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BIBLICAL BIOPOLITICS: JUDICIAL PROCESS, RELIGIOUS RHETORIC, TERRI SCHIAVO AND BEYOND

Joshua E. Perry[†]

The fight over Terri Schindler Schiavo's right to live and our society's reaction to that fight shows us just how deeply the sanctity-of-life ethic has been eroded in our culture. . . . The problem is that we have courts that have been infected with this quality of life ethic. . . . [W]e have devalued and desanctified human life to the point that now a court can casually sentence a human being to die by malnutrition and dehydration.

—Richard Land, President of the Southern Baptist Convention's Ethics & Religious Liberty Commission¹

I just don't know why it took so long for the Florida Legislature to act. . . . Abraham Lincoln said in the Gettysburg Address that (we have) a government 'of the people, by the people and for the people.' That's the way it's supposed to be. It's not for judges, it's not for the Supreme Court . . . it's for

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¹ Press Release, Ethics & Religious Liberty Comm'n of the Southern Baptist Convention, Schiavo Case a "Wake-up Call" to the Nation (Oct. 22, 2003), available at http://sites.silaspartners.com/partner/Article_Display_Page/0,,PTID314166|CHID601016|CIID1658564,00.html.

the people. And when the people respond, their leaders had better listen.

—Dr. James Dobson, founder and chairman of Focus on the Family²

The battle is with our courts, and from this moment on we should let Terri be the face of the fight to confirm prolife judicial nominees. . . . Each time a judge comes up for a vote, we must be willing to do all we can to support those judicial nominees that respect life and to oppose those who subscribe to this growing culture of death. The time to take back our judiciary has come.

—Tony Perkins, President of the Family Research Council³

Part of me says, 'This can't be happening.' And then when I look over the long history of judicial abuses, I say, 'Here we go again.' . . . [Passage of Terri's Law I] really was historic. It shows what can happen when people unite together and urge a state legislature and an executive to withstand judicial tyranny. We want to take this lesson that we learned and use it again and again on the state level and on the federal level.

—Randall Terry, The Society for Truth and Justice (founder of Operation Rescue)⁴

INTRODUCTION

Far beyond the small community of Pinellas Park, Florida, Terri Schiavo became a household name around the world. Her tragic plight was discussed in coffee shops and newspapers from St. Petersburg, Florida to St. Petersburg, Russia.⁵ After her percutaneous endoscopic gastrostomy (PEG) tube was removed for the third time and throughout the duration of Mrs. Schiavo's final thirteen days, the talk radio and twenty-four-hour cable television news machine in this country

² Bob Ditmer, *Dobson Speaks out About Terri Schiavo*, FAM. NEWS IN FOCUS, Oct. 22, 2003, <http://www.family.org/cforum/fnif/news/a0028517.cfm>.

³ Adelle M. Banks, *Reprieve for Brain-Damaged Woman*, CHRISTIANITY TODAY, Dec. 2003, at 24.

⁴ All Things Considered: Struggle by Religious Conservatives to Overcome What They See as Judicial Tyranny Regarding Their Social Agendas (NPR radio broadcast Dec. 23, 2003) (as cited in broadcast transcript).

⁵ See Danica Kirka, *Schiavo Stokes Europe Euthanasia Debate*, ABC NEWS, Apr. 11, 2005, available at <http://abcnews.go.com/International/wireStory?id=659621&CMP=OTC-RSSFeeds0312>.

reached a crescendo of media saturation with “all Terri, all of the time” coverage. When Mrs. Schiavo finally died, over fifteen years after suffering the heart attack that resulted in a medical diagnosis of persistent vegetative state (PVS), this complex drama, for many years relegated to a painful and private family concern, had exploded on the national stage as a defining moment in the cultural conflict over how legal, medical, and religious communities negotiate difficult dilemmas in the end-of-life context.

While precise national statistics do not exist, experts speculate that “thousands and thousands” of patients are removed from life support in the United States each year.⁶ Why then did Terri Schiavo’s story capture the attention of the nation? Why did people around office water coolers debate whether her husband had a conflict of interest and swap conspiracy theories about what caused her heart attack? Why did Florida state legislators and federal Congressmen introduce and re-introduce legislation to “save Terri”—legislation that was immediately and dramatically signed, respectively, by the Governor of Florida and President of the United States? Why did so many commentators point to the *Schiavo* case as proof of a slippery slide from a “culture of life” towards a “culture of death”? In short, why did so much controversy swirl around the life and death of Terri Schiavo? This Article is an exploration of these complex questions.

