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July 10, 2023

UNIFORM LAW COMMISSION
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602

Re: Potential revision of the Uniform Determination of Death Act

Dear Hon. Members of the Commission,

The Pacific Justice Institute (PJI) is a nonprofit public interest firm which has represented families in various courts in life support litigation. Based on state versions of the Uniform Determination of Death Act (UDDA), our experience is that medical providers insist on removal of life support against the known wishes of the patient and/or the patient's family if the provider asserts a diagnosis of brain death. PJI therefore has real world experience with the application of UDDA and the legal challenges that it generates. In light of that, this letter is submitted for your consideration.

INTRODUCTION

PJI supports the medically informed positions of Catholic Medical Association,[1] Life Guardian Foundation and Respect for Human Life submitted to the Commission.[2] Instead of a medical discussion, this letter addresses the profound constitutional implications of the

[1] "Of primary concern is the determination of death by neurologic criteria (DNC) as the sole criteria needed. A diagnosis of DNC does not equate with biological death." Catholic Medical Association

[2] "The UDDA should be repealed and replaced with: No one shall be declared dead unless respiratory and circulatory systems and entire brain have been destroyed." Life Guardian Foundation

revisions under review and UDDA itself. Because 40 states have adopted some version of UDDA and rely on the work of the Commission, deliberations would be incomplete if confined to medical considerations without looking at legal ramifications.

DISCUSSION

The right to life is the most precious civil liberty interest possessed by the individual. All others liberties are preconditioned on its presence. It stands as self-evident that the right to life is inextricably linked to the definition of *death*. No more of an important issue than the degree of control that the State can exert over life and death can be reviewed by both the judiciary and legislative bodies. Because language found in UDDA has become the primary model for which states rely for the definition of *death*, this letter begins with a brief overview of UDDA's origin, then turns to the standard definitions of the meaning of life (and death), and concludes with a discussion of constitutional questions.

UNIFORM DETERMINATION OF DEATH ACT

UDDA originated in meetings of the 1968 Ad Hoc Commission at the Harvard Medical School. The Commission published an article with the goal of changing how death was determined legally and medically. There were two reasons for this: (1) to prevent a waste of medical resources on keeping people alive through modern technologies; and (2) the need to have organs for transplants.[3] The redefining of death was not the result of a medical breakthrough.[4] Moreover, the Commission certainly "did not believe that brain death was the equivalent of biological death."[5] Understanding this is important because of the popular view that the drafters of UDDA redefined *death* based upon medical discoveries resulting in a new understanding of when death actually occurs. Of course, that is fiction.

THE MEANING OF *LIFE* (AND DEATH)

Except when using the term in a literary, philosophical, or spiritual sense, the starting and stopping point for defining *life* is in the field of biology. As one of the five branches of natural science, those in the field of biology identify certain basic characteristics of living organisms which include: (1) nutrition (the process by which organisms obtain energy and raw materials from nutrients such as proteins, carbohydrates and fats); (2) respiration (release of energy from food substances in all living cells); (3) movement; (4) excretion (the cells get rid of waste products); (5) growth; (6) reproduction; and, (7) sensitivity.[6]

Brain death is not biological death. It is subject to little debate that UDDA is a legal and medical fiction. Persons declared brain dead have living cells. They generate new

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[3] Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. Mich. J. L. Reform 301, 320 (2015).
[4] Id. at 321.
[5] Id. 320.
[6] *See*, Ngepathimo Kadhila, Cambridge University Press 978-0-521-68054-7 - NSSC Biology Module 1. Archived at http://assets.cambridge.org/97805216/80547/excerpt/9780521680547_excerpt.pdf

tissue.[7] They heal if cut and fight infection.[8] They eliminate waste.[9] Children will go into puberty.[10] Men grow beards.[11] Females can menstruate and gestate a fetus.[12] These are consistent with life – not death. Indeed, if astronauts found something on one of Jupiter's moons exhibiting these phenomena, they would trumpet the discovery of life there.

Perhaps not ironically, *death* is viewed in the negative, i.e., the opposite of life. "The concept of biological death involves the cessation of biological functioning."[13] Hence, when a biologist sees the presence of the basic characteristics of living organisms in something, death is not present.

MEANING OF *LIFE* IN THE CONSTITUTION

The Constitution's Fifth Amendment provides that "No person shall be…deprived of life…without due process of law." Similarly, the Fourteenth Amendment affirms that no State shall "deprive any person of life…without due process of law."[14] When interpreting the Constitution, the original public understanding of the meaning of the words in the text is the starting point.[15] If the language is clear, the search for meaning ends. In these two amendments it is without cavil that to be "deprived of life" means *death*.

Consider that the due process clause found in the Fifth Amendment was ratified in 1791. The Fourteenth Amendment became law in 1868. These dates are important. At the time of the drafting and ratification of the U.S. Constitution, and later the Fourteenth Amendment, the public meaning of *life* meant *biological life*. In other words, a living person enjoys "circulatory and respiratory functions."[16] It would be an anachronism to project *brain death* as equivalent to the Constitution's use of the term "deprivation of life."

