

Medical Futility Dispute Resolution Options in the United States: Law & Ethics Fundamentals

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

**What is
a medical
futility dispute**

Surrogate will
not consent
when MD thinks
they should

Futility is about
line drawing

Appropriate

Inappropriate

Advisable

Inadvisable

Proportionate

Disproportionate

Beneficial

**Non-
beneficial**

**Inside the
standard
of care**

**Outside the
standard
of care**



Therapeutic obstinacy

Surrogate

driven

overtreatment

Clinician

Surrogate

CMO

LSMT

Surrogate will **not**
consent to CMO
recommendation

**When may /
should / must a
clinician stop LSMT
without consent?**

It

depends

4

types

of LSMT

Futile

Legally Proscribed

Legally Discretionary

Potentially inappropriate

AMERICAN THORACIC SOCIETY DOCUMENTS

Categories outlined in a
new multi-society policy
statement

An Official ATS/AACN/ACCP/ESICM/SCCM Policy Statement: Responding to Requests for Potentially Inappropriate Treatments in Intensive Care Units

Gabriel T. Bosslet, Thaddeus M. Pope, Gordon D. Rubenfeld, Bernard Lo, Robert D. Truog, Cynda H. Rushton,



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ESICM

EUROPEAN SOCIETY OF
INTENSIVE CARE MEDICINE

Futile

Legally Proscribed

Legally Discretionary

Potentially inappropriate

Futile

Interventions

cannot accomplish

physiological goals

Scientific
impossibility

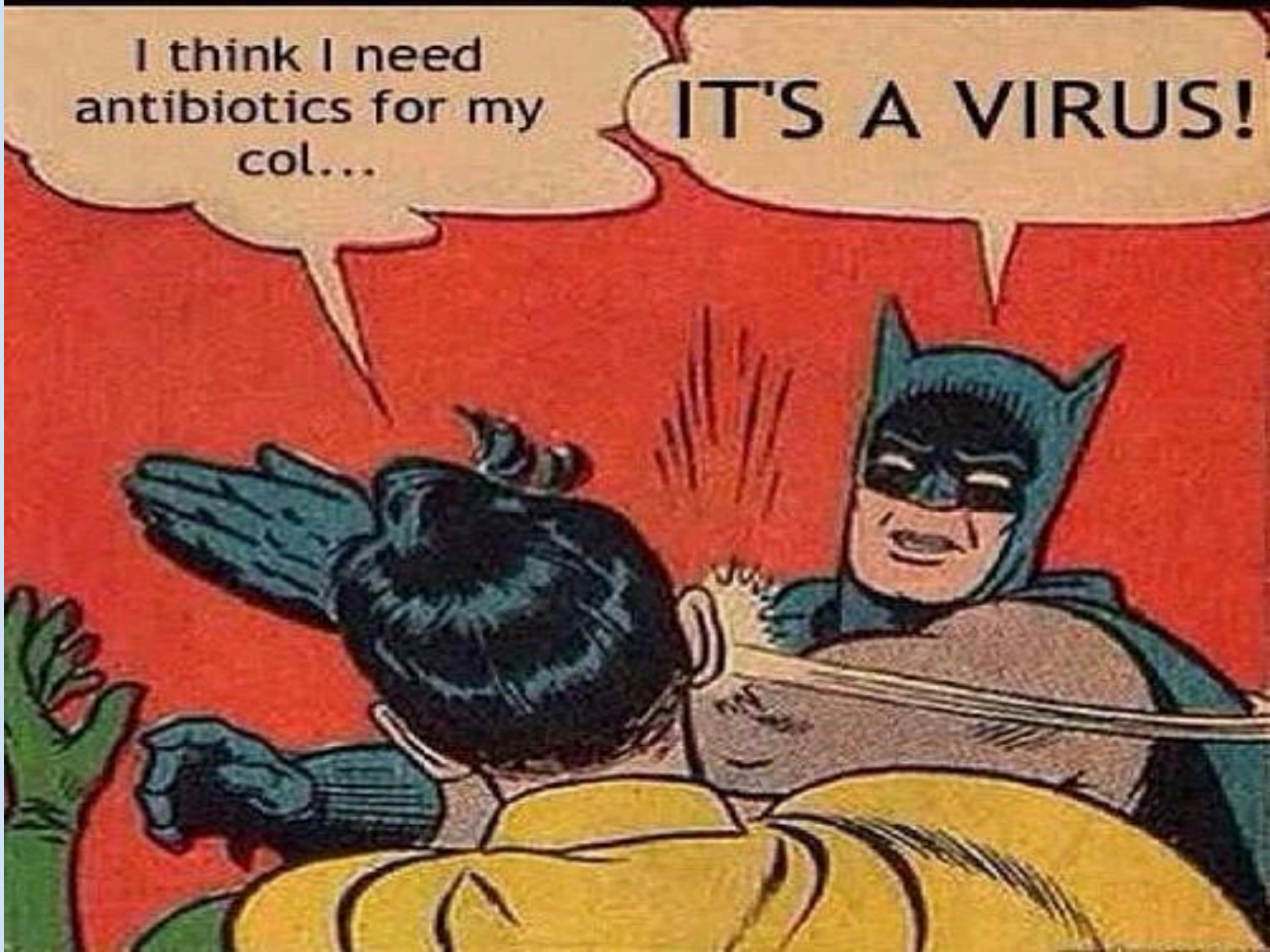


Goal = fill

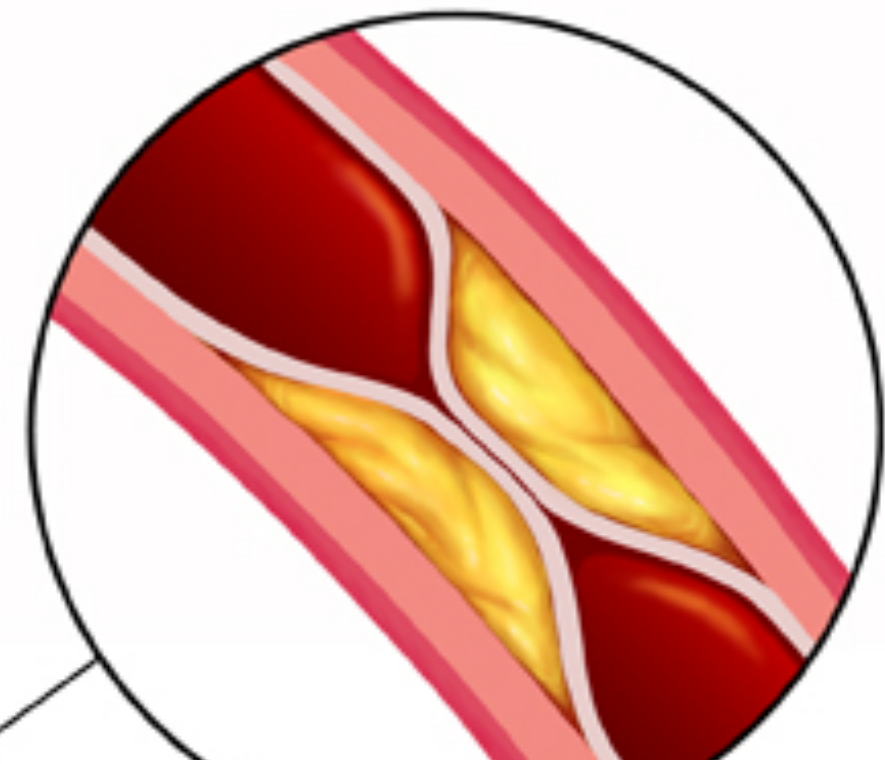
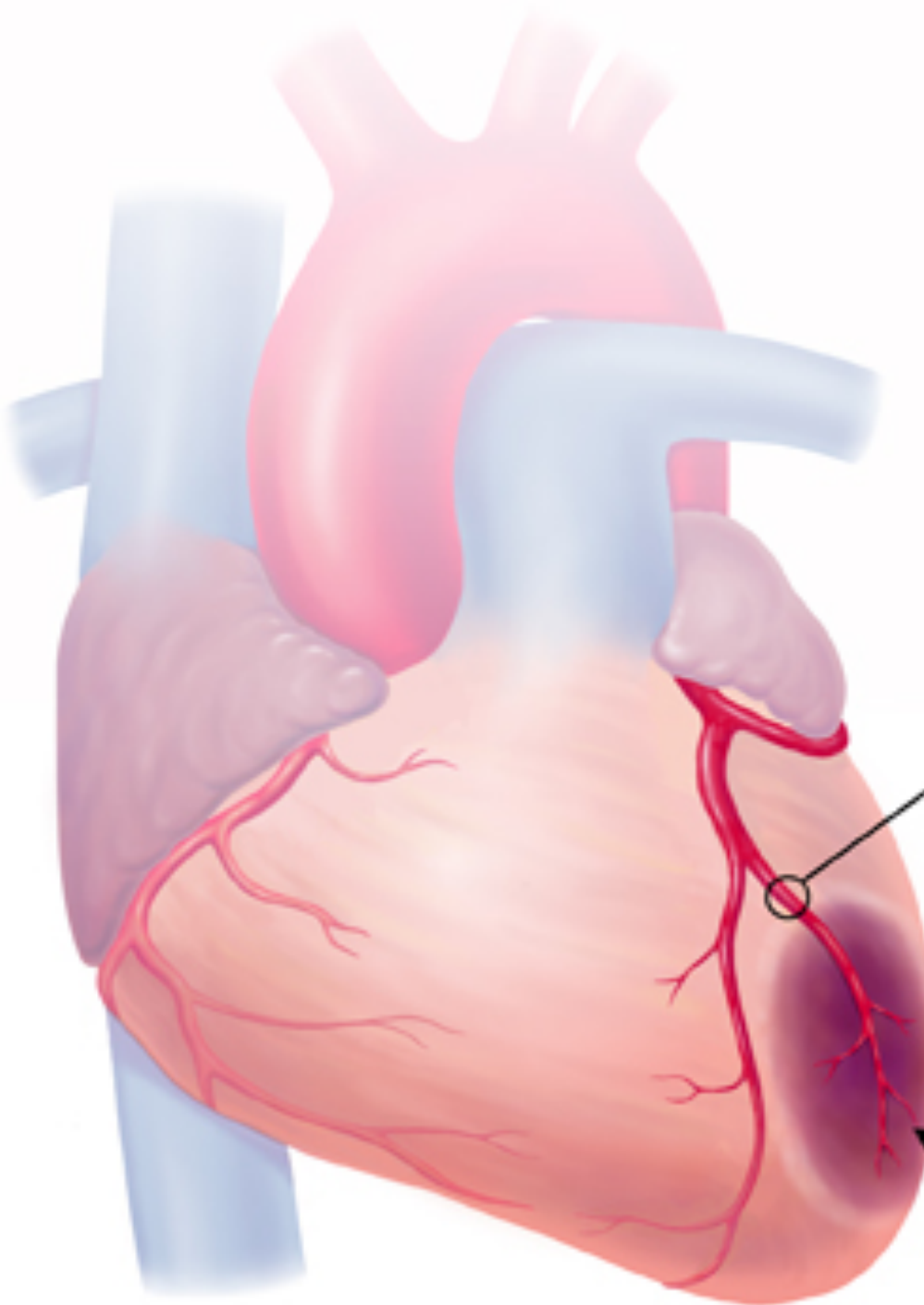
Example 1

I think I need
antibiotics for my
col...

IT'S A VIRUS!



Example 2



Antifungals as
treatment for
myocardial
infarction

Example 3



CPR when show rigor mortis or dependent lividity

“Futile”

Value free
objective

May the
clinician
stop LSMT?

“Futile”