I argue that politicized religious forces (the Religious Right)⁷ were responsible for the international attention garnered by Mrs. Schiavo’s plight and the escalation of her cause to a culture war flash-point. A thorough examination of the Terri Schiavo guardianship proceedings reveals that the judicial process, both substantively and procedurally, achieved a decision that was consistent with the specific facts of Mrs. Schiavo’s case and Florida’s established legal framework. In other words, the Florida judiciary is to be commended for a job well done. This conclusion is important because it challenges those claims of the Religious Right that attempted to undermine the credibility and legitimacy of the Florida judiciary.⁸

⁶ Robin Wallace, *Unknown Number Face Life-Support Decision*, FOXNEWS.COM, Apr. 4, 2005, <http://www.foxnews.com/story/0,2933,151862,00.html>.

⁷ The use of the term “Religious Right” is not intended to be pejorative. Rather, it is simply the most concise way to describe these politically conservative communities of self-identifying religious activists. See George M. Marsden, *The Sword of the Lord: How “Otherworldly” Fundamentalism Became a Political Power*, 12 BOOKS & CULTURE 10, 10 (March/April 2006) (“Fundamentalists and fundamentalistic evangelicals have become leading [sic] part of a solid ‘Religious Right’ bloc in the Republican Party and a considerable influence in mainstream politics.”).

⁸ Additionally, this analysis is important because some in the legal community remain unsure about whether or not the judicial process failed Terri Schiavo. I

Thus, through description and analysis of the strategies employed by the Religious Right, including detailed legal analysis of the extensive litigation history, politics and bioethical theory intertwined in the Terri Schiavo case, I claim that the *Schiavo* case is an illustrative example of what I am labeling “Biblical BioPolitics.”⁹ The term “Biblical” refers generally to a commitment to the advancement of societal transformation premised on a literal interpretation of the Bible and fervent allegiance to biblical authority, church doctrine and/or religious tradition. These commitments are most frequently found among “fundamentalists and fundamentalistic evangelical” Christians, but are also shared by their political allies, including Roman Catholics and some Jewish communities.¹⁰ “BioPolitics,” as I use the term, is a play on the notion of bioethics and refers to the Religious Right’s legislative and public policy agenda in the realm of medical and health-related issues, including, for example, abortion, emergency contraception, embryonic stem-cell research, and euthanasia, *inter alia*—subjects within the traditional purview of bioethics and health law.¹¹ Throughout this Article, I argue that the

argue that it did not. See Joshua E. Perry et al., *The Terri Schiavo Case: Legal, Ethical, and Medical Perspectives*, 143 ANNALS INTERNAL MED. 744, 744-48 (2005).

⁹ As I describe the Biblical BioPolitics agenda, another label that accurately applies is “‘Culture of Life’ Politics.” See George J. Annas, “‘Culture of Life’ Politics at the Bedside—The Case of Terri Schiavo,” 352 NEW ENG. J. MED. 1710, 1710-15 (2005).

¹⁰ Marsden, *supra* note 7, at 10.

¹¹ The analysis of the *Schiavo* case that follows is a first step in what I anticipate to be a long-term, multi-article exploration of those ways in which the legal system engages moral questions in the realm of bioethics and health policy. I plan future projects to explore the deeper issues underlying the Religious Right’s Biblical BioPolitics; namely, whether morally pluralistic communities best flourish under regimes that privilege the personal beliefs of individuals and what role religious discourse and argument should play in the development of public policy vis-à-vis bioethical and health care issues. My use of the term “BioPolitics” is consistent with Michel Foucault’s history of biopower and description of late-twentieth century biopolitics where “regulatory mechanisms must be established to establish an equilibrium, maintain an average. . . . [i]n a word, security mechanisms have to be installed around the random element inherent in a population of living beings so as to optimize a state of life.” MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-76 246 (Mauro Bertani et al. eds., David Macey trans., Picador 2003).

For more on the notion of biopolitics as developed by Foucault and a brief comment on its application to the *Schiavo* case, see John T. Parry, “*Society Must Be [Regulated]*”: *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 873 (2005) (“Death is no longer something that just happens. Rather it is a process, . . . monitored and controlled by lawyers, doctors, family members, legislatures, government officials, and the person who is dying. It is the concern, in short, of biopolitics.”).

Religious Right, advancing an agenda of Biblical BioPolitics, used irresponsible and destructive rhetoric to co-opt Terri Schiavo's tragedy for the purposes of advancing an anti-abortion culture war agenda.

