



To: The Uniform Law Commission

April 17, 2023

From: The Chalcedon Foundation

In Re: Uniform Determination of Death Act and its proposed revision now under review

The ethics of life and death decisions have not kept up with medical science, and the result has been the progressive mutation of the concept of the “benefit of the doubt.” The attempt to frame the criteria for “doubt” in the four-decades-old Uniform Determination of Death Act (UDDA) triggered a string of subsequent litigations, indicative of instabilities and internal contradictions in the codification. The legal realities are motivating the calls to revise UDDA in recognition that it is problematic, but disagreement over the revision route now prevails given the conflicting agendas hoping to bend UDDA’s core definitions and presuppositions. Given the focus of UDDA’s concern (a patient in serious trouble), it is no surprise that the term “benefit” and “doubt” are mutually reflexive: there is doubt regarding life and death, and there is doubt that the patient gains any benefit from continued medical intervention.

The parameters of the debate are ill-formed, however, as they take “erring on the side of caution” off the table in favor of a purported clinical definition. The risk inherent in such reductionisms is the loss of the human element vis-à-vis the patient, which often becomes inextricably tied to a dubious moral calculus weighing one human (the patient) against another (a potential donor recipient). The claim of the original owner of those organs may be temporarily muted, provoking the question, Who will raise a voice in defense of the patient against being redefined as a field ripe for harvesting? The shifting sands of clinical definitions continue to take steps away from erring on the side of caution, of giving the patient the benefit of the doubt, by appeal to statistics and probabilities recorded for patients in similar situations. Under UDDA, and even more so under the proposed revisions of RUDDA, the patient lucky enough to be the one in a hundred who will eventually come out of a coma will actually be the unlucky one who fell afoul of the grinding power of an ethically dislocated medical standard.

The dangers become manifest when ethics are defined without reference to the Golden Rule and its human-based (and personhood-affirming) morality. The more abstract the ethical theory, the less human the physician and patient become in the exchange. Attempts to anchor medical ethics in clinical terms dehumanize in proportion to the expedience they deliver. We're told to seek simplicity, and distrust it, and this situation will undercut trust at multiple levels of consideration.

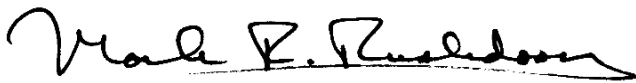
The problem with reductionism, abstraction, and prioritizing simplicity is that they all involve an intrinsic loss respecting their object. Humanity itself feels the cut of these analytic scalpels, and to the extent the patient becomes less than human as we shift the demarcation line a little farther away from him, our collective humanity becomes less than human for proposing, tolerating, and codifying this approach. Getting the definitions wrong is not a victimless error, it intersects with the highest rights we profess, and a human is affected by it. The sleight-of-hand used to mitigate this awareness is to suggest that what is human about the patient is, for all intents and purposes, no longer there or no longer recoverable. Here again, we face a serious moral division over the phrase "for all intents and purposes," as this proviso raises the question, Whose intents? Whose purposes? Is the patient's right to life subject to being abridged because he or she no longer tilts the proper scale, or because the clock has arbitrarily run out on them?

Erring on the side of caution entails moral judgments, application of the Golden Rule, and that most human of attributes, hope. Hope has been a major factor in patients who have defeated death, and to the extent we disenfranchise hope as a legitimate consideration in making a life-and-death decision, we have already pulled the plug conceptually. The UDDA standard is a disputed one, and RUDDA even more so, and so long as our physicians cannot agree (without coercion) we have a moral obligation to err on the side of caution and preserve the benefit of the doubt. Let the *patient* cross the line that indisputably signifies their passing from this world. Do not push them over the line, or proactively move the line so that the patient is suddenly on the wrong side of it.

There are, after all, clinical indications that all parties would agree properly denote death. For UDDA and RUDDA to attempt to define an additional gray area, requiring imposition of institutional moral clarity, is precisely what birthed the many subsequent litigations. The true gray area is where the prognosis may be poor, unknown, or uncertain, but to then remove the objective basis of hope by clinical definition, by invoking brain stem inactivity alone as a demarcation line for comatose patients, is to dehumanize the patient. This stratagem also commoditizes the patient, since the line signifying harvest time for organs has been moved

against the patient's interests. There can be no more hazardous undertaking than ruling on the definition of humanity, especially when the long-term trend to dehumanize others has penetrated the one profession originally chartered to preserve it.

Litigation is only a symptom of deeper problems in American medicine. To cure the symptom by altering UDDA in the wrong direction won't cure the underlying problem regarding litigation, but the cure will have profound side effects on the medical profession, beginning with the accelerated erosion of trust in medical professionals. What a tragedy it would be to inflict moral opprobrium upon innocent surgeons performing legitimate transplantations with the suspicion that the harvesting was conducted under a dehumanizing standard. Labeling something "the standard of care" had cachet up until the last few years, but since human lives are specifically on the line, labels won't suffice. However, if RUDDA is written to fully protect the humanity most at risk from the definition process, the moral underpinning of the words "standard of care" can be recovered for the medical profession. To waste this opportunity, particularly at this juncture in history, would be the ultimate tragedy.



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