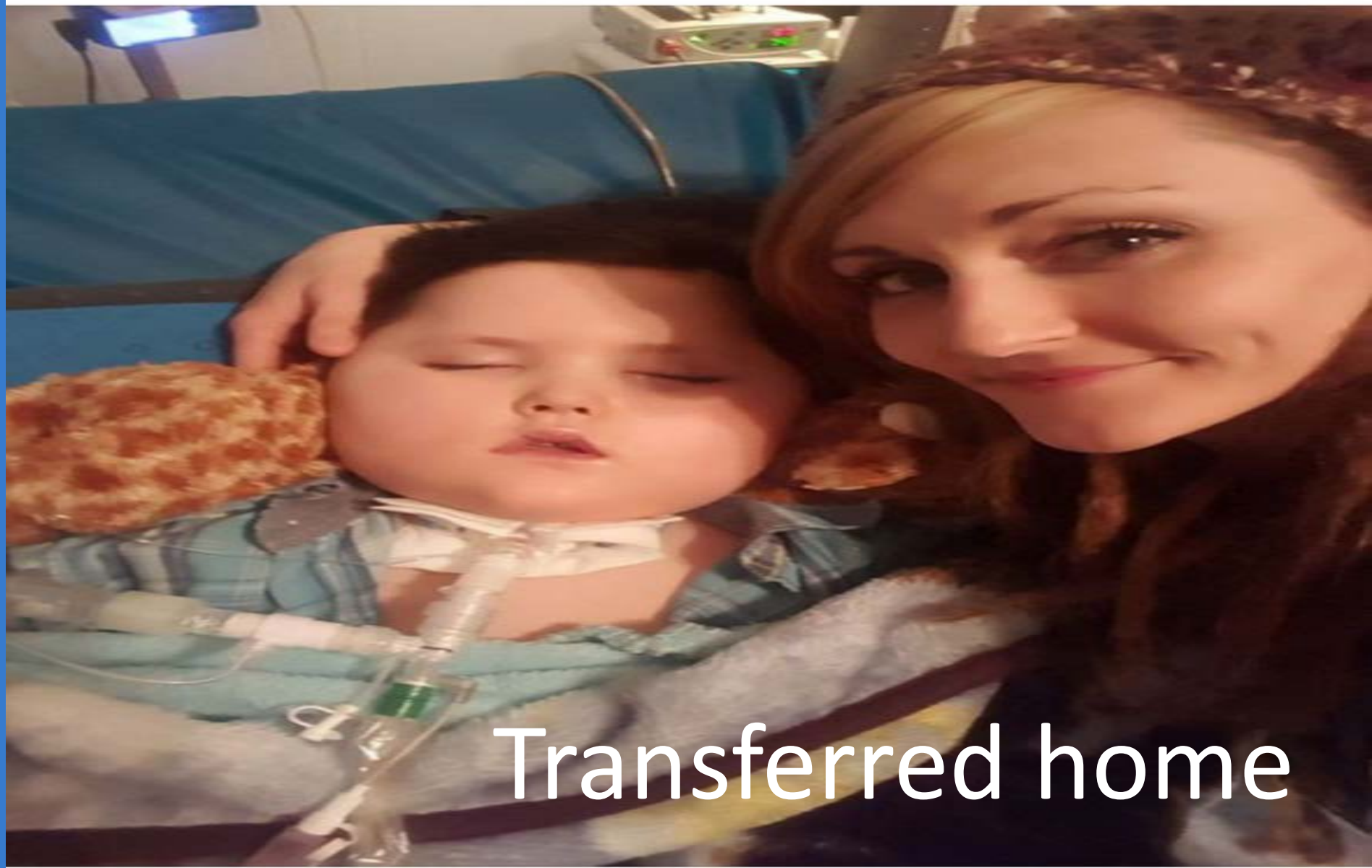
**“mother has sole
authority to make
medical decisions . . .
including . . . brain
functionality
examinations”**



Tasha Dawn Stone

Yesterday at 10:50 PM · 👥

Allen and I are home! Praise Jesus!!



Transferred home





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

MT said

“yes”

KS also

said “yes”

Brett Shively
2yo "drown"
Wichita, 2006





18TH JUDICIAL DISTRICT COURT

SEDGWICK COUNTY, KANSAS

Forbid brain viability exam

TRO - 02/01/06

D/C home - 03/17/06

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

CA also

said “yes”



Alex Pierce - drowned



LOMA LINDA
UNIVERSITY

CHILDREN'S
HOSPITAL



Refuse apnea test

1 ALLISON ARANDA
2 P.O. Box 2015
3 Napa, CA 94559
4 707.227.6744

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUN 7 2016

5 Attorney for Petitioner

BY *Roberta Lee*
DEPUTY

6
7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO
10

11
12
13 ALEX PIERCE, by and through his
14 mother SABRINA PIERCE
15 Plaintiff,

16 vs.

17 LOMA LINDA UNIVERSITY MEDICAL
18 CENTER,
19

20 Defendant

Case No.: CIV-DS-1608931

**~~PROPOSED~~ ORDER ON EX PARTE
MOTION FOR TEMPORARY
RESTRAINING ORDER**



**Israel
Stinson**

Children's
Hospital



LOS ANGELES®

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

MT, KS, CA

said “yes”

