

# Legal Perspectives on Brain Death

Thaddeus Mason Pope, JD, PhD, HEC-C  
The Alliance - 2021 National Donor  
Management Summit

1

# Nothing to disclose

2

1. Should consent be required to perform an evaluation for brain death?
2. How should religious objections to the use of neurologic criteria to declare death be handled?
3. What is meant by “all functions of the entire brain”?
4. What are the “accepted medical standards”?

3

# 2020

4

# 75%

[optn.transplant.hrsa.gov/data/view-data-reports/national-data](https://optn.transplant.hrsa.gov/data/view-data-reports/national-data)

5

# 9400 / 12600

6

2021

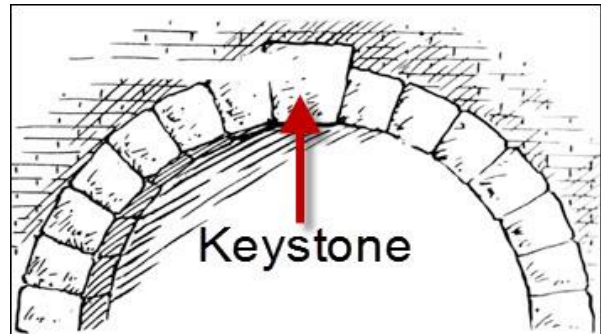
7

70%

8

4900  
/-----\  
6900

9



10

BUT

11

Individuals  
determined BD

12

Are they  
**legally** dead?

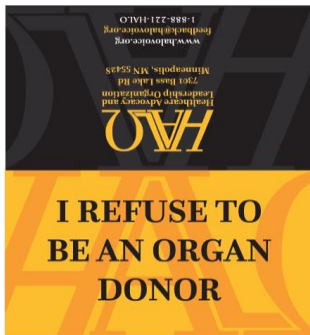
13

Uncertainty  
Conflict

14

Public  
trust

15



16

I, \_\_\_\_\_,

**REFUSE TO BE AN ORGAN DONOR.**

**Do not** perform an apnea test.  
**Do not** notify an organ procurement organization if I appear to be at or near death.

**Do not** take any organs for transplantation or research.

Signature: \_\_\_\_\_

Witness: \_\_\_\_\_

Witness: \_\_\_\_\_

Date: \_\_\_\_\_



17

Roadmap

18

3

19

UDDA

20

**Mismatch**

legal criteria to  
medical standards

21

**Variability**

medical standards

22

UDDA

23

Law almost  
every state

24

“in accordance with  
accepted medical  
standards”

25

**2 ways**  
to determine death

26

“irreversible cessation of  
**circulatory & respiratory**  
functions”

27

*or*

28

“irreversible cessation  
of all functions of  
the entire **brain**”