May &
should
refuse

~~Futile~~

Legally Proscribed

Legally Discretionary

Potentially inappropriate

Legally

Proscribed

Treatments that
may accomplish
effect desired by
the patient

>0%

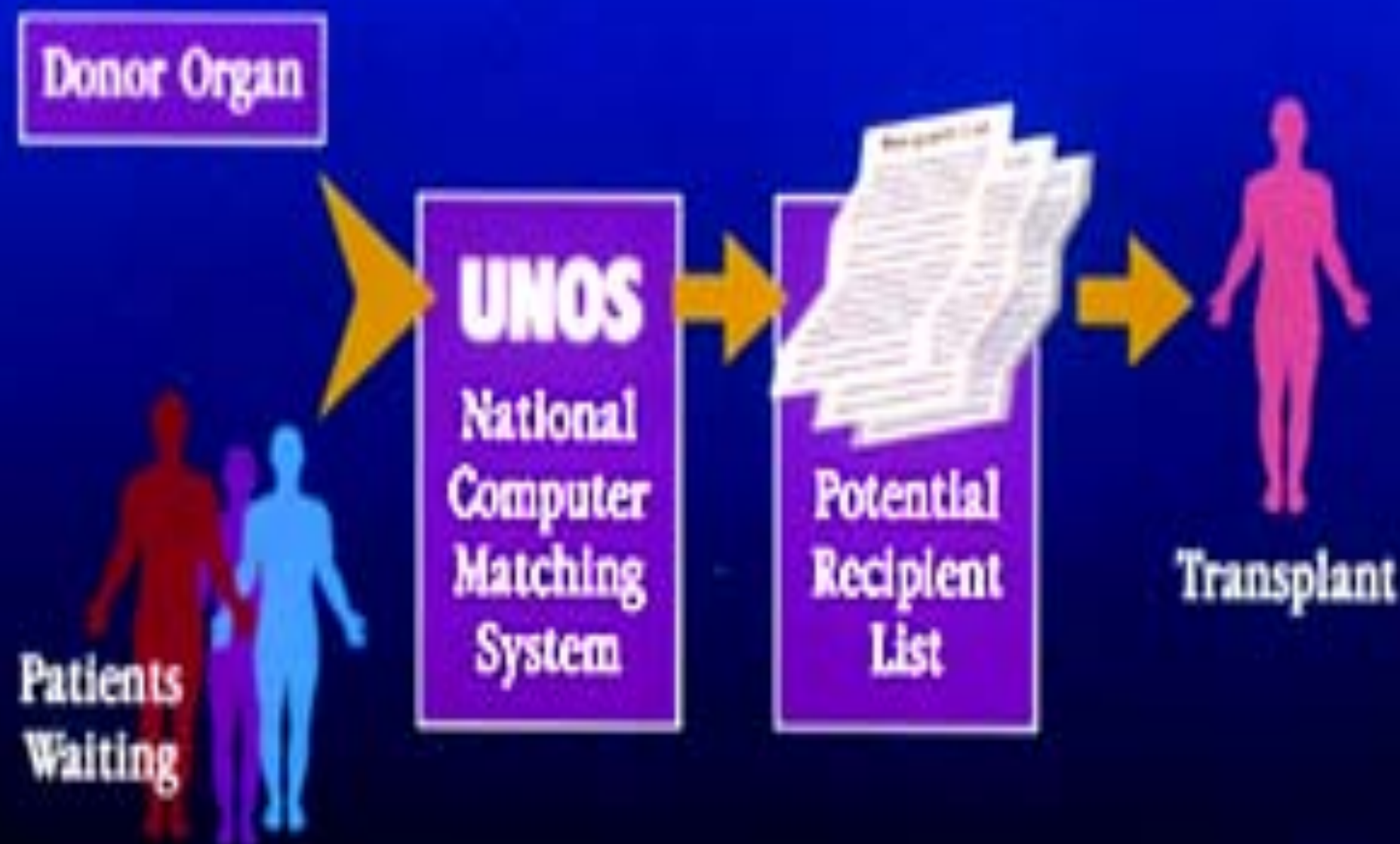
Not

“futile”

Prohibited by
applicable laws,
judicial precedent,
or widely accepted
public policies

Example 1

Organ Matching



Might “work”

But illegal

Example 2

Family Medical Center

Name _____
Address _____

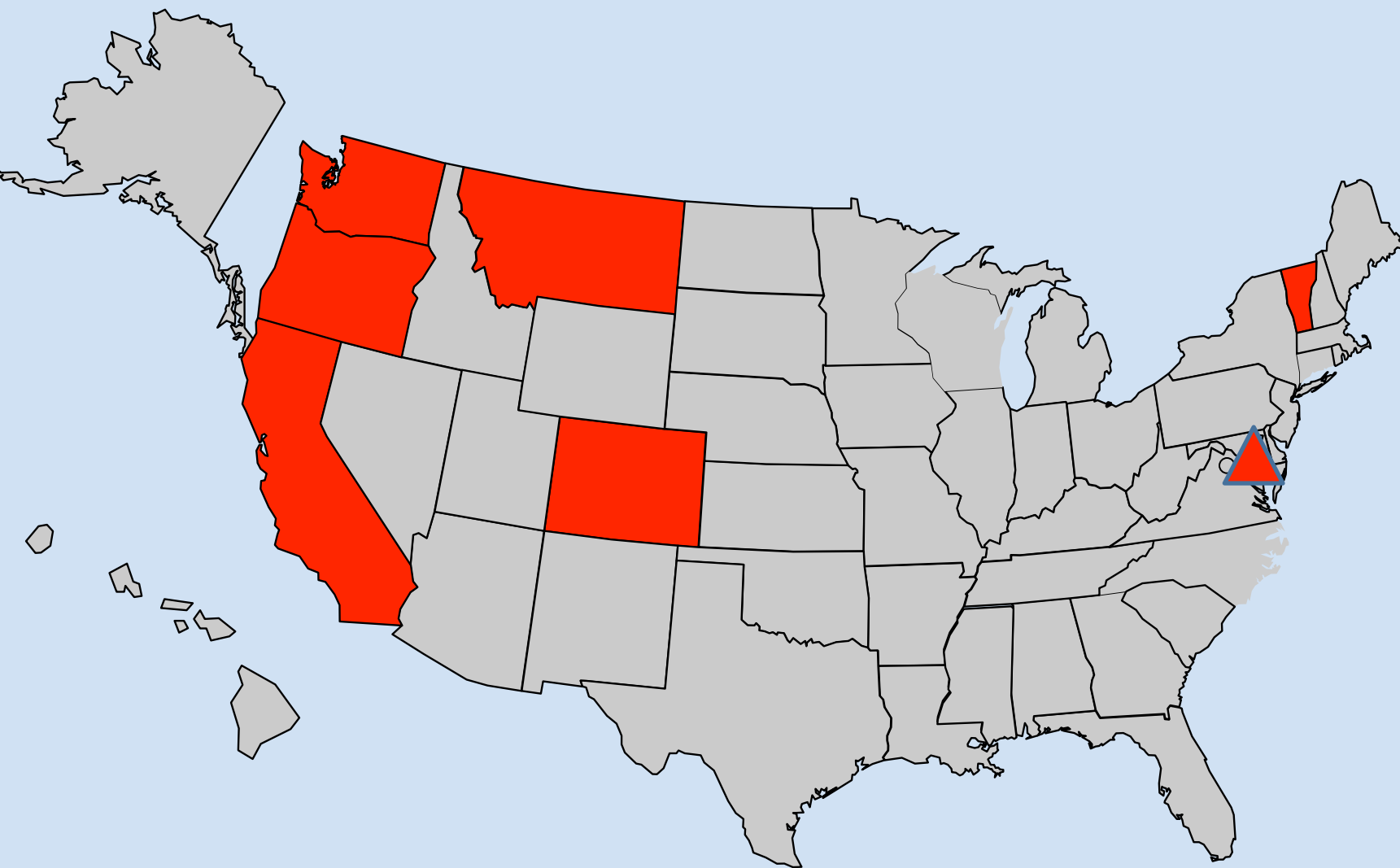
Age _____
Date _____

R_x



Example 3





If treatment
request is legally
proscribed →

May &
should
refuse

~~Futile~~

~~Legally Proscribed~~

Legally Discretionary

Potentially inappropriate

Legally

Discretionary

Permitted
limiting

Laws, judicial
precedent, or policies
that give physicians
permission to refuse
to administer them.