Plausible

Normally, may
not do things to
patient without
consent





Med Mal

No



Virginia

Mirranda

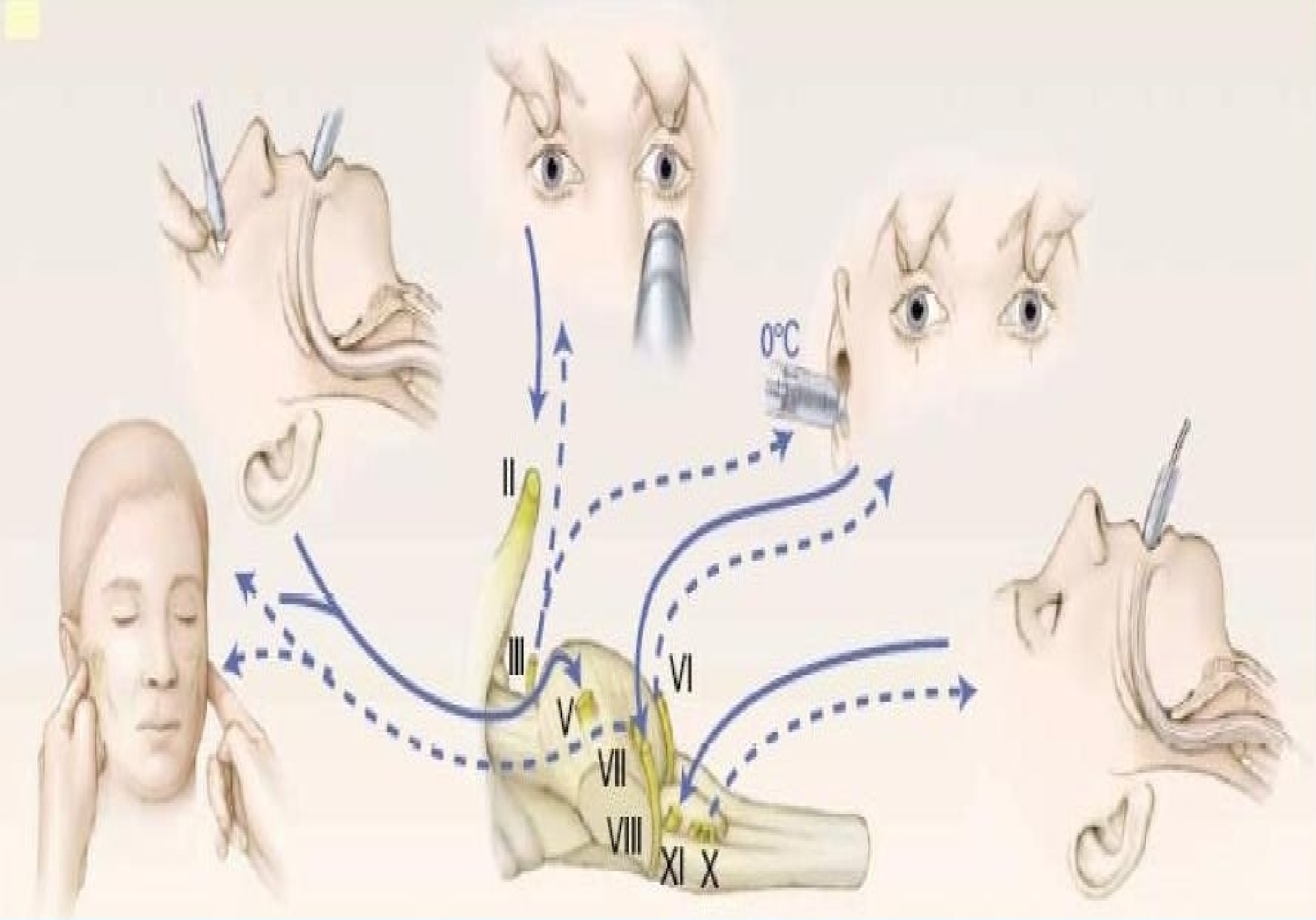
Lawson

Richmond, Virginia

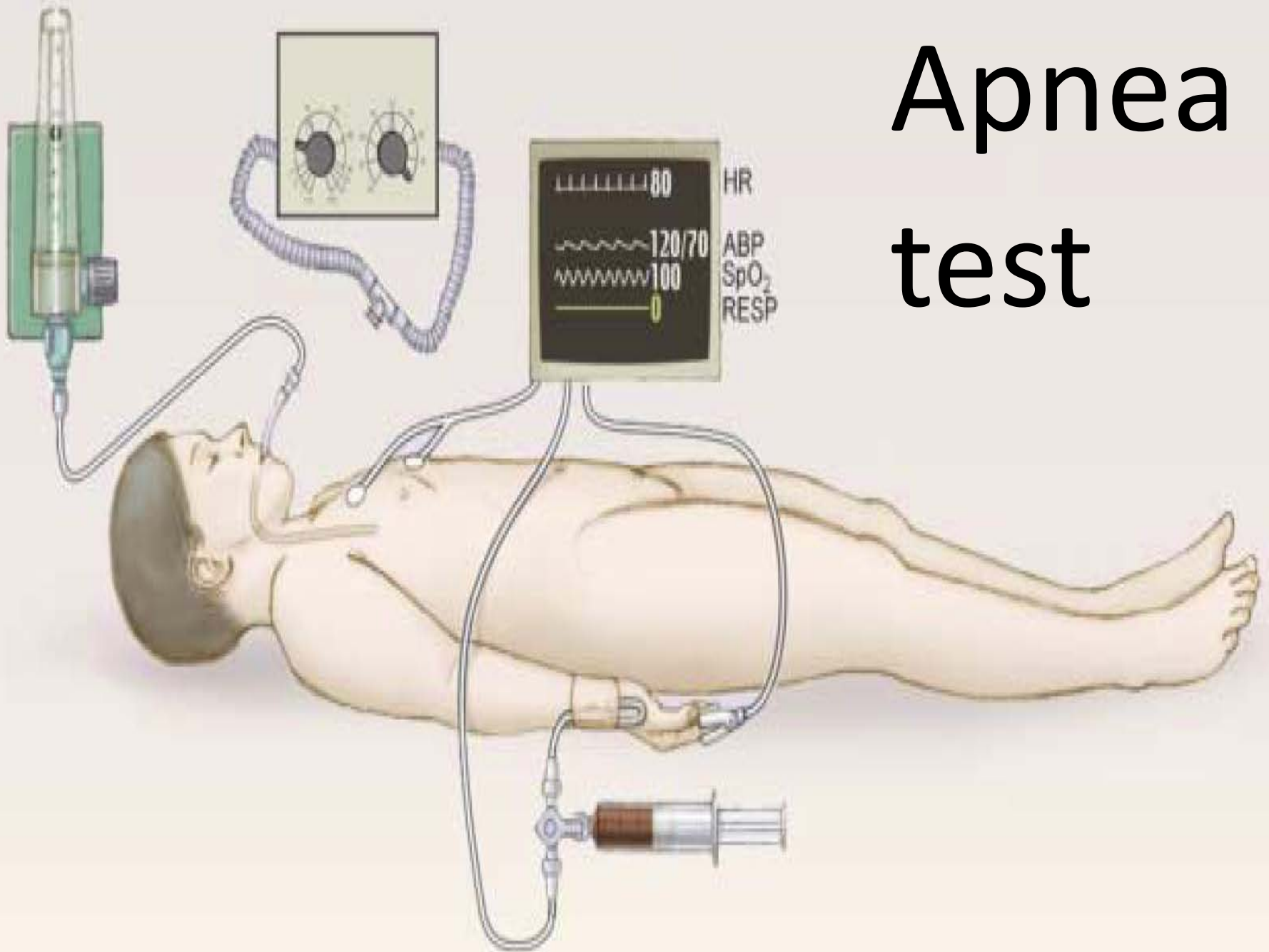




2-year-old
Choked popcorn - May 11, 2016



Apnea test





Dad:
“no”

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

5/20/2016
5/20/2016

Witnessed Kelsey Rong

5/20/2016

Witnessed Ann Roache

5/24/2016



JOHN MARSHALL COURTS BUILDING
RICHMOND, VIRGINIA

June 10, 2016

Richmond Circuit Court

Hospital

“is . . . allowed

to administer

the apnea test”

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

VA said

“no”

NV also
said “no”



A.B. 424
(June 2, 2017)



“determination of the death . . . is a clinical decision that does **not require the consent** of the person’s . . . representative”

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



“... process for
determining brain
death is underway.