29

**Problem 1**

30

Clinicians do **not**  
 assess what  
**UDDA** requires

31

**Mismatch**



32

**UDDA**

33

irreversible cessation  
**all** functions  
**entire** brain

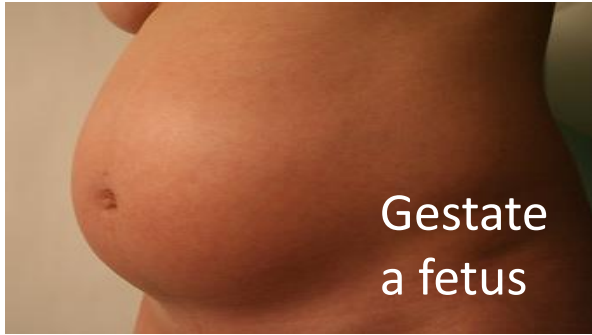
34

**BUT**

35

Brain dead  
 people  
**do** stuff

36



37



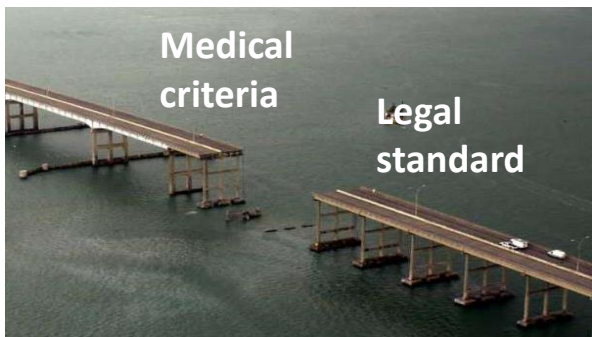
38

Clinicians only assess  
cessation  
**some** functions  
**part** of brain

39

UDDA requires  
**all** functions  
**entire** brain

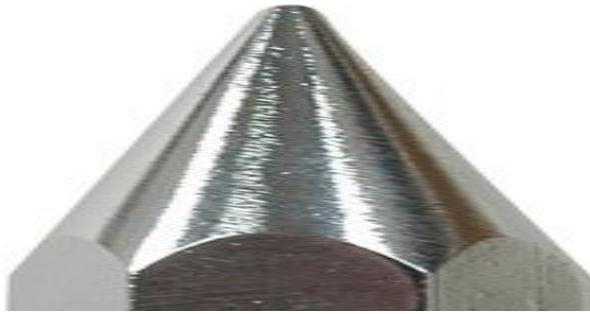
40



41

Medically dead  
**≠**  
Legally dead

42



43



*Most authoritative criteria*

AMERICAN ACADEMY OF  
NEUROLOGY

44

**SPECIAL ARTICLE**

## 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

*Neurology*® 2019;92:1-5. doi:10.1212/WNL.0000000000006750

**Correspondence**  
J.A. Russell  
james.a.russell@lahey.org

45

Patient can  
**satisfy** BD  
guidelines

46

Dead

47

Yet...

48



“neuro-endocrine  
function **may be  
present**”

49



50

May determine BD  
**despite** function  
hypothalamus

51

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

52



53

UDDA

requires

54

irreversible  
cessation of

55

**all** functions  
*of the*  
**entire** brain

56



57

**A Framework for Revisiting Brain Death:  
Evaluating Awareness and Attitudes  
Toward the Neuroscientific and Ethical  
Debate Around the American Academy of  
Neurology Brain Death Criteria**

Krishanu Chatterjee, BA<sup>1</sup>,  
Mohamed Y. Rady, BChir, MB (Cantab), MA, MD (Cantab)<sup>2</sup>,  
Joseph L. Verheijde, PhD, MBA, PT<sup>3</sup>, and Richard J. Butterfield, MA<sup>4</sup>

Journal of Intensive Care Medicine  
1-18  
© The Author(s) 2021  
  
Article reuse guidelines:  
sagepub.com/journals-permissions  
DOI: 10.1177/0885066620985827  
journals.sagepub.com/home/jic  


58

200 clinicians  
Mayo Clinic

59

“a positive result upon  
performing the AAN protocol  
demonstrates loss of all  
functions of the entire brain”

60

1/3 disagreed

61



62

Medical criteria  
do not require  
cessation of  
**all** functions

63

Require cessation  
of **critical** functions

64



65

**BUT**

66

**Lack** authority  
to do that

67

**Analogy**

68



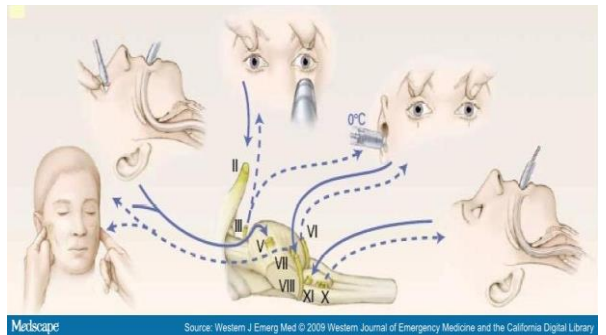
69



70

**UDDA**

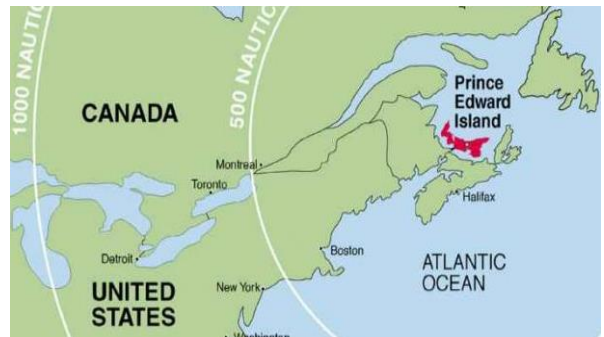
71



72

# contrast

73



74

“death includes  
brain death”