In this Article, I argue that the Biblical BioPolitics rhetoric was destructive because it confused the issues swirling around Mrs. Schiavo's end-of-life guardianship saga with "sanctity of life" sloganeering and anti-abortion politics. The employment of abortion-politics rhetoric in a case such as *Schiavo* is simply wrong as a matter of fact and irresponsible as a matter of public discourse. First, repeated use of phrases such as "culture of life," "murder," and "disabled" erroneously mischaracterized the facts of the *Schiavo* case. Much of this Article will focus on clearly setting forth the record and clarifying the terms of debate. Secondly and related to the first point, language is integral to the operation of law and the formation of public policy, and I argue that the rhetoric promulgated by those pushing a Biblical BioPolitics agenda has the potential to be particularly corrosive to the public discourse surrounding end-of-life decision-making, and particularly destructive to the flourishing of what James Davison Hunter has termed "genuine and peaceable pluralism."¹² If the Religious Right seeks to reverse thirty years of legal and bioethical consensus surrounding the autonomy regime at the end-of-life, that is a legitimate prerogative. I argue, however, that the discourse throughout the *Schiavo* case was irresponsible in so far as it failed to substantively critique the established privacy principles of self-determination and autonomy in the context of a PVS diagnosis. Instead, as I document in this Article, Religious Right leaders, wrapped in the mantle of religious authority and moral leadership, resorted to populist, *ad hominem* sloganeering that served primarily to fuel much of the public's growing loss of confidence both in the legitimacy of the judiciary and the rule of law, as well as in the competence of the neurological science community to diagnose PVS.

As illustrated by the drama surrounding the *Schiavo* case, I argue that the Religious Right's Biblical BioPolitics agenda fails to accommodate the reality of America's cultural and religious pluralism and concomitant societal disagreement over such notions as "the sanctity of life." For example, a certain percentage of the American population subscribes to the view that human life, regardless of consciousness or hope for consciousness, is sacred. In the *Schiavo* case, proponents of this position argued that Mrs. Schiavo's biological life was sacred and

¹² JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 307 (1991).

worth preserving through artificial nutrition and hydration for an indefinite period of time and regardless of nearly unanimously dim prognoses for recovery. Throughout this Article, I refer to this as the vitalist position and attribute it to those advancing the Biblical BioPolitics agenda in other contexts, such as abortion and embryonic stem-cell research.

I also want to consider, however, another segment of the American population for whom life's sacredness includes at least a minimal level of conscious awareness or perhaps the potential for such consciousness. For this segment of the population, respect and honor for life's sacredness prevents the mere preservation of biological function once a condition such as PVS has been confirmed. Therefore, premised on different conceptions of what life's sacredness entails, the American population does not agree about whether a person in PVS, with neurological devastation permanently precluding restoration of consciousness, ought to be kept alive indefinitely with artificial hydration and nutrition. This divide in public opinion signifies a profound moral pluralism.

As a normative matter, I argue that in cases like *Schiavo*, a legal regime which is presumptively neutral and seeks to determine a patient's desire, confirmed by clear and convincing evidence, regarding whether or not life-prolonging procedures ought to be employed is the most sympathetic to this plurality of moral positions. I argue that this regime, which rests upon thirty years of legal precedent, was operative in Florida and throughout the majority of the country, but is now threatened by the rhetoric and agenda of Biblical BioPolitics proponents committed to a vitalist conception of life's sacredness. Indeed, in the wake of the *Schiavo* case, the National Right to Life Committee has proposed model legislation that would require doctors and hospital administrators to presume that all patients unable to speak for themselves would want to continue to receive hydration and nutrition, unless the patients had clear living wills stating otherwise. Looking beyond *Schiavo*, this Article is, therefore, concerned with policy proposals beginning to emerge in several states, prompted by Biblical BioPolitics, that would create a presumption mandating life-sustaining treatment. Against such proposals, I argue, as a normative matter, that the current regime appropriately protects the liberty interests of PVS patients and must not be disturbed by legislative proposals inspired by the *Schiavo* case that would weaken individual rights to self-determination at the end of life.¹³

¹³ This concern was also voiced at the 2005 annual meeting of the American Medical Association, which adopted a policy opposing state legislation proposed or

In Part I of this Article, I consider the intersection of law and bioethics that provides the relevant legal background and appropriate doctrinal framework for understanding the *Schiavo* case. In this Part, I briefly review the past thirty years of legal evolution and the resultant emergence of the autonomy regime. This regime, which privileges a patient's liberty interest or privacy right to self-determination, best ensures that individuals living and dying in an increasingly pluralistic society will not be subjected against their will to an existence marked only by biological function, void of any opportunity for meaningful restoration to health and flourishing.¹⁴

In Part II, I present a thick analysis of the *Schiavo* case and address a series of threshold questions: Who was Terri Schiavo, what happened throughout the complicated course of litigation, and whether the judicial process protected her liberty interests? The legal narrative set forth comprehensively addresses the findings of fact and conclusions of law as determined by the embattled Judge George Greer, as well as the judicial process that was so highly scrutinized by both federal and state courts of review. In the telling of the numerous twists and turns of Mrs. Schiavo's saga, what Professor John Robertson has termed the *Bleak House* of medical-legal jurisprudence,¹⁵ a key conclusion will be made clear: In the midst of a tragic and intractable family dispute, the judicial process, slowly and deliberately, worked to produce a result consistent with the relevant Florida laws respecting an individual patient's autonomy at the end of life. The judges and justices at every level performed their Constitutional duty with restraint and care.¹⁶ In the *Schiavo* case, the judiciary is to be commended.