**Consent need not
be obtained ...”**



Columbia
SOUTH
CAROLINA

Atlanta

ALABAMA
Montgomery

GEORGIA

Tallahassee

NO!



YES



YES

California

Kansas

Montana

NO

Nevada

Virginia

Georgia

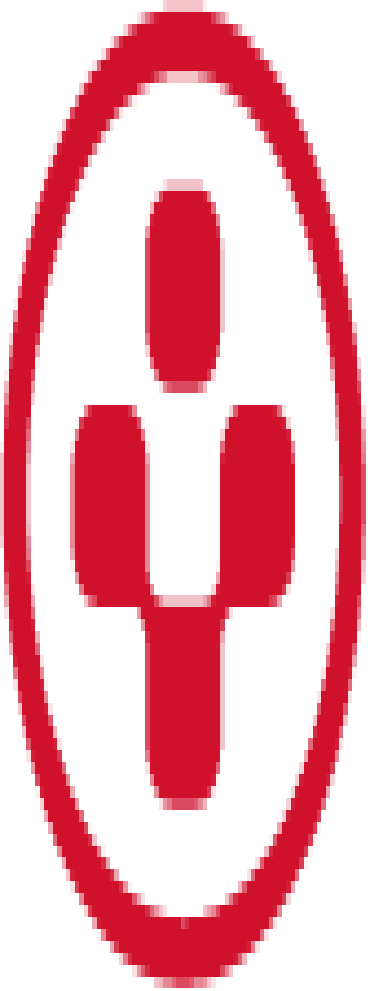
New York

Conflict
continues

2 more recent cases in

DALLAS





Medical City

Children's Hospital



McKinley Hawkins

[Doctors](#)

[Locations](#)

[Patients and Families](#)

[Specialties](#)

[Health Professionals](#)



Cook Children's Medical Center



Payton Summons

Not only

courts

Organ support after death by neurologic criteria

Results of a survey of US neurologists

**$\frac{1}{4}$ neurologists
say need consent**

That's

3rd attack

on BD

Attack

4 of 5



Jahi McMath

Dec. 12, 2013

Declared dead



Lost lawsuits against hospital

CERTIFICATION OF VITAL RECORD
OFFICE OF CLERK-RECORDER
COUNTY OF ALAMEDA
 OAKLAND, CALIFORNIA

3052013245211

CERTIFICATE OF DEATH

3201301008821

1. NAME OF DECEDENT - FIRST (Given) JAH		2. MIDDLE KELIS		3. LAST (Family) MCMATH	
4. DATE OF BIRTH <small>mm/dd/yyyy</small> 10/24/2000					
5. AGE Yrs. 13		6. UNDER ONE YEAR <input type="checkbox"/> Days		7. UNDER ONE YEAR <input type="checkbox"/> Hours <input type="checkbox"/> Minutes	
8. BIRTH STATE/FORIGN COUNTRY CA		9. SOCIAL SECURITY NUMBER CA 000000		10. MARITAL STATUS/DEPT (at Time of Death) NEVER MARRIED	
11. EVER IN U.S. ARMED FORCES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> UNK		12. DATE OF DEATH <small>mm/dd/yyyy</small> 12/12/2013		13. HOUR 24 Hour 1500	
14. EDUCATION - Highest Level/Degree 07		15. WAS DECEDENT HISPANIC/LATINO/AFRICAN? <small>If yes, see worksheet on back</small> <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		16. DECEDENT'S RACE - Up to 3 races may be listed (see worksheet on back) AFRICAN AMERICAN	
17. USUAL OCCUPATION - Type of work for most of life. DO NOT USE RETIRED		18. KIND OF BUSINESS OR INDUSTRY (e.g., grocery store, road construction, employment agency, etc.) E.C. REEMS ACADEMY		19. YEARS IN OCCUPATION 7	
20. DECEDENT'S RESIDENCE (Street and number, or location) 2742 75TH AVE					
21. CITY OAKLAND		22. COUNTY/PROVINCE ALAMEDA		23. ZIP CODE 94605	
24. YEARS IN COUNTY 13		25. STATE/FORIGN COUNTRY CA		26. INFORMATION MAY BE ADDED (e.g., date of birth, date of death, date of burial, city or town, state and zip)	
27. INFORMATION MAY BE ADDED (e.g., date of birth, date of death, date of burial, city or town, state and zip)					
28. NAME OF SURVIVING SPOUSE/SPOUSE- NAILAH WINKFIELD, MOTHER		29. MIDDLE DELMAR		30. LAST (BIRTH NAME) MCMATH	
31. NAME OF FATHER/PARENT-FIRST MILTON		32. MIDDLE DELMAR		33. LAST MCMATH	
34. NAME OF MOTHER/PARENT-FIRST LATASHA		35. MIDDLE NAILAH		36. LAST SPEARS	
37. BIRTH STATE MI		38. BIRTH STATE CA		39. BIRTH STATE CA	
40. PLACE OF FINAL DISPOSITION 3237 ARNOLD AVE, SALINA, KS 67401		41. SIGNATURE OF EMBALMER NOT EMBALMED		42. LICENSE NUMBER NONE	
43. SIGNATURE OF LOCAL REGISTRAR LATASHA SPEARS-WINKFELD		44. SIGNATURE OF LOCAL REGISTRAR MUNTU DAVIS, M.D.		45. LICENSE NUMBER 50	
46. DATE <small>mm/dd/yyyy</small> 01/03/2014		47. DATE <small>mm/dd/yyyy</small> 01/03/2014		48. DATE <small>mm/dd/yyyy</small> 01/03/2014	
101. PLACE OF DEATH CHILDREN'S HOSPITAL		102. IF HOSPITAL, SPECIFY ONE <input checked="" type="checkbox"/> IP <input type="checkbox"/> SVCP <input type="checkbox"/> DOA		103. IF OTHER THAN HOSPITAL, SPECIFY ONE <input type="checkbox"/> Hospice <input type="checkbox"/> Nursing Home/LTC <input type="checkbox"/> Decedent's Home <input type="checkbox"/> Other	
104. COUNTY ALAMEDA		105. CITY OAKLAND		106. DEATH REPORTED TO CORONER? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
107. CAUSE OF DEATH PENDING INVESTIGATION		108. TIME INTERVAL BETWEEN Death and Death INVS		109. DEATH REPORTED TO CORONER? 2013-03628	
110. GROSSLY PERFORMED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		111. AUTOPSY PERFORMED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		112. USED IN DETERMINING CAUSE? <input type="checkbox"/> YES <input type="checkbox"/> NO	
113. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RESULTING IN THE UNDERLYING CAUSE GIVEN IN 107 NONE					
114. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEM 107 OR 113? If yes, list type of operation and date. NO					
115. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED Decedent Attended Since NO		116. SIGNATURE AND TITLE OF CERTIFIER JESSICA D HORN, DEPUTY CORONER		117. LICENSE NUMBER 50	
118. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED MANNER OF DEATH: <input type="checkbox"/> Natural <input type="checkbox"/> Accident <input type="checkbox"/> Suicide <input checked="" type="checkbox"/> Investigation <input type="checkbox"/> Could not be determined		119. TYPE ATTENDING PHYSICIAN'S NAME, ADDRESS, ZIP CODE JESSICA D HORN, DEPUTY CORONER		120. INJURY DATE <small>mm/dd/yyyy</small> 01/03/2014	
121. INJURY DATE <small>mm/dd/yyyy</small> 01/03/2014		122. HOUR 24 Hour 1500		123. PLACE OF INJURY (e.g., home, construction site, wooded area, etc.)	
124. DESCRIBE HOW INJURY OCCURRED (events which resulted in injury)					
125. LOCATION OF INJURY (Street and number, or location, and city, and zip)					
126. SIGNATURE OF CORONER/DEPUTY CORONER JESSICA D HORN		127. DATE <small>mm/dd/yyyy</small> 01/03/2014		128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER JESSICA D HORN, DEPUTY CORONER	
129. STATE REGISTRAR A		130. FAX AUTH. 010001002532290		131. CENSUS TRACT	