Surrogate



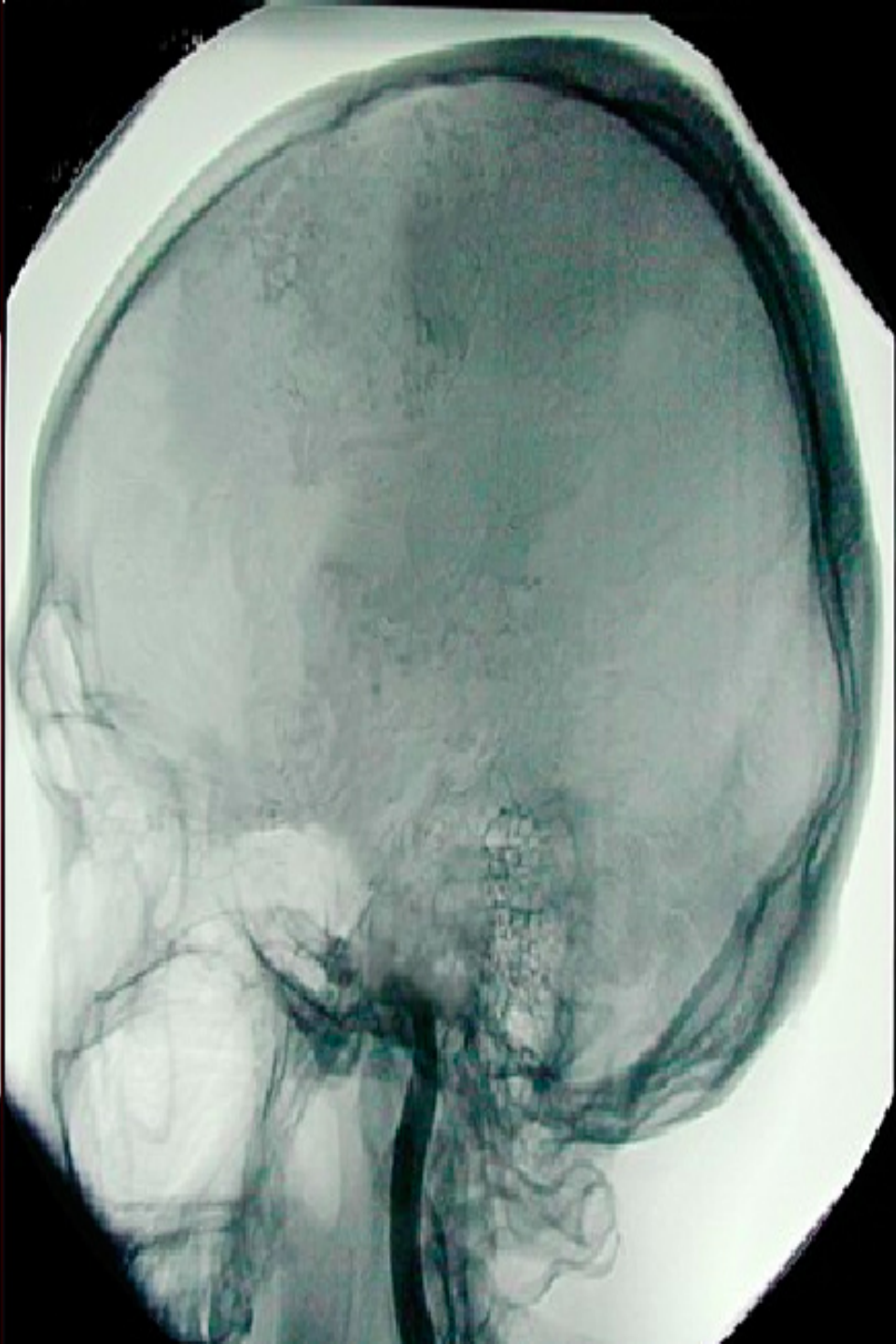
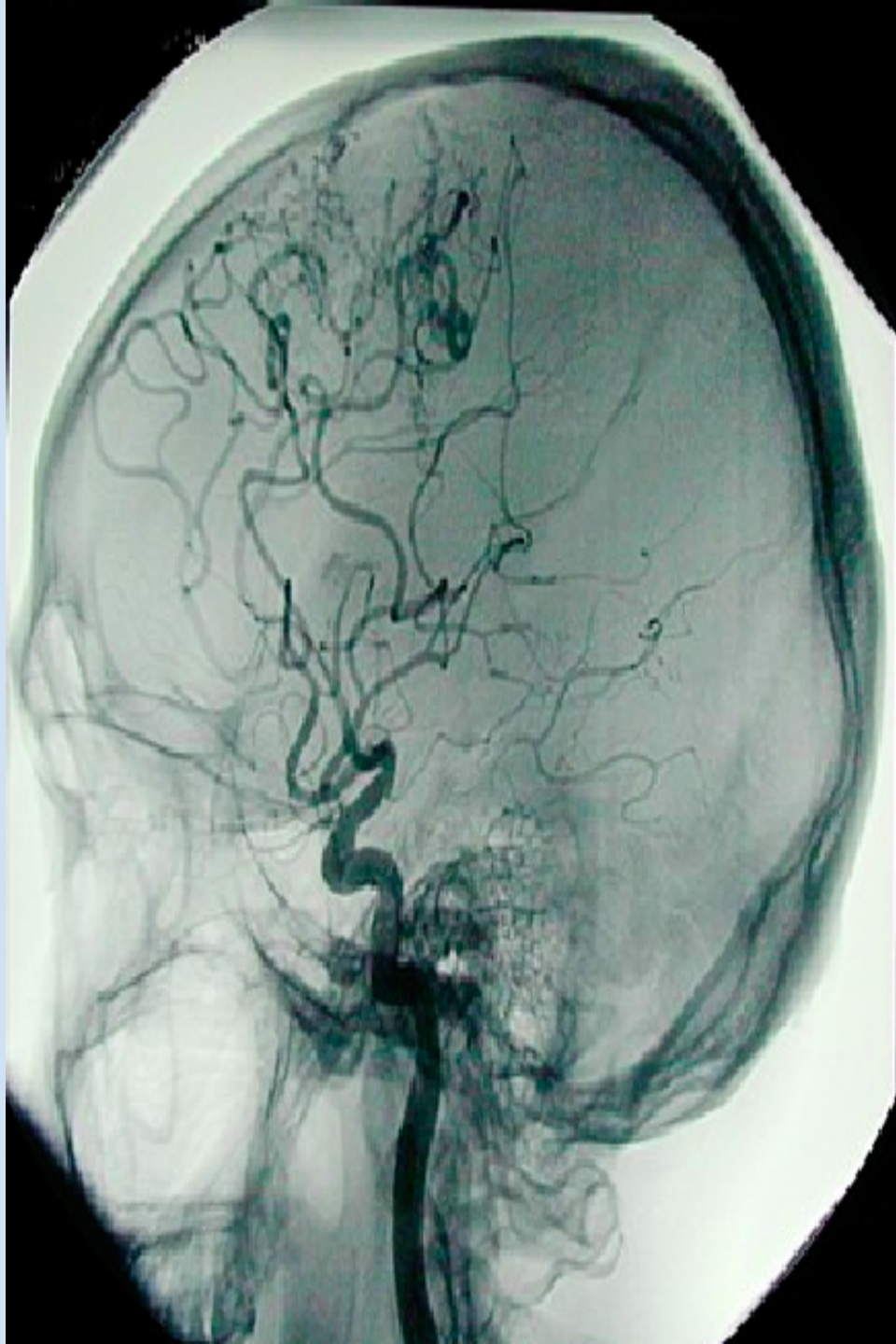
**Appropriate
medicine**