passed in the wake of the Terri Schiavo case "that presumes patients would want life-sustaining treatment unless they have clearly stated otherwise." Lindsey Tanner, *American Medical Association Acts on Terri Schiavo-Inspired Policy*, SAN DIEGO UNION TRIBUNAL, June 21, 2005, <http://www.signonsandiego.com/news/health/2005/0621-1738-amameeting.html> (quoting Johns Hopkins neurologist Dr. Michael Williams: "While the (Schiavo) circumstances were heart-wrenching and compelling, they're so rare that they're not a good basis to revise existing law. . . . I wish there had not been politics involved in it. . . .").

¹⁴ A more comprehensive critique of this regime and an exploration of more communitarian concerns will be the subject of future work.

¹⁵ John A. Robertson, *Schiavo and Its (In)Significance* 2-3 (Univ. of Tex., Public Law & Legal Theory Research Paper No. 72, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692901.

¹⁶ See Lisa A. Davis, *Schiavo Judge to Be Honored*, TAMPA TRIB., May 2, 2005, at 1 ("I don't think anyone could ever say [that Judge Greer's] decisions were unlawful'. . . . 'They were very thoughtful. His decisions were meticulous. [The West Pasco Bar Association] admired his ability to sustain the pressure not to follow the law. . . . I think that shows his character.'"). In addition to praise received from his

End-of-life guardianship law in Florida asked whether Terri Schiavo, if she could communicate, would choose to receive artificial nutrition and hydration, and thereby maintain an indefinite biological existence, or choose to forgo end-of-life medical procedures and be allowed to die. The legal system produced an answer, albeit controversial, that was consistent with Florida legal precedent and well-grounded in legal theory regarding autonomy rights and surrogate decision-making in the context of PVS. Additionally, the substantive conclusions and civil procedure of lower court judges were reviewed time and time again by appellate justices at every level of state and federal courts. Crafting this narrative and making this defense of the judicial process in Terri Schiavo's case is essential to my goal of clarifying factual errors and identifying the irresponsibility of the religiously-charged rhetoric that insisted the judiciary acted "tyrannically" in an effort to "sentence" Mrs. Schiavo to death and lobbied for executive and legislative intervention.¹⁷

In Part III, I begin to describe more fully what I mean by Biblical BioPolitics and those politicized religious forces that escalated the effort to "save Terri" to an unprecedented level of political involvement by the legislative and executive branches of government both at the state and federal levels. I focus particularly on the legal and political strategies of Randall Terry, a seasoned right-to-life, anti-abortion activist whose activities on behalf of Mrs. Schiavo's parents provide a glimpse of the radical, old-school Biblical BioPolitical strategy at the grass-roots level. Although Randall Terry is a fringe figure who fails to enjoy the same level of political influence or share the multi-million dollar annual operating budget of the four organizations and men profiled in Part IV, his history and practice of in-the-trenches advocacy, including his reckless and irresponsible use of rhetoric, offers an instructive glimpse into the more mainstream, 21st Century Religious Right that is explored in Part IV.

In Part IV, I identify four increasingly visible and politically-mainstream figures on the politically and religiously conservative side of the American political spectrum. Although active politically since the 1970s, the last five years have resulted in unparalleled success for those conservative Evangelicals and pro-life Roman Catholics that

local bar association, Judge Greer was also awarded the 2005 president's award of merit from the Florida Bar Association for his "steadfast ruling in the Terri Schiavo case" in the face of hate mail and death threats that necessitated a twenty-four-hour security detail. *Bar Notes*, JACKSONVILLE'S FINANCIAL NEWS & DAILY RECORD, June 6, 2005, http://www.jaxdailyrecord.com/showstory.php?story_id=43115.

¹⁷ Press Release, Ethics & Religious Liberty Comm'n of the Southern Baptist Convention, *supra* note 1.

most visibly constitute what this Article identifies as the Religious Right. The success of the Religious Right was most clearly and recently signified by the two Presidential election victories of George W. Bush, a self-described born-again, Evangelical Christian whose ability to harness the enthusiasm of the Religious Right was instrumental to his Presidential victories. When discussing the Religious Right in this Article, I will refer primarily to those four groups profiled in Part IV: (1) James Dobson's "Focus on the Family," (2) Tony Perkins's "Family Research Council," (3) Richard Land's "Southern Baptist Ethics and Religious Liberty Commission," and (4) Jay Sekulow's "American Center for Law and Justice."