**INFORMATIONAL - NOT A VALID
DOCUMENT TO ESTABLISH IDENTITY**

002357979

CERTIFIED COPY OF VITAL RECORD
 STATE OF CALIFORNIA, COUNTY OF ALAMEDA

002357979

This is a true and exact reproduction of the document officially registered and placed on file in the office of the Alameda County Clerk-Recorder.

DATE ISSUED

JAN 13 2014

This copy is not valid unless prepared on an engraved border displaying the date and signature of the Clerk-Recorder.

PATRICK O'CONNELL
 ALAMEDA COUNTY CLERK-RECORDER

EXHIBIT





Transferred to NJ
Sustained organ support
4.5 years!!

Mar. 2015

Med Mal lawsuit

future

medical

expenses

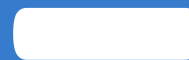
Dead people
do not have
medical expenses

Re-litigate
status
as alive

Dec. 2013



Feb. 2019



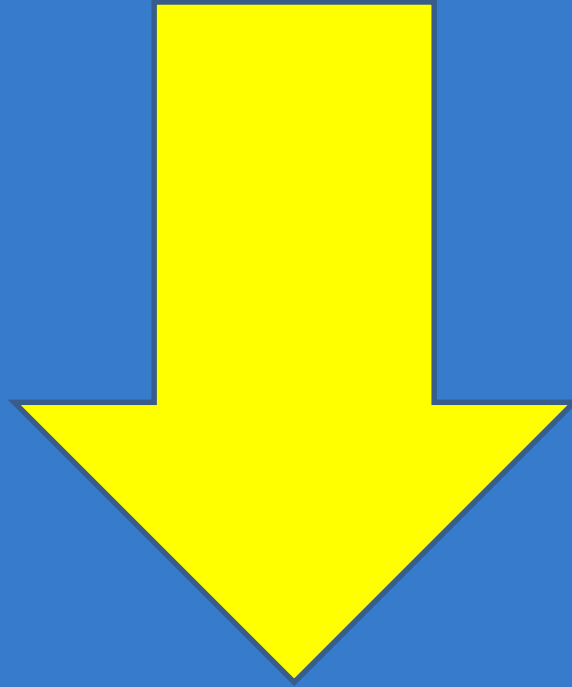
Argument
over **facts**,
not law

Does not attack
medical criteria
themselves

**No longer meets
criteria**



Dead at T1



Not dead at T2

Problem

stay dead

Death

should be

irreversible



Collateral estoppel

Chance
to prove



SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA

“Triable issue . . .
whether changed
circumstances”

BUT



KURT OTTO WILSON
1929 — 2000



Fly High Jahi
JAHİ KELIS MCMATH
2000 — 2018



June 2018

CERTIFICATE OF DEATH

STATE FILE NUMBER

20180037090

DECEASED NAME

JAHI KELIS MCMATH

DATE OF BIRTH

10/24/2000

SEX

FEMALE

DATE OF DEATH

06/22/2018

PLACE OF DEATH

NEW BRUNSWICK CITY

COUNTY OF DEATH

MIDDLESEX

RESIDENCE ADDRESS

308 PICKERING PLACE

SOCIAL SECURITY NUMBER

606-23-1015

MUNICIPALITY OF RESIDENCE

FRANKLIN TOWNSHIP

COUNTY OF RESIDENCE

SOMERSET

DOMESTIC STATUS

SINGLE/NEVER MARRIEDMANNER OF DEATH: **NATURAL**

CAUSE OF DEATH:

**BLEEDING
HYPOVOLEMIC SHOCK
HEPATIC FAILURE
ANOXIC BRAIN INJURY**DATE ISSUED: **JUNE 29, 2018**DATE FILED WITH REGISTRAR: **06/29/2018**

AMENDED DATE:

ISSUED BY:

New Brunswick City**Jenny Sanders, Deputy Registrar**

This is to certify that the above is correctly
copied from a record on file in my office.

Certified copy not valid unless the raised
Great Seal of the State of New Jersey
or the seal of the issuing municipality
or county, is affixed hereon.

REG-42A
JUN 14

Vincent T. Arrisi
State Registrar
Office of Vital Statistics and Registry



6/2018

THIS DOCUMENT CONTAINS A UNIQUE STATE OF NJ WATERMARK HOLD AT LIGHT TO VERIFY

THIS DOCUMENT CONTAINS A UNIQUE STATE OF NJ WATERMARK HOLD AT LIGHT TO VERIFY



21032617

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) SBN 93578

Bruce M. Brusavich

Agnew Brusavich, 20355 Hawthorne Boulevard, 2nd Fl., Torrance, CA 90503

TELEPHONE NO.: (310) 793-1400

FAX NO. (Optional): (310) 793-1499

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): Plaintiffs LATASHA NAILAH SPEARS; et al.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

STREET ADDRESS: 24405 Amador Street

MAILING ADDRESS: 24405 Amador Street

CITY AND ZIP CODE: Hayward, CA 94544

BRANCH NAME: Hayward Hall of Justice

PLAINTIFF/PETITIONER: LATASHA NAILAH SPEARS WINKFIELD; et al.

DEFENDANT/RESPONDENT: FREDERICK S. ROSEN, M.D.; et al.