Example 1



Anencephaly

Example 2



bright line rule







Jahi McMath



Israel Stinson

Aden Hailu



Example 3

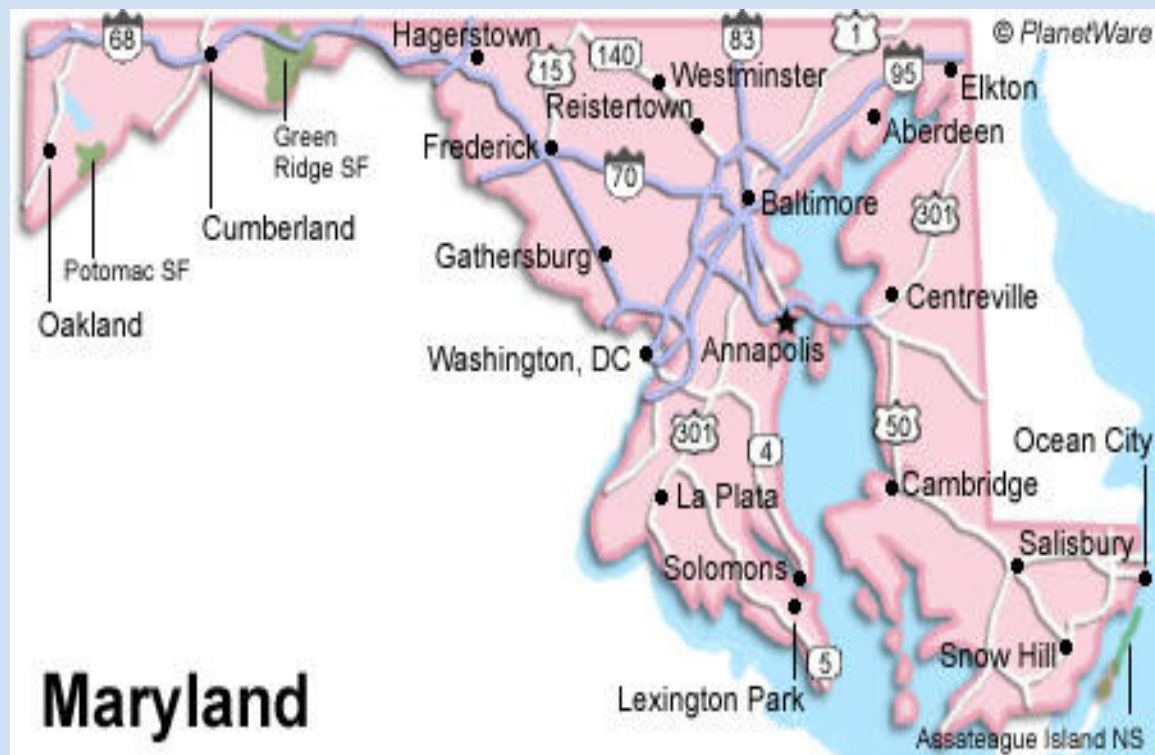


Trisomy 18 / 23

22-week gestation

ECMO

Example 4



DNR/COLST
CLINICIAN ORDERS
for DNR/CPR and OTHER LIFE SUSTAINING TREATMENT

Patient Last Name

Patient First/Middle Initial

Date of Birth

FIRST follow these orders, **THEN** contact **Clinician**.

(If patient/resident has no pulse and/or no respirations)

A



DO NOT RESUSCITATE (DNR)



☐ **DNR/Do Not Attempt Resuscitation**
(Allow Natural Death)

CARDIOPULMONARY RESUSCITATION (CPR)

☐ **CPR/Attempt Resuscitation**

For patient who is breathing and/or has a pulse, GO TO SECTION B – G, PAGE 2 FOR OTHER INSTRUCTIONS. CLINICIANS MUST COMPLETE SECTIONS A-1 THROUGH A-5

A-1 Basis for DNR Order

Informed Consent - Complete Section A-2

Futility - Complete Section A-3

A-2 Informed Consent

Informed Consent for this DO NOT RESUSCITATE (DNR) Order has been obtained from:

Name of Person Giving Informed Consent (Can be Patient)

Relationship to Patient (Write "self" if Patient)

Signature (If Available)

A-3 Futility (required if no consent)

☐ I have determined that resuscitation would not prevent the imminent death of this patient should the patient experience cardiopulmonary arrest. Another clinician has also so determined:

Not 5-society
statement “futility”

Might restore CP
function

“imminent death”

3 days

May the
clinician
stop LSMT?