Arguing that Mrs. Schiavo's case should be understood as a potential paradigm for future Religious Right activism in the realm of Biblical BioPolitics, in Part IV, I investigate the influence of irresponsible rhetoric on public policy regarding patients in PVS. Specifically, I explore the Religious Right's use of rhetoric to discredit the judiciary and influence the public discourse and, ultimately, the evolution of the law in a direction that fails to acknowledge competing and pluralistic understandings of what life's sacredness means in the context of PVS.

Throughout this Article I analyze why the Religious Right's irresponsible use of rhetoric in the realm of bioethics is particularly problematic. First, I argue that the rhetoric of "judicial tyranny," "judicial activism," and "judicial arrogance"—at least with regard to the Terri Schiavo case—is simply without factual basis as demonstrated by the detailed review of the judicial proceedings set forth in Part II. I argue that judges in the *Schiavo* case repeatedly suppressed their personal values and emotional instincts in favor of respect for Mrs. Schiavo's autonomy right to determine whether or not she wished to be indefinitely maintained in a state of mere biological existence permanently void of any conscious awareness or relational interaction.

Beyond merely disseminating erroneous information, however, attempts by the Religious Right to fuel public skepticism of the judiciary and undermine the legitimacy and authority of the judicial process have potentially long-term harmful effects because they suggest that one or both of the other two branches of government are better qualified or more capable of resolving disputes such as the one before the courts in Terri Schiavo's case. This rhetoric suggests that in the future, final judgments, if unsatisfactory, may be appealed to the executive or legislative branches of government and re-litigated in the court of public opinion. As demonstrated by a comprehensive analysis of the judicial process in the *Schiavo* case, including the rules of evidence and civil procedure, the political neutrality of the fact-finder, and the numerous avenues for appeal assuring procedural and substan-

tive review, state courts afford a process for adjudication of end-of-life disputes in which feuding families can rely with confidence.

Religious Right rhetoric inciting the intervention of the executive and legislative branches only serves to overtly politicize an otherwise personal and private end-of-life guardianship dispute. Such intervention confuses the rule of law, discredits the judicial process and weakens the notion that after appeals are exhausted, a judicial determination must be respected.

Second, I argue that the Religious Right's rhetorical refrain of "culture of life," "right to life," and other vitalist slogans borrowed from abortion politics undermines the exercise of personal liberty in the context of a diagnosed persistent vegetative state that has rendered a patient neurologically devastated and beyond the healing abilities of modern medicine. Both this concept of patient self-determination and the mechanisms for intervention by a surrogate on behalf of a patient who has lost all hope of consciousness have been hammered-out over the last thirty years of medical-legal jurisprudence. In an attempt to institute a vitalist public policy that universally defends biological life (regardless of one's level of consciousness or recovery prognosis), the Religious Right's insistence that "all life is sacred" fails to provide adequate safeguards for personalized decision-making by those whose opinions and beliefs may differ on what life's sacredness entails. Such individual safeguards, particularly in the midst of a morally pluralistic society, are essential if persons are to be assured of the liberty to determine what quality of life might be personally acceptable or what differing notions of life's sacredness might entail for them as individuals.¹⁸ I argue that the current "clear and convincing evidence" regime appropriately protects incapacitated patients, and legislative attempts to add a presumption that all PVS patients would want indefinite nutrition and hydration treatment and to heighten the requirements so that patients must explicitly memorialize in writing their wishes regarding artificial hydration and nutrition in the event

¹⁸ The scope of this Article will only explore the specific end-of-life crisis created by a diagnosis of PVS. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 68-101 (Vintage ed. 1994) (discussing the "sanctity of each human life" and notions of the sacred or intrinsically valuable in the context of liberal, pluralist discourse). *But see* John Keown, *Life's Dominion: An Argument About Abortion and Euthanasia*, 110 L. Q. REV. 671, 674 (1994) (book review) (arguing that "[t]he principle of the sanctity of life, as traditionally understood, rules out the intentional killing of human beings because of the inalienable worth they possess in virtue not of any particular physical or mental abilities they may be able to exercise but simply because of their humanity.").

they find themselves in a persistently vegetative state are inconsistent with notions of a genuine and peaceable pluralism.

Furthermore, the use of rhetoric by religious organizations is particularly irresponsible when the speakers are making universal appeals premised, often implicitly, upon divine or biblical authority. The use of rhetoric in politics, of course, enjoys a long history in the United States. Likewise, religiously motivated persons have historically contributed much to the political discourse. While myriad examples exist throughout the history of the United States, one perhaps thinks most immediately of the influence of the Reverend Dr. Martin Luther King, Jr. and those progressive factions of Christianity and Judaism that under-girded much of the Civil Rights Movement.