75

**Discretion**  
how to determine BD

76



77

# UDDA

78

More  
specific

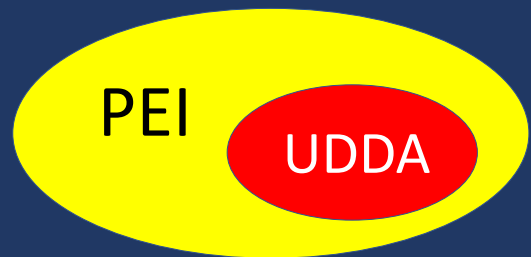
79

1. All functions
2. Entire brain
3. Cessation
4. Irreversible

80

UDDA delegates  
**less** to clinicians

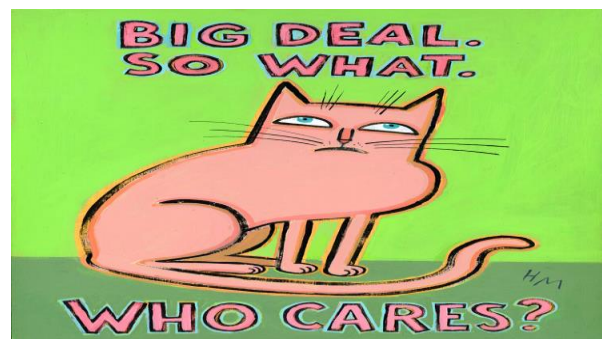
81



82

Med – Leg  
mismatch

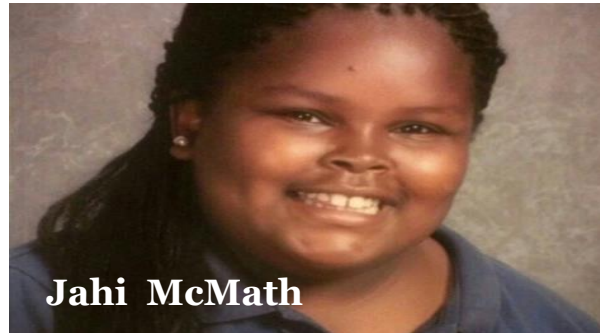
83



84

# Legal challenges

85



86

# Original attack

87

**Jahi** does not satisfy BD criteria

88

# Later challenge

89

AAN & AAP Guidelines **themselves**

90

Bruce M. Brusavich, State Bar No. 93578  
Terry Schneider, State Bar No. 118322  
Alexander B. Boris, State Bar No. 313195  
**AGNEWBRUSAVICH**  
A Professional Corporation  
20355 Hawthorne Boulevard  
Second Floor  
Torrance, California 90503  
(310) 793-1400

Andrew N. Chang  
ESNER, CHANG & BOYER  
Southern California Office  
234 East Colorado Boulevard  
Suite 750  
Pasadena, CA 91101  
(626) 535-9860121

Attorneys for Plaintiffs

**FILED**  
ALAMEDA COUNTY  
DEC 22 2017  
CLERK OF THE SUPERIOR COURT  
By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ALAMEDA

LATASHA NAILAH SPEARS WINKFIELD, ) CASE NO. RG 15760730

91

Plaintiffs request the opportunity to present evidence and expert testimony that the ANN and AAP Guidelines fail to meet the requirements of California's UDDA that an individual is brain dead only after suffering "an irreversible cessation of all functions of the person's entire brain, including her brain stem".

92

**"incalculable disruption**  
... if this court decides the Guidelines do not meet ... UDDA ... criteria"

93

McMath entry dismissal Alameda Cty 12-06-16.pdf - Adobe Acrobat Standard DC

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Scott E. Murray, Esq. (State Bar No. 104741); smurray@sdndmlawyers.com 201 N. Civic Dr., Suite 230, Walnut Creek, CA 94596 TELEPHONE NO. (925) 267-8181 FAX NO. (925) 267-8188 E-MAIL ADDRESS	<b>FILED</b> ALAMEDA COUNTY 2018 DEC -6 PM 2:05 CLERK OF THE SUPERIOR COURT By <i>[Signature]</i> Deputy
ATTORNEY FOR (Name) Defendant James Howard, M.D. SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 24405 Amador Street MAILING ADDRESS: 24405 Amador Street CITY AND ZIP CODE: Hayward, 94544 BRANCH: Hayward Hall of Justice	CIV-120
PLAINTIFF/RESPONDENT: Latasha Nailah Spears Winkfield, et al. DEFENDANT/RESPONDENT: James Howard, M.D., et al.	CASE NUMBER: R616760730
NOTICE OF ENTRY OF DISMISSAL AND PROOF OF SERVICE <input checked="" type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Other (specify):	

TO ATTORNEYS AND PARTIES WITHOUT ATTORNEYS: A dismissal was entered in this action by the clerk as shown on the