Legally
discretionary

May &
should
refuse

~~Futile~~

~~Legally Proscribed~~

~~Legally Discretionary~~

Potentially inappropriate

Potentially

Inappropriate

Some chance of
accomplishing the
effect sought by
the patient or
surrogate

Not “futile”

because

might “work”

E.g. dialysis for
permanently
unconscious
patient

E.g. vent for
patient w/ widely
metastatic cancer

We call them
“futility disputes”

. . . BUT . . .

Disputed
treatment
might keep
patient alive.

But . . . is that
chance or
that outcome
worthwhile

Not a
medical
judgment

Value

judgment

May the
clinician
stop LSMT?

Table 4. Recommended Steps for Resolution of Conflict Regarding Potentially Inappropriate Treatments

1. Before initiation of and throughout the formal conflict-resolution procedure, clinicians should enlist expert consultation to aid in achieving a negotiated agreement.
 2. Surrogate(s) should be given clear notification in writing regarding the initiation of the formal conflict-resolution procedure and the steps and timeline to be expected in this process.
 3. Clinicians should obtain a second medical opinion to verify the prognosis and the judgment that the requested treatment is inappropriate.
 4. There should be case review by an interdisciplinary institutional committee.
 5. If the committee agrees with the clinicians, then clinicians should offer the option to seek a willing provider at another institution and should facilitate this process.
 6. If the committee agrees with the clinicians and no willing provider can be found, surrogate(s) should be informed of their right to seek case review by an independent appeals body.
 - 7a. If the committee or appellate body agrees with the patient or surrogate's request for life-prolonging treatment, clinicians should provide these treatments or transfer the patient to a willing provider.
 - 7b. If the committee agrees with the clinicians' judgment, no willing provider can be found, and the surrogate does not seek independent appeal or the appeal affirms the clinicians' position, clinicians may withhold or withdraw the contested treatments and should provide high-quality palliative care.
-