In this Article, however, I adopt the “culture war” critique of James Davison Hunter to argue that at this particular moment in the nation’s red state/blue state polarization, the irresponsible use of rhetoric by the Religious Right is particularly problematic as it finds legal expression in legislative proposals that would presume patients in a persistent vegetative state would desire artificial hydration and nutrition.¹⁹ In short, Biblical BioPolitics is problematic to the extent that it “influences both the nature of the legal debate and the substance of the outcome” in ways that polarize a complex substantive and procedural legal debate in the realm of bioethics.²⁰ This polarization only serves to further impoverish an already shallow and fragmentary moral discourse. While I do not contest the right of religious persons to contribute to the formation of public policy, I do strongly critique the irresponsible and destructive manner in which contributions were made by many on the Religious Right in the context of Terri Schiavo’s case.²¹

While a recent flurry of academic and popular attention has been focused on the saga of Terri Schiavo, this Article provides a comprehensive examination of the judicial proceedings in Mrs. Schiavo’s case, as well as an analysis of Religious Right activism in its larger culture war context, including empirical analysis of the irresponsible rhetoric employed by those proponents of Biblical BioPolitics. Such understanding is necessary if we are to appreciate fully the implications for the intersection of law, medicine, ethics and religion in the

¹⁹ See HUNTER, *supra* note 12, at 250-71.

²⁰ *Id.* at 271.

²¹ Moreover, the rhetoric employed by the Religious Right in the *Schiavo* case largely failed to substantively attack the legitimacy of the legal principles embedded over the last thirty years. Hence, an opportunity to review constructively and with civility public policy vis-à-vis PVS patients was lost.

Terri Schiavo case and in the continuing bioethical culture war struggles that surely lie ahead.

I. AUTONOMY AT THE END OF LIFE

In the context of medical decision-making, the principle of autonomy, or "self governance," is fundamental in American jurisprudence.²² Thirty years ago, the seminal case of Karen Ann Quinlan was among the first judicial reflections on the intersection of one's independent right to make medical determinations and the State's interest in preserving and protecting life.²³ The New Jersey Supreme Court analyzed Ms. Quinlan's right according to the constitutional theory of privacy rights developed through the line of cases beginning with *Griswold* and continuing through to *Roe*, as well as certain privacy provisions of New Jersey's Constitution.²⁴ Because Ms. Quinlan's neurological devastation prevented her from exercising her independent right of choice, the New Jersey court concluded that "Karen's right of privacy [could] be asserted on her behalf by her guardian under the peculiar circumstances here present."²⁵

²² See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (citing *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (1914) ("[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .")). *Canterbury* was among the first cases to recognize and articulate the necessity of "a reasonable divulgence by physician to patient [i.e., adequate disclosure] to make such a decision [i.e., informed consent] possible." *Id.*

²³ See *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976). See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270 & n.2 (1990) (noting that before *Quinlan*, "the number of right-to-refuse-treatment decisions was relatively few").

²⁴ *In re Quinlan*, 355 A.2d at 663 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). See generally *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); and N.J. CONST. art. I, § 1.

²⁵ *In re Quinlan*, 355 A.2d at 664. Ms. Quinlan, like Terri Schiavo, was in a persistent vegetative state (PVS) and had not memorialized her wishes regarding end-of-life medical treatment. Concluding its ground-breaking, judicial-pioneering analysis, the court issued a specific set of instructions:

[U]pon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital "Ethics Committee". . . . If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn . . . without any civil or criminal liability. . . .

Id. at 671-72. This procedural mechanism afforded the treating physicians the immunity from prosecution that had, at least in part, fueled their refusal to withdraw Ms.

Into the 1980s, the “laboratory’ of the States” continued to develop the doctrine of autonomy and hone its application in the context of a PVS diagnosis.²⁶ In Delaware, Mary Reeser Severns, an active member of the Euthanasia Council of Delaware, was involved in a one-car accident resulting in a serious brain injury and loss of conscious awareness.²⁷ Fed through a naso-gastric tube and reliant on a respirator, Ms. Severns’s husband and guardian sought the court’s permission to discontinue use of artificial life-preserving mechanisms.²⁸ Mr. Severns, in fact, argued that his wife had clearly stated that “she did not want to be kept alive as a ‘vegetable’ or by extraordinary means.”²⁹ The Delaware court concluded that Mr. Severns, as his wife’s guardian, could “vicariously assert any constitutional right which Mrs. Severns has and which is relevant to the relief sought.”³⁰ In reaching this conclusion, the court noted an emergence of “something approaching consensus” regarding operative principles at the end of life as reflected in a Massachusetts Supreme Judicial Court opinion.³¹

A person has a strong interest in being free from nonconsensual invasion of his bodily integrity and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity. Thus a competent

Quinlan’s respirator.

²⁶ See *Cruzan*, 497 U.S. at 292 (O’Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

²⁷ *Severns v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334, 1336 & 1338 n.2 (Del. 1980).