REQUEST FOR DISMISSAL

CASE NUMBER: RG 15760730

FOR COURT USE ONLY

FILED
ALAMEDA COUNTY

SEP 07 2018

CLERK OF THE SUPERIOR COURT
By Sue Peapo Deputy

A conformed copy will not be returned by the clerk unless a method of return is provided with the document.

This form may not be used for dismissal of a derivative action or a class action or of any party or cause of action in a class action. (Cal. Rules of Court, rules 3.760 and 3.770.)

1. TO THE CLERK: Please dismiss this action as follows:

That's 4th
challenge

Attack

5 of 5

Most
serious
attack

Are medical
criteria for BD
legally
sufficient?

Reno, Nevada



Aden Hailu




April 1, 2015

Catastrophic anoxic
brain injury during
exploratory
laparotomy

May 28, 2015

Met AAN criteria
for brain death



Dad: “she
is not dead”



Dad

loses

Trial court

AAN criteria met

Aden is dead

A photograph of two men in suits. The man on the left is seen from the back, with his head slightly turned. The man on the right is in profile, looking towards the left. The background is a warm, orange-brown color. The text 'Dad' is in white, 'appeals' is in yellow with a yellow underline, and 'Nevada Supreme Court' is in white.

Dad

appeals

Nevada

Supreme

Court

Dad
wins



Supreme Court of Nevada

November 2015

Irrelevant if Aden
meets AAN criteria

NOT the
“right” criteria

2

reasons

1

UDDA

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

BUT

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

IMPORTANCE Brain death is the irreversible cessation of function of the entire brain, and it is a medically and legally accepted mechanism of death in the United States and worldwide.

 Supplemental content at
jamaneurology.com

Variability of brain death determination guidelines in leading US neurologic institutions

[View Article Online](#)

David M. Green, MD,
MA
Pasquale N. VanDine,
MD, PhD

ABSTRACT

Background: 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

Improving uniformity in brain death determination policies over time

OPEN

Hilary H. Wang, MD
Panayiotis N. Varelas,

ABSTRACT

Objective: To demonstrate that progress has been made in unifying brain death determination

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

First published January 25, 2019, DOI: <https://doi.org/10.1212/WNL.0000000000007009>

AAN

≠

Hospital policies

≠

Clinicians

Number of physicians

Qualifications

How tests

administered

Hailu = AAN

AAN \neq UDDA

Court
throws BD
into **doubt**

uncertainty



Nevada

legislature

steps in

A.B. 424 (2017)



“accepted
medical
standards”

AAN / AAP

authoritative

criteria



Supreme Court of Nevada

November 2015

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

UDDA

Wis. Stat.

146.71

S.B. 327 (1981), Ch. 134

“irreversible
cessation . . .

all functions of
. . . **entire** brain”

BUT

Brain dead
people
do stuff

Controversies in the Determination of Death

*A White Paper by
the President's Council on Bioethics*



Acknowledge conceptual problems



Gestate
a fetus



Heal wounds
Fight infections
Stress response

Grow
Sexually mature
Regulate temp



Sexually responsive

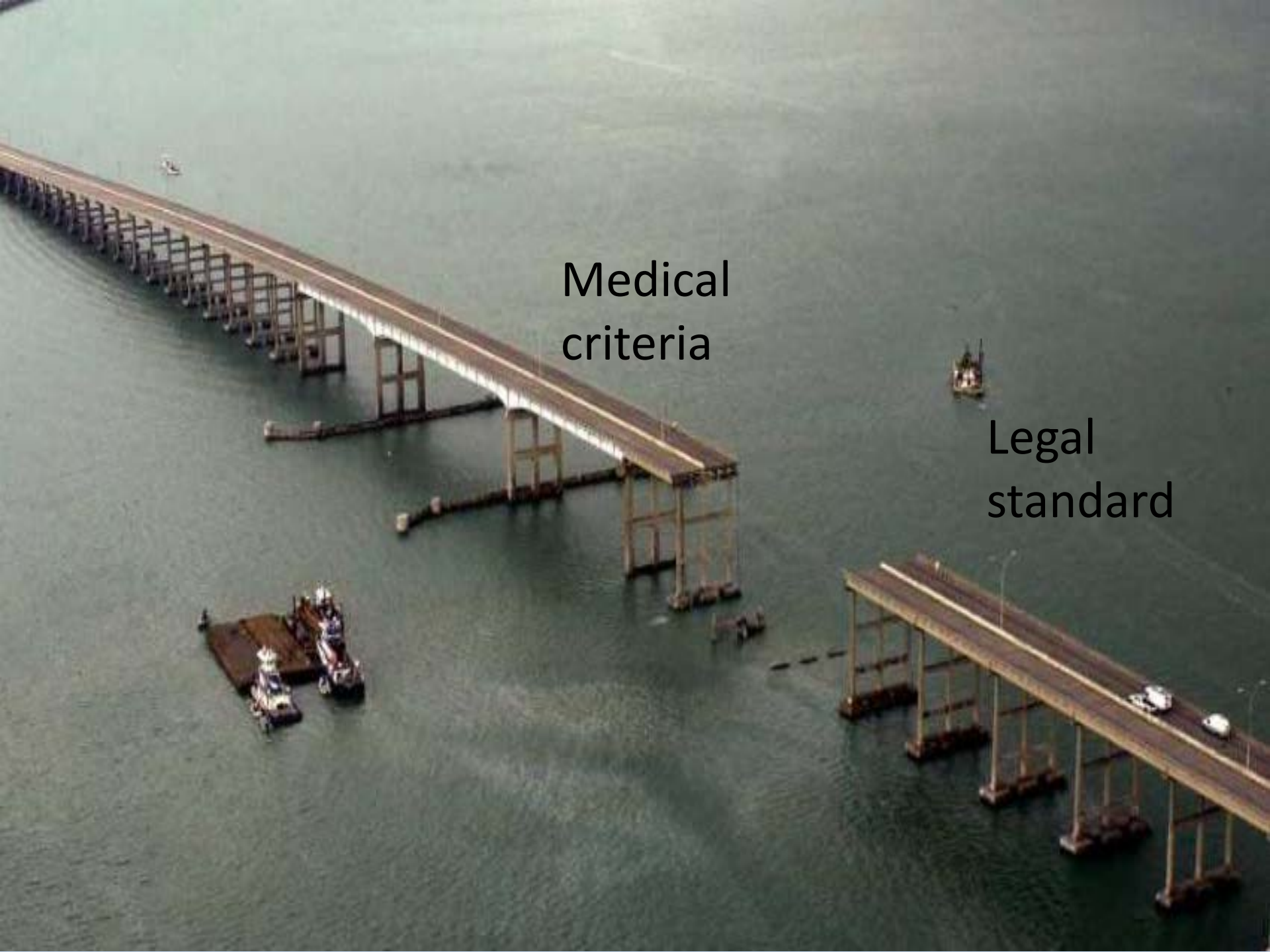
UMN, *J Neurosurgery* 35(2): 211-18

AAN measures
only cessation
some functions
of **part** of brain

Supposed to
measure:

“**all** functions”

“**entire** brain”



Medical
criteria

Legal
standard

**UDDA
requires**

**Clinicians
measure**



Predictable



UDDA

“**silent** on . . .

diagnostic tests

. . . procedures”

“medical profession
remains free to
formulate acceptable
... practices”

Defers to
medical
profession

BUT

Discretion not
unfettered



Medical criteria
must measure
legal standards

“irreversible

cessation . . .

all functions of

. . . **entire** brain”



99%



Medical criteria
drifted too far
from statute



Legal standard
may demand
more than
medical criteria



January

2019

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

“neuroendocrine
function **may be**
present”

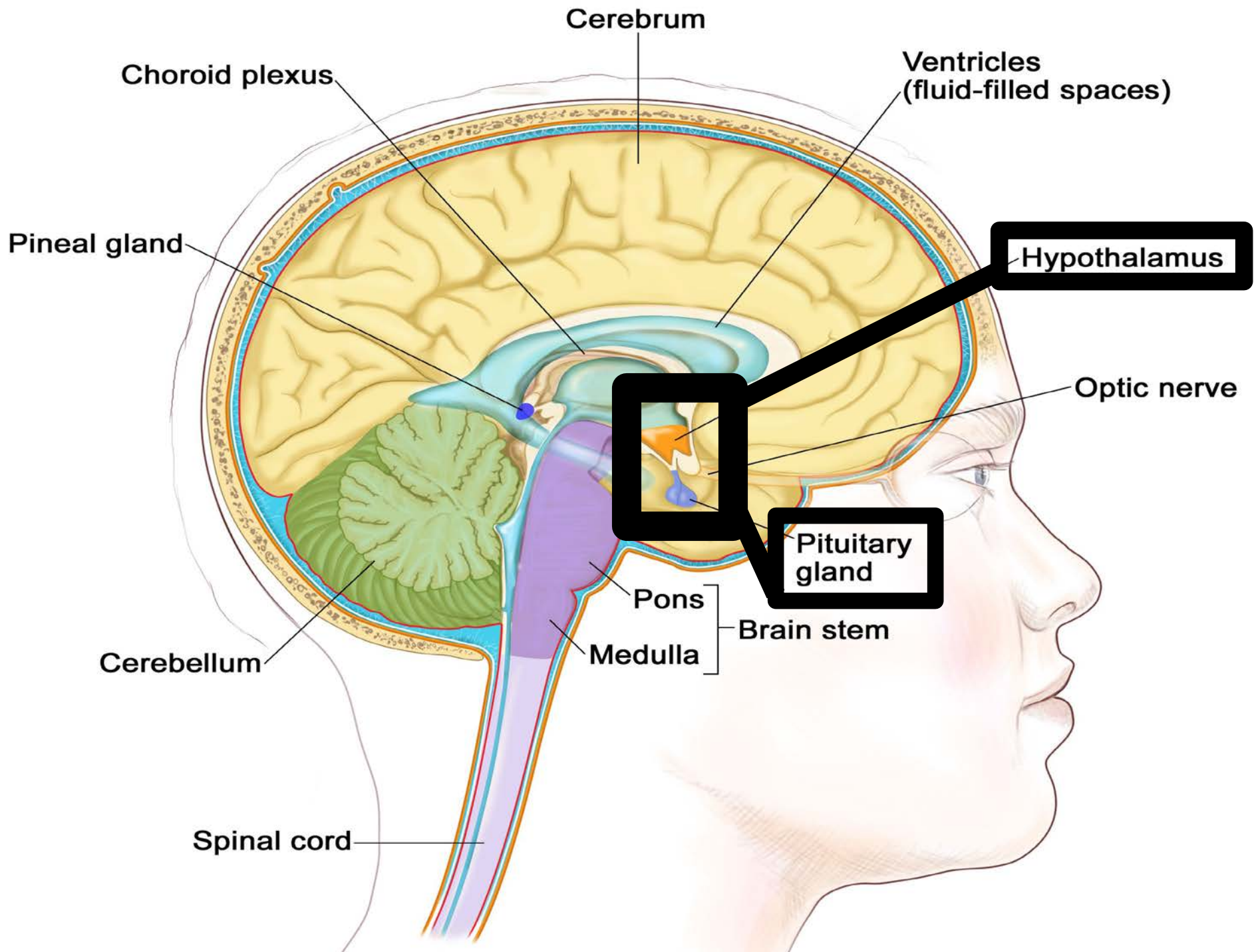
“not inconsistent
with the whole
brain standard of
death.”

UDDA

Supposed to
measure:

“**all** functions”

“**entire** brain”



Medically dead



Legally dead

Conclusion

Debate
has been
academic

THE JOURNAL OF CLINICAL ETHICS

VOLUME 25, NUMBER 3

FALL 2014

At the Bedside

What Should Careproviders Do When a Patient "Won't Budge"?
Edmund G. Howe

Clinical Ethics at 25 Years

Empirical Bioethics Research Is a Winner, But Bioethics Mission Creep Is a False Alarm
Anne Lederman Flamm and Eric Kodish

Power and Jurisdiction
John H. Evans

Features

When Should We Not Respect a Patient's Wish?
Stephen Napier

The Ethical and Clinical Importance of Measuring Consciousness in Continuously Sedated Patients
Kasper Raus, Martine de Laat, Eric Mortier, and Sigr   Sterckx

The Proportionate Value of Proportionality in Palliative Sedation
Jeffrey T. Berger