95%

Still no
consent

50%

Last resort

Not responsive
in any case

**Options when
intractable
PIT conflicts**

1

**Replace
surrogate**

SDM steps into shoes of patient



Hierarchy

1. Subjective
2. Substituted judgment
3. Best interests

~ 60%

accuracy

**You're
Fired!**





2

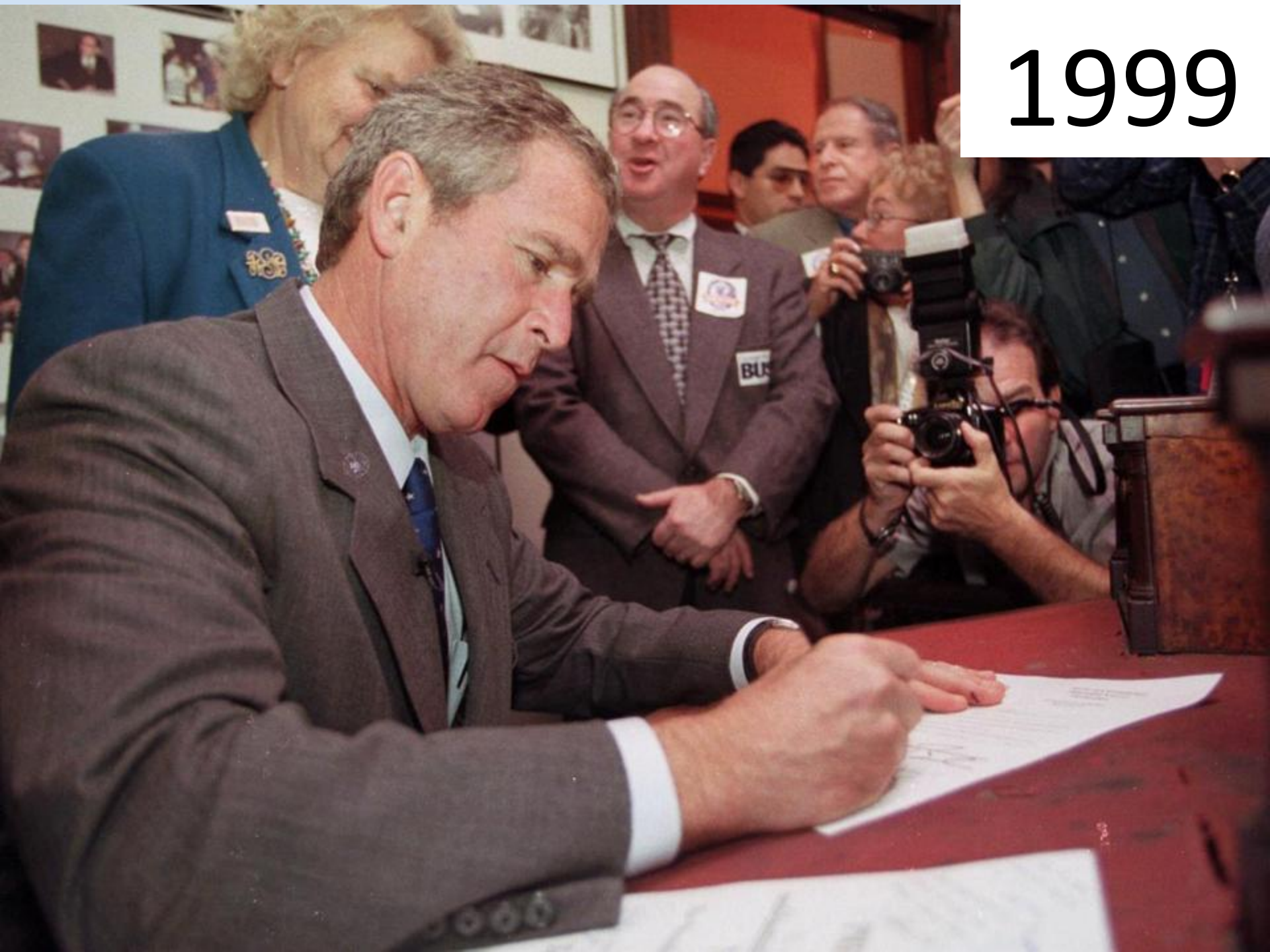
**Green
lights**

TEXAS



The Lone Star State

1999



Stop LSMT
without
consent

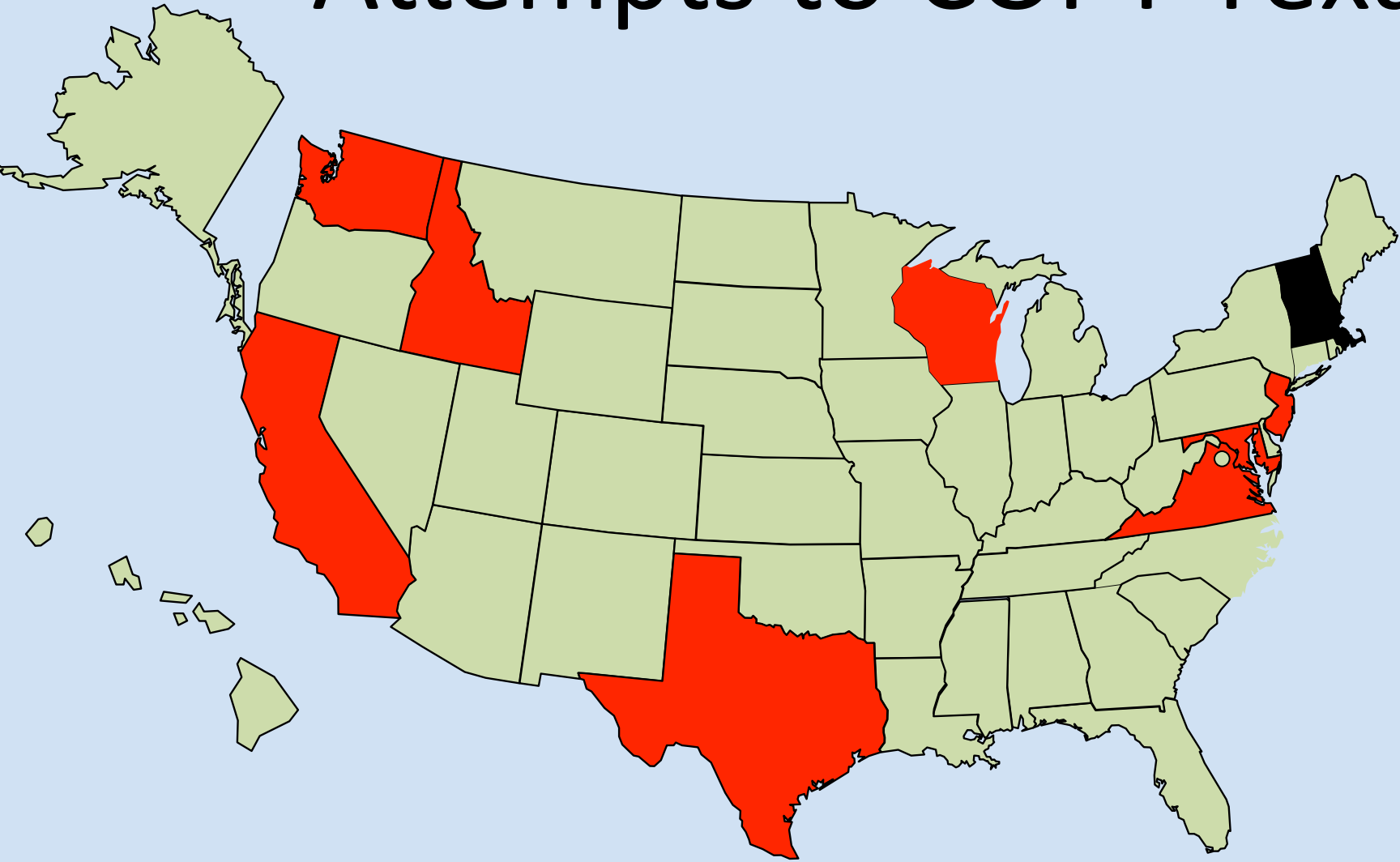
Physician may stop
LST **without**
consent for **any**
reason, if review
committee agrees

Give the
surrogate

48hr notice RC

Written decision RC

10 days to transfer

[illegible]

BUT

NOT TEXAS





H.B. 3074

(2015)