94



95

**ALLIANCE DEFENDING FREEDOM**

JACK PHILLIPS | PLANNED PARENTHOOD | CHURCH ALLIANCE

REQUEST LEGAL HELP

**We're Defending You**

96





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

97



98



99



100

Public trust

101

**Not** dead  
when doctors  
say they are

102



103

## 1<sup>st</sup> problem

mismatch legal criteria  
to medical standards

104

## Problem 2

105

**Which** guidelines  
should clinicians use  
to determine BD?

106

# UDDA

107

“irreversible cessation  
of all functions of  
the entire brain”

108

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

109

**BUT**

110

**Which** medical  
standards are  
accepted ?

111

variability

112

Research

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

113

Improving uniformity in brain death  
determination policies over time

OPEN

Hilary H. Wang, MD **ABSTRACT**

114

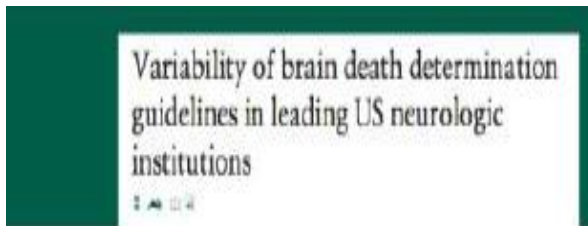
# Neurology®

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

116



David M. Geier, MD, MA  
Tatiana N. Vanila, MD, PhD

### ABSTRACT

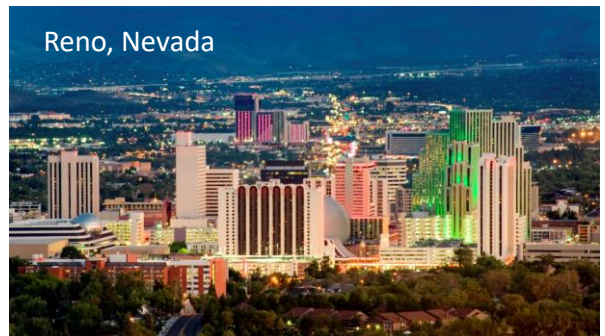
**Background:** In accordance with the Uniform Determination of Death Act, guidelines for brain death determination are developed at an institutional level, potentially leading to variability of practice. We evaluated the differences in brain death guidelines in major US hospitals with a

115

Number of physicians  
Qualifications  
**How** tests administered

117

Reno, Nevada

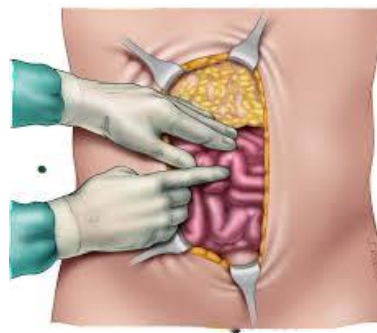


118

**Aden Hailu**



119



brain injury during exploratory laparotomy

120

**Met** AAN criteria  
for brain death

121



122



123

Dad  
loses

124

**Trial court**  
AAN criteria met  
→ Aden **is** dead

125



126

Dad  
wins

127



128

**Irrelevant** if Aden  
meets AAN criteria  
**NOT** the  
“right” criteria

129

Unclear they are  
“**accepted** medical  
standards”  
as UDDA requires

130

**uncertainty**



131

Fix

132



# Nevada


A.B. 424 (2017)

133

Determination of BD  
“must be made in  
accordance with ...  
**applicable guidelines ...”**

134

SPECIAL ARTICLE



## 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

135

American Academy  
of Pediatrics  
DEDICATED TO THE HEALTH OF ALL CHILDREN™

Guidance for the Clinician in  
Rendering Pediatric Care

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

abstract

Thomas A. Nakagawa, MD, Stephen Ashwal, MD, Mudit

136



# New Jersey

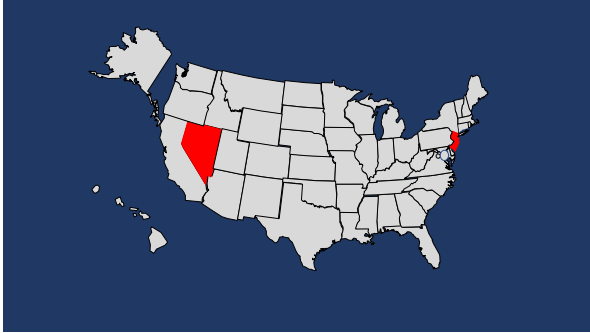
A.B. 3586 (2014)