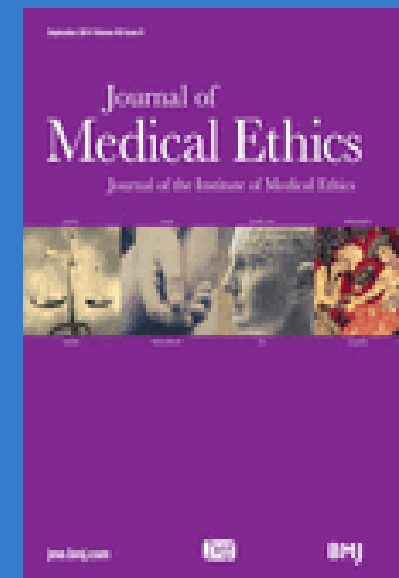
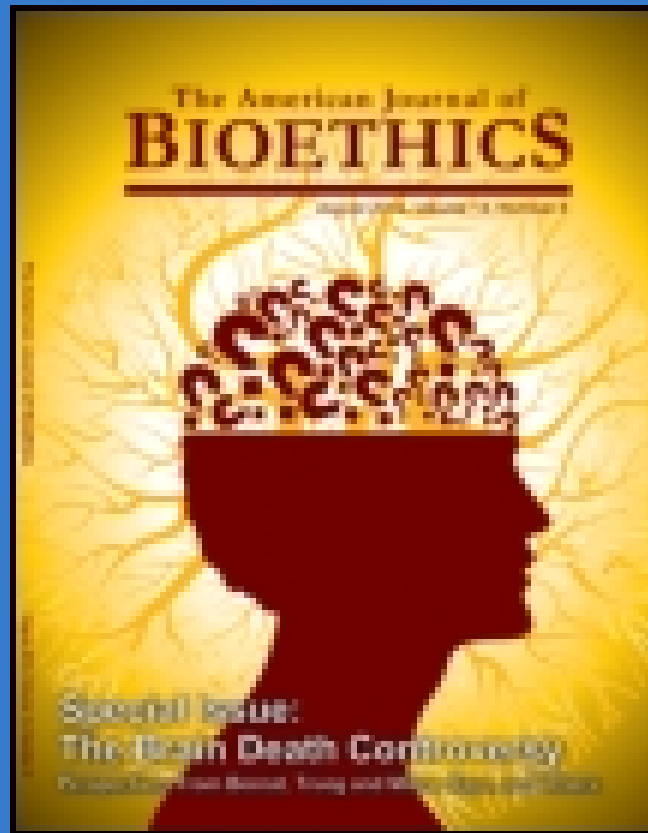
Practice Boundaries

Family Members' Requests to Extend Physiologic Support after Declaration of Brain Death: A Case Series Analysis and Proposed Guidelines for Clinical Management
Anne Lederman Flamm, Martin L. Smith, and Patricia A. Mayer

A Survey of Healthcare Industry Representatives' Participation in Surgery: Some New Ethical Concerns
Jeffrey Bedard, Crystal Dea Moore, and Wayne Shelton