artificially
administered
nutrition &
hydration

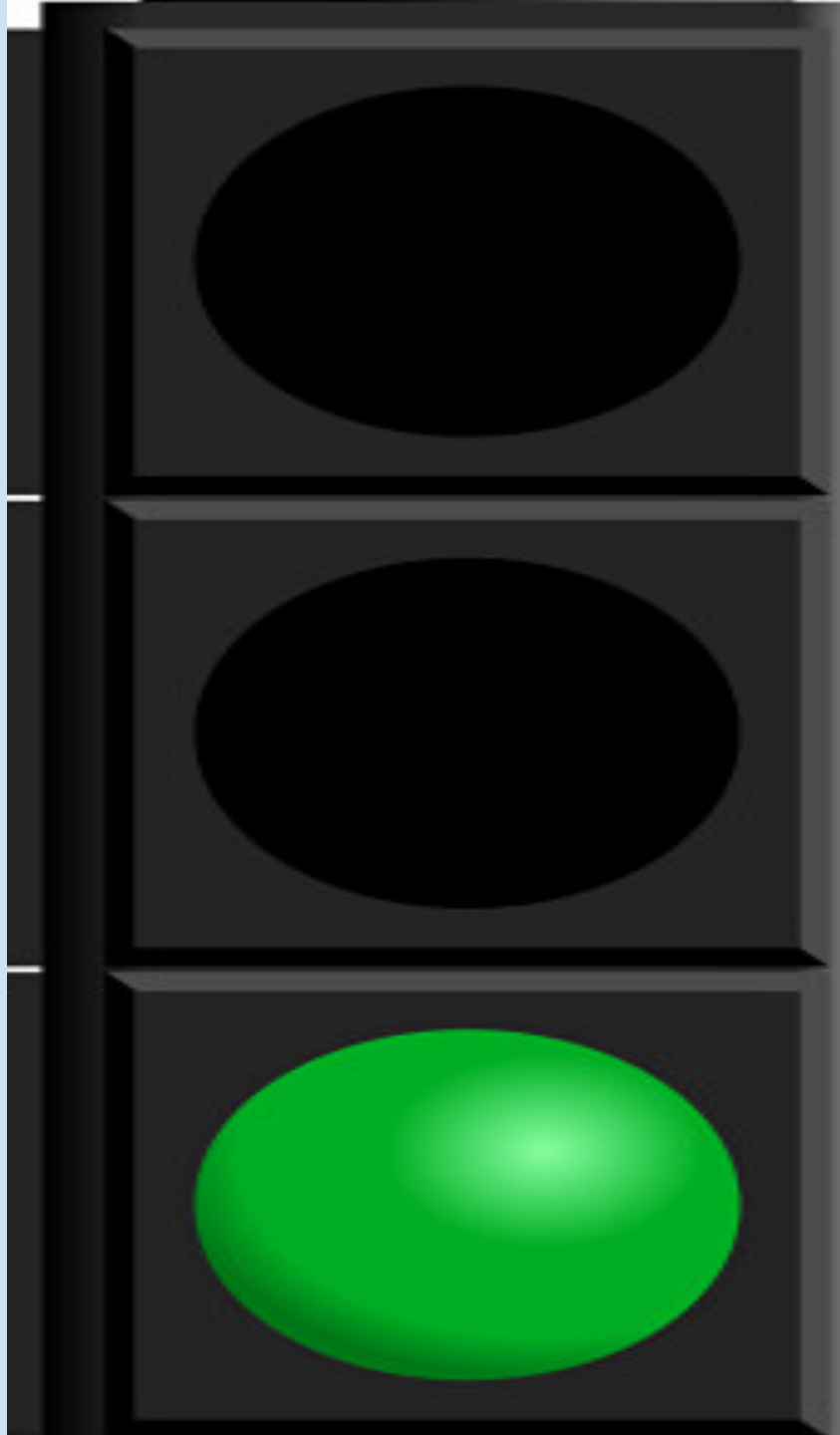
S.B. 11

(2017)

CPR



Chris Dunn trial



3

**Red
lights**

Consent
always



OKLAHOMA

Nondiscrimination in Treatment Act

November 2013

“health care provider
shall not deny . . .
life-preserving health
care . . . directed by the
patient or [surrogate]”

Medical Treatment Laws Information Act

November 2014

Oklahoma Health Care Providers' Responsibilities and Rights Under Certain Medical Treatment Laws





“If surrogate directs
[LST] . . . provider that
does not wish to
provide . . . **shall**
nonetheless
comply”



Discrimination in Denial of Life Preserving Treatment Act

“Health
care . . . **may not**
be . . .
denied if . . .
directed by . . .
surrogate”

Kansas



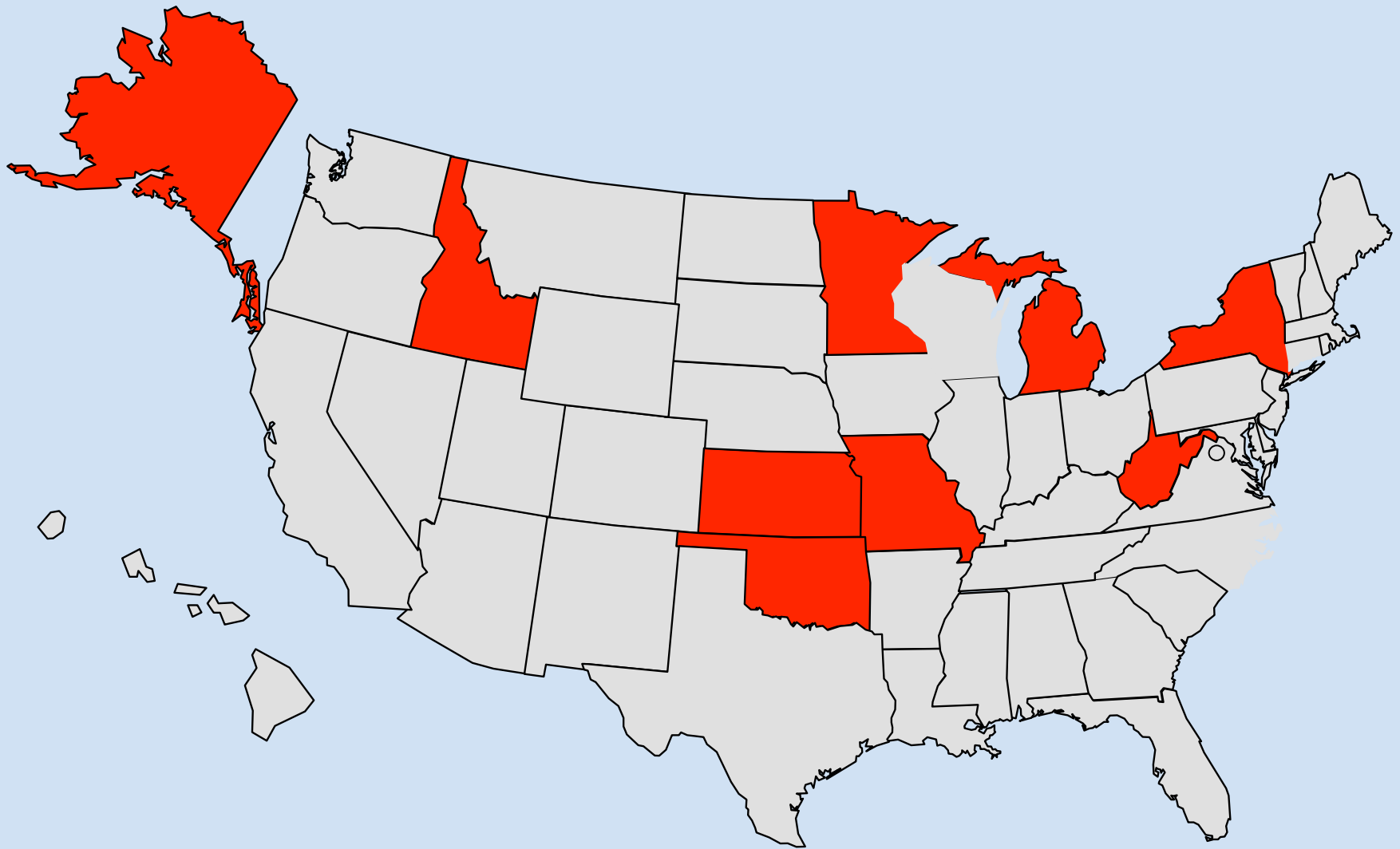
Simon's Law

Simon
Crosier



DNR without
parents'
consent or
knowledge

“No healthcare . . . staff shall withhold, withdraw or place any restrictions on life-sustaining measures for any . . . under 18 years of age without the **written permission**”







Thaddeus Mason Pope, JD, PhD

Director, Health Law Institute
Mitchell Hamline School of Law
875 Summit Avenue
Saint Paul, Minnesota 55105

T 651-695-7661

C 310-270-3618

E Thaddeus.Pope@mitchellhamline.edu

W www.thaddeuspope.com

B medicalfutility.blogspot.com