137

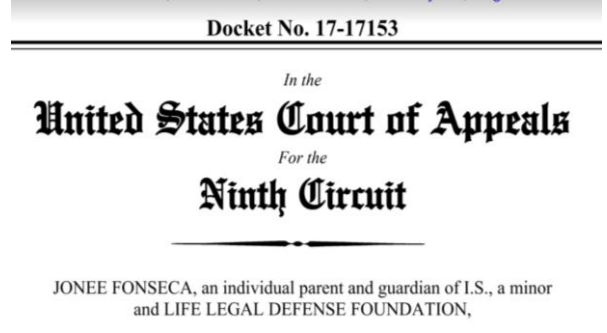


## H.B. 1896 (2021)

138



139



140



141



142



143



144



# Mismatch

legal criteria to  
medical standards

145

# Variability

medical standards

146

Will see **more**  
of these cases

147



Uniform Law Commission

148

**Amend** UDDA

149

**Align** medical  
guidelines to  
legal criteria

150

**Clarify** which  
guidelines are  
“accepted”

151

**Reduce**

variability

**Increase**

certainty & trust

152

**2020 | Most lives ever saved by  
deceased donors**



153

**Thaddeus Mason Pope, JD, PhD, HEC-C**  
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

154

**References**

155

Materials from this  
presentation are available

<http://thaddeuspope.com/braindeath>

156

## 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 **4 million** direct visits. Plus, it is distributed through RSS, email, Twitter, and re-publishers like WestlawNext and Bioethics.net.

157

*Must Clinicians Get Consent for Brain Death Testing Pro/Con*, 159 CHEST (forthcoming 2021).

*Recommendations of the International Donation and Transplantation Legislative and Policy Forum* (in progress) (with others).

Recommendations of the Definition and Determination of Death Project (in progress).

158

*It's Time to Revise the Uniform Determination of Death Act*, 173(1) ANNALS OF INTERNAL MEDICINE 75 (2020).

*Revising the Uniform Determination of Death Act: Response to Miller and Nair-Collins*, HASTINGS BIOETHICS FORUM (January 29, 2020) (with Ariane Lewis and Richard J. Bonnie).

159

*Why Should We See Brain Death as Socially Situated?* 22(12) AMA JOURNAL OF ETHICS E983-985 (December 2020) (guest editor of issue with Ariane Lewis).

*Brain Death Testing: Time for National Uniformity*, 20(6) AMERICAN JOURNAL OF BIOETHICS 1-3 (2020).

160

*Is There a Right to Delay Determination of Death by Neurologic Criteria?* 77 JAMA NEUROLOGY (August 3, 2020) (with Ariane Lewis, and Richard J. Bonnie).

*Determination of Brain Death / Death by Neurologic Criteria - The World Brain Death Project*, 323 JAMA (August 3, 2020) (with others).

161

*It's Time to Revise the Uniform Determination of Death Act*, 172(2) ANNALS OF INTERNAL MEDICINE 143-144 (2020) (with Ariane Lewis and Richard Bonnie).

*Determination of Death by Neurologic Criteria in the United States: The Case for Revising the Uniform Determination of Death Act*, 47(4) (Supp.) JOURNAL OF LAW, MEDICINE & ETHICS 9-24 (2019) (with Ariane Lewis, et al.).

162

The 50-Year Legacy of the Harvard Report on Brain Death, 320(4) JAMA 335-336 (2018)  
(with Robert Truog & David Shumway Jones).

Brain Death and the Law – Hard Cases and Legal Challenges, 48(5) HASTINGS CENTER REPORT (Nov/Dec 2018).

163

Brain Death Rejected: Expanding Clinicians' Legal Duties to Accommodate Religious Objections and Continue Physiological Support, in LAW, RELIGION, AND AMERICAN HEALTHCARE (Cambridge Univ. Press 2017).

Brain Death: Legal Status and Growing Conflict, and Court Challenges, 37 JOURNAL OF LEGAL MEDICINE 265-324 (2017).

164

Legal Standards for Brain Death, 13 JOURNAL OF BIOETHICAL INQUIRY 173-178 (2016).

Brain Death: Legal Obligations and the Courts, 35 SEMINARS IN NEUROLOGY 174-179 (2015) (with Christopher Burkle).

165

Brain Death: Legal Duties to Accommodate Religious Objections 147 CHEST e69 (2015).

Legal Briefing: Brain Death and Total Brain Failure, 25(3) JOURNAL OF CLINICAL ETHICS 245-257 (2014).

166

Pregnant and Dead in Texas: A Bad Law, Badly Interpreted, LOS ANGELES TIMES (Jan. 16, 2014) (with Art Caplan).

Legal Briefing: Organ Donation, 21(3) JOURNAL OF CLINICAL ETHICS 243-263 (2010).

167

### **Thaddeus Mason Pope, JD, PhD, HEC-C**

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

168