Law

Legal Briefing: Brain Death and Total Brain Failure
Thaddeus Mason Pope





Death, Dying, and Organ Transplantation

Reconstructing Medical Ethics at the End of Life

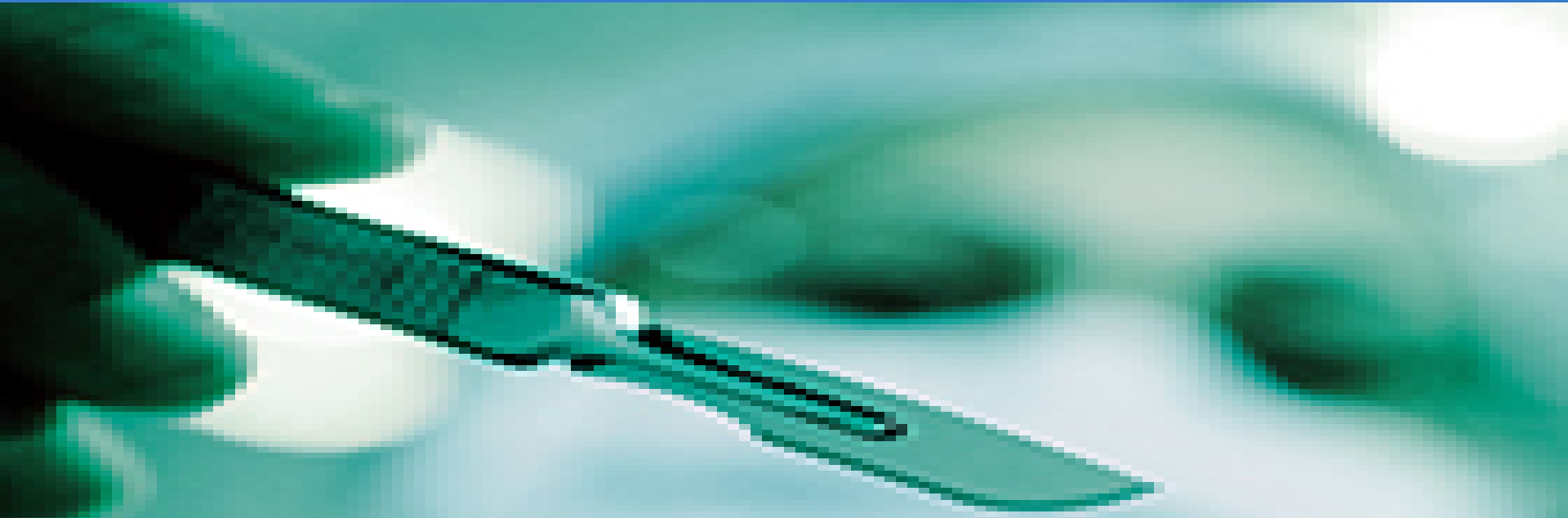
FRANKLIN G. MILLER
ROBERT D. TRUOG

OXFORD

DEFINING DEATH

The Case for Choice

ROBERT M. VEATCH
and
LAURENCE R. ROSS



REPLACEMENT PARTS

The Ethics of Procuring and Replacing
Organs in Humans

EDITED BY

ARTHUR L. CAPLAN

JAMES J. MCCARTHEY | DANIEL P. REID



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

Not true

anymore

**Courts and legislatures
are tackling this**



Not just
academic
debate

Now it is a

public policy

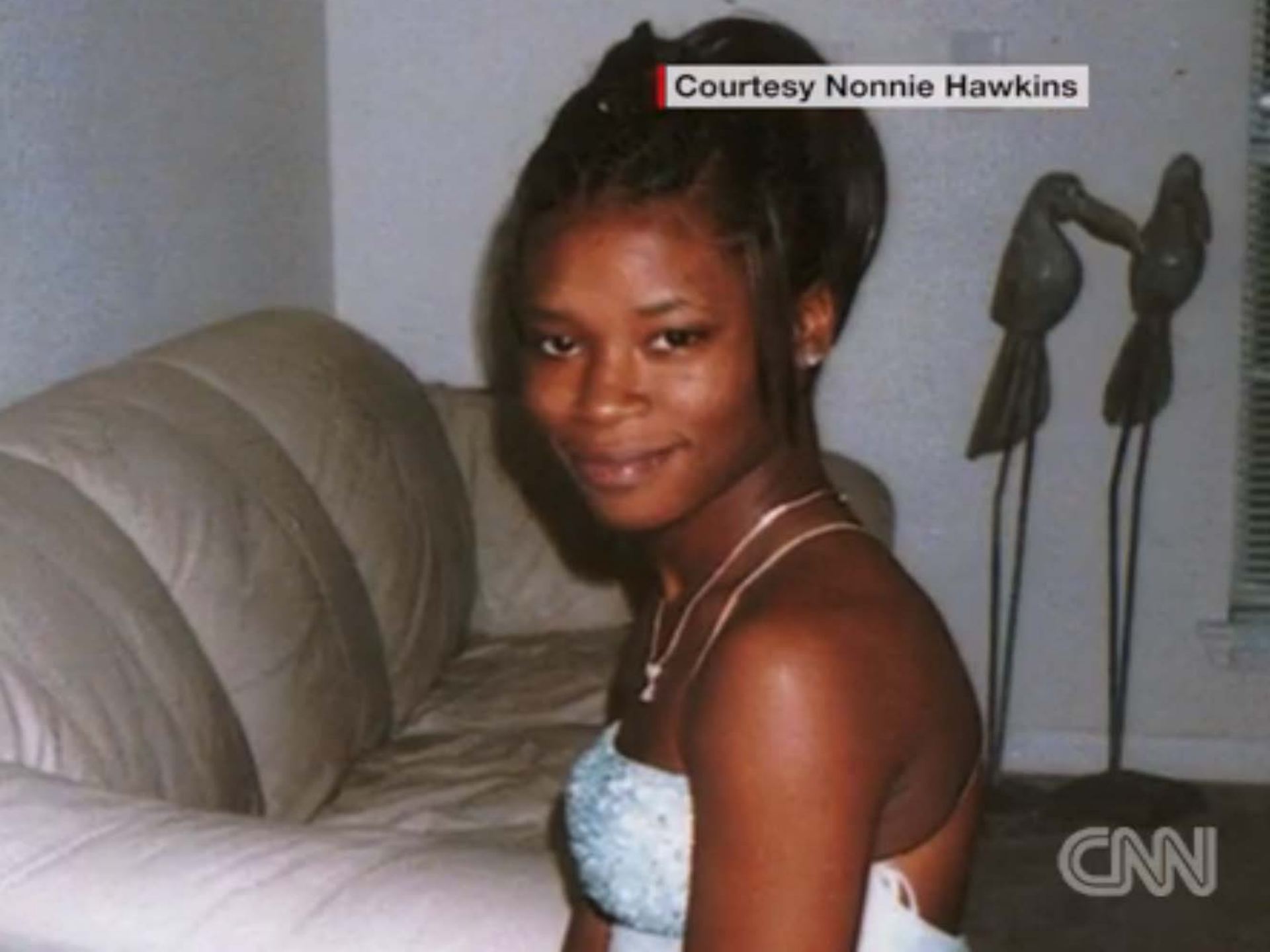
question

U.S. hospitals

will see

more cases

Courtesy Nonnie Hawkins



CNN



“Determining whether
a patient is alive or dead
is the **most fundamental**
aspect of providing
medical care.”

Life

Death

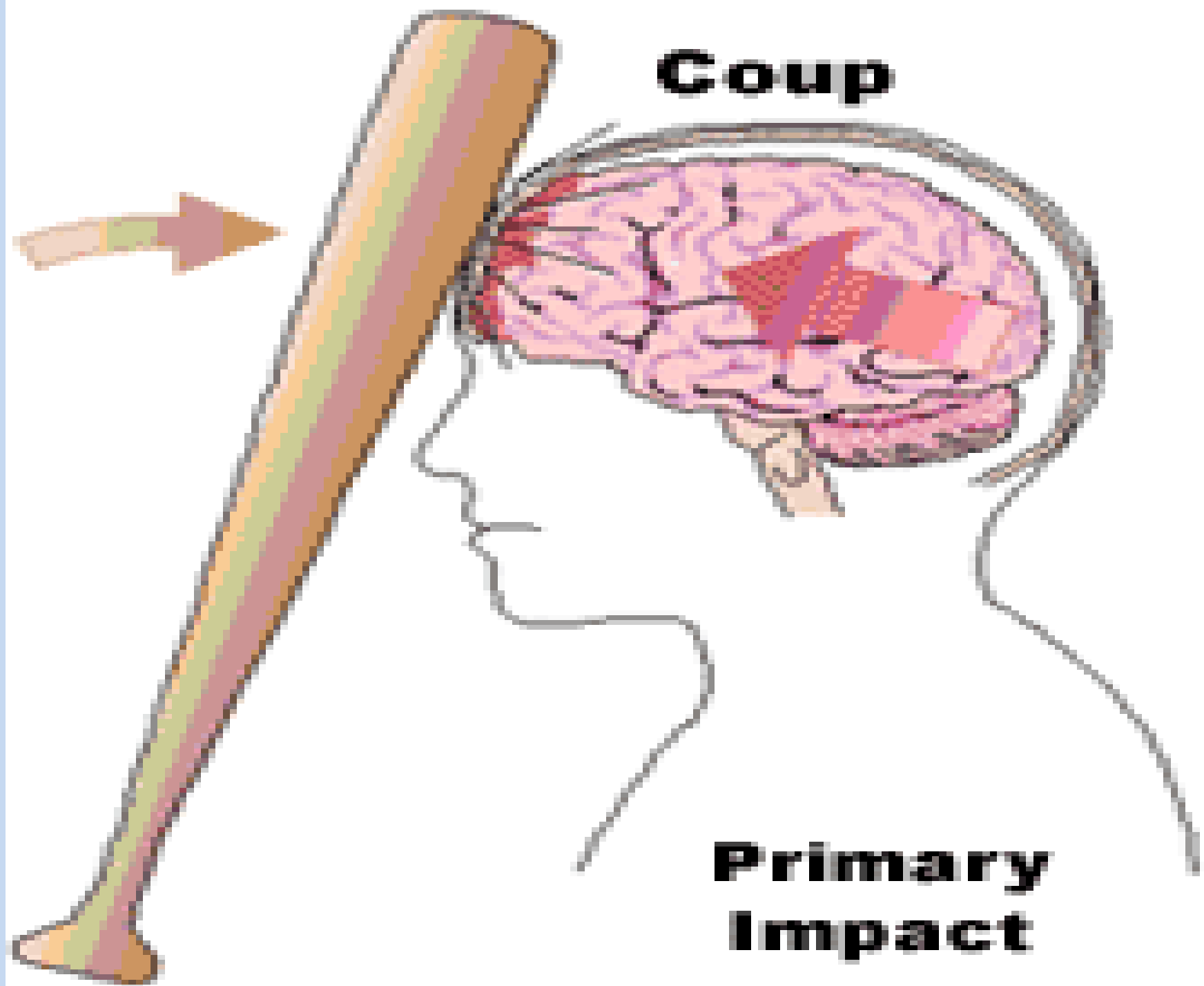
Life

Death



Case

Coup



**Primary
Impact**

Wicked Witch of the East





DING DONG THE WITCH IS DEAD!



But we've got to **verify** it legally,
to see if she
is morally, ethically
spiritually, physically
positively, absolutely
undeniably and reliably Dead



She's not only
merely dead,

She's really most
sincerely dead.

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B medicalfutility.blogspot.com

References

Materials from the
cases discussed in
this presentation
are available at

<http://thaddeuspope.com/braindeath>

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.

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