CONSTITUTIONAL IMPLICATIONS OF UDDA

Both the Fifth and Fourteenth Amendments prevent the deprivation of life "without due process of law." In the law the process due rests in direct proportion to the gravity of the right at stake. Hence, the degree of deprivation dictates the level of procedures required.[17] No surprise there. By way of example, loss of a pension stands as greater than

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[7] Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. Mich. J. L. Reform 301 (2015). This law review article appears in full in the record at Vol. I:110.
[8] Shah at 330.
[9] Nair-Collins, at 670. This law review article appears in full in the record at Vol. I:130.
[10] Shah at 312.
[11] Id.
[12] Id.
[13] Michael Nair-Collins, *Death, Brain Death, and the Limits of Science: Why the Whole-Brain Concept of Death Is A Flawed Public Policy*, 38 J.L. Med. & Ethics 667, 668 (2010).
[14] The question may be asked as to why the Constitution repeats itself. The Fifth Amendment and other early amendments is comprised of rights held by the people and, by extension, restrictions on the national government. The Fourteenth Amendment is part of the Civil War amendments (13th-15th) which generally extended the restrictions placed on the federal government to state governments.
[15] *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).
[16] UDDA, § 3(a).
[17] *Mathews v. Eldridge* (1976) 424 U.S. 319, 341.

the suspension of a library card. Thus, the rights to the defense and restoration of a pension are more robust than reactivating a library card.

Due process soars to its zenith in matters involving life and death. The heart of the problem with UDDA is that it moves the clock forward by changing the meaning of *death* so that time runs out quicker on a person and the game ends before biological life ceases. Constitutional principles necessitate the highest level of due process be afforded a patient facing removal of life support due to a declaration of brain death. This requires that "a person in jeopardy of serious loss [have] notice of the case against him and opportunity to meet it."[18]

Hence, in the case of a declaration of brain death, due process requires that the family's decisionmaker must be fully informed that brain death is not synonymous with biological death and that the decision to remove life support rests with the patient's family representative. The U.S. Supreme Court explained that "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality."[19] In consideration of that, the heaviest of legal due process burdens must fall on the medical facility wishing to engage in the deprivation of the patient's life -- not the family's decisionmaker. UDDA and proposed revisions fail in that respect.

The due process protections and requirements to protect life speak to the profound need for an independent second opinion when a family has been apprised of conflicting medical views. Understandably, the family frequently wishes to give their loved one the benefit of the medical and spiritual doubt. Tragically, in the real world of litigating life support matters, medical facilities – and courts – place extreme pressure on despondent families. The burden of proof to maintain life support for a loved one falls as a heavy weight on the family.

If a second opinion is sought by the family, medical facilities typically require review by a physician with admitting privileges to that hospital. This fences out doctors serving in other facilities as well as those from out-of-state. Such conduct first creates a practical crisis for the family and second is ethically suspect. Under the limitations imposed by hospitals, families rarely can find a physician to provide a second opinion. As to ethical problems, requiring in-house or closely associated doctors to give a second opinion rightly raises doubts as to independence and medical objectivity. In contrast, the further removed a physician is from a relationship with the medical facility, the more confidence the family will have in the legitimacy of the second opinion.

It is recognized that lawmakers can provide a definition of *death* as an alternative to the understanding of that term grounded in biology. No doubt a good many people and their families wish to cut off medical treatment upon a diagnosis of brain death for any number of personal, financial, medical, and spiritual reasons. Health care directives readily implement such wishes. The Constitution erects no impediment to a state's legislature providing citizens that option. But when the definition of brain death is used as authority to remove life-support under the full force of law against the known wishes of a patient or the

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[18] *Joint Anti-Fascist Comm. v. McGrath* (1951) 341 U.S. 123, 171-172 (Frankfurter, J., concurring).

[19] *Cruzan v. Dir., Mo. Dept. of Health* (1990) 497 U.S. 261, 281.

patient's family advocate, then the due process clauses set a constitutional roadblock that medical providers must not drive through.

Life stands at the apex of liberty interests. This logically requires the highest level of judicial review when a medical provider seeks to make a declaration of brain death against the known wishes of a patient and the patient's family. A ruling that forfeits a patient's life should use the criminal law standard of "beyond a reasonable doubt." Lower standards of "preponderance" and "clear and convincing" evidence fall short in light of the profound finality of an adverse decision. In like manner, any statute, regulation, or even private hospital policy relative to procedures and protocol that could compromise the right to life must be held to the highest level of legal scrutiny in favor of the patient.

CONCLUSION

In view of the above, PJI urges that the Committee engage in a thorough analysis as to whether UDDA, in its current form or in proposed revisions, is consistent with the exceptionally high level of due process that the Constitution demands when a deprivation of a person's life hangs in the balance.

Thank you for your deliberation on this matter and for your service to the community.

Very truly yours,

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