²⁸ See *id.* at 1338-39. The Delaware court recognized that it was “on the threshold of new terrain—the penumbra where death begins but life, in some form, continues. We have been led to it by the medical miracles which now compel us to distinguish between ‘death,’ as we have known it, and death in which body lives in some fashion but the brain (or a significant part of it) does not.” *Id.* at 1344. *Accord* *Rasmussen v. Fleming*, 741 P.2d 674, 678 (1987) (“Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. . . . sustained only by medical technology.”); *In re Eichner v. Dillon*, 426 N.Y.S.2d 517, 531 (N.Y. App. Div. 1980) (citing Donald G. Colletter, Jr., *Death, Dying and the Law: A Prosecutorial View of the Quinlan Case*, 30 RUTGERS L. REV. 304 (1977)); *John F. Kennedy Mem’l Hosp., Inc. v. Blutworth*, 452 So. 2d 921, 923 (Fla. 1984) (“It is now possible to hold such persons on the threshold of death for an indeterminate period of time by utilizing extraordinary mechanical or other artificial means to sustain their vital bodily functions. The procedures used can be accurately described as a means of prolonging the dying process rather than a means of continuing life.”).

²⁹ *Severns*, 421 A.2d at 1338 n.2.

³⁰ *Id.* at 1350.

³¹ *Id.* at 1341-42 (citing *In re Spring*, 405 N.E.2d 115 (Mass. 1980)).

person has a general right to refuse medical treatment in appropriate circumstances, to be determined by balancing the individual interest against countervailing [sic] State interests, particularly the State interest in the preservation of life. . . . The same right is also extended to an incompetent person, to be exercised through a 'substituted judgment' on his behalf. The decision should be that which would be made by the incompetent person, if he were competent, taking into account his actual interests and preferences and also his present and future incompetency.³²

In another case before the Massachusetts high court, Paul Brophy's right to discontinue treatment was upheld, further bolstering the judicial consensus regarding a patient's autonomy in the context of a PVS diagnosis.³³ An Easton, Massachusetts fireman and emergency services technician, Mr. Brophy suffered an aneurysm on March 22, 1983, resulting in PVS.³⁴ Unable to chew or swallow, Mr. Brophy received nutrition and hydration through a gastrostomy tube (G-tube).³⁵ After weeks of intensive physical and speech therapy with no signs of improvement, Mr. Brophy's wife and legal guardian requested removal of the G-tube.³⁶ When the physicians and hospital refused, litigation commenced.

Although Mr. Brophy had never specifically discussed whether he would choose to forgo treatment via G-tube, he had clearly articulated his preferences regarding end-of-life treatment. Discussing the *Quinlan* case with his wife, Mr. Brophy had stated, "I don't ever want to be on a life-support system. No way do I want to live like that; that is not living."³⁷ Approximately five years earlier Mr. Brophy had "helped to rescue from a burning truck a man who received extensive burns and who died a few months later."³⁸ Tossing his commendation for bravery in the trash, Mr. Brophy said, "I should have been five minutes later. It would have been all over for him."³⁹ And finally, just a week "prior to his illness, in discussing a local teenager who had been put

³² *Id.* at 1341-42 (citing *In re Spring*, 405 N.E.2d 115 (Mass. 1980)).

³³ *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986).

³⁴ *Id.* at 628.

³⁵ *Id.*

³⁶ *See id.*

³⁷ *Id.* at 632 n.22. The court noted that one of Mr. Brophy's favorite aphorisms, no doubt frequently expressed in his line of work, was, "When your ticket is punched, it is punched." *Id.*

³⁸ *Id.*

³⁹ *Id.* Referring to the burn victim, Mr. Brophy told his brother, "If I'm ever like that, just shoot me, pull the plug." *Id.*

on a life support system he said, 'No way, don't ever let that happen to me, no way.'⁴⁰

Based on the clarity of this evidence, the probate court judge found that Mr. Brophy, "would, if competent, decline to receive food and water in this manner," yet refused to permit withdrawal of the life-sustaining treatment.⁴¹ On appeal, the Supreme Judicial Court of Massachusetts set aside the lower court judgment and authorized Mr. Brophy's guardian to transfer him "to the care of other physicians who [would] honor Brophy's wishes."⁴²

The *Brophy* Court noted the law's evolution from an emphasis away from "a paternalistic view of what is 'best' for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved," regardless of their level of competency.⁴³ On the tension between the State's and an individual's arguably competing interests, the *Brophy* Court emphasized that

'[i]t does not advance the interest of the State or the ward to treat the ward as a person of lesser status or dignity than others. To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons.' . . . A significant aspect of this right of privacy is the right to be free of nonconsensual invasion of one's bodily integrity.⁴⁴

⁴⁰ *Id.*

⁴¹ *Id.* at 629.

⁴² *Id.*

⁴³ *Id.* at 633. On the importance of honoring the privacy and dignity of both competent and incompetent persons, the *Brophy* court twice cited the Florida Supreme Court. *Id.* at 633 & 633 n.27 (citing *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980)). See also John F. Kennedy Mem'l Hosp., Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984) (conveying that the right articulated in *Satz* "should not be lost when [terminally ill patients] suffer irreversible brain damage, become comatose, and are no longer able to personally express their wishes to discontinue the use of extraordinary artificial support systems.").

⁴⁴ *Brophy*, 497 N.E.2d at 634 (citation omitted); *In re Spring*, 405 N.E.2d 115, 119 (Mass. 1980); PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL & BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 121, 136 (1983), available at http://www.bioethics.gov/reports/past_commissions/deciding_to_forego_tx.pdf ("In general, a person's choices regarding care ought to override the assessments of others about what best serves that person. . . . decisionmaking for incapacitated patients should be guided by the principle of substituted judgment, which promotes the underlying values of self-determination . . .").

The *Brophy* Court correctly noted that balancing the State's interest in prolonging a patient's life against the rights of the patient to reject such prolongation entails recognition that the State's interest in life encompasses a broader interest than "mere corporeal existence."⁴⁵

By 1990, when the U.S. Supreme Court decided *Cruzan v. Director, Missouri Department of Health*, the highest courts in many states had already determined that patient autonomy was the prevailing principle when confronted with an end-of-life dispute involving a diagnosis of PVS.⁴⁶ Nonetheless, the *Cruzan* opinion was instrumental in solidifying the analytical framework. In January 1983, Nancy Cruzan, thirty years old, lost control of her car traveling down a rural Missouri road and overturned her vehicle.⁴⁷ By the time she was found, her brain had been deprived of oxygen for twelve to fourteen minutes, causing her to enter PVS.⁴⁸ After it became clear that Ms. Cruzan would not regain her mental faculties, her parents asked the hospital to terminate the artificial nutrition and hydration keeping their daughter alive.⁴⁹ When the hospital refused, Ms. Cruzan's parents sought judicial authorization, which was granted when the court found that a person in Nancy's condition had a fundamental right under both the Missouri and the U.S. Constitutions to refuse or direct the withdrawal of "death prolonging procedures."⁵⁰ The Supreme Court of Missouri reversed, declining to read a broad right of privacy in Missouri's Con-

⁴⁵ *Brophy*, 497 N.E.2d at 635 ("The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity."). *Contra id.* at 640 (Nolan, J., dissenting) ("I can think of nothing more degrading to the human person than the balance which the court struck today in favor of death and against life. It is but another triumph for the forces of secular humanism (modern paganism) which have now succeeded in imposing their anti-life principles at both ends of life's spectrum."); *id.* (Lynch, J., dissenting in part) ("[T]he State has a closely related interest in preserving the sanctity of all human life.") (discussing the philosophical foundations of the state as articulated by Hobbes and Locke). See generally Lois Shepherd, *In Respect of People Living in a Permanent Vegetative State—And Allowing Them to Die*, 16 HEALTH MATRIX 631 (2006) (arguing that Terri Schiavo "could not feel, see, hear, taste, smell, perceive, think, or experience life in any way at all" and yet "she was kept alive for others' benefit and on the basis of others' hopes, beliefs, or principles").

⁴⁶ 497 U.S. 261 (1990).

⁴⁷ *Id.* at 266.

⁴⁸ *Id.*

⁴⁹ *Id.* at 267.

⁵⁰ *Id.* at 268. The trial court found that Ms. Cruzan's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least half-way normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." *Id.*

stitution and expressing doubt as to whether such a right existed under the U.S. Constitution.⁵¹

In *Cruzan*, the Court reiterated the relevant state case law, and concluded that “the common-law doctrine of informed consent” was generally viewed as “encompassing the right of a competent individual to refuse medical treatment.”⁵² Furthermore, citing the Fourteenth Amendment, the Court stated that the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions” and, for purposes of the *Cruzan* case, the Court “assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”⁵³

The precise question in *Cruzan*, however, concerned a person in PVS without the capacity to communicate her wishes regarding the continuation of end-of-life treatment. The Court noted that because an incompetent person is not able to make an informed and voluntary choice to exercise her self-determination right to refuse treatment, such right must be exercised by a surrogate.⁵⁴ In its holding, the Court stated that the U.S. Constitution does not forbid states from requiring that surrogates demonstrate an incompetent’s wishes as to the withdrawal of treatment by a clear and convincing evidentiary standard.⁵⁵ In other words, the nation’s highest court did not negate the autonomy regime recognized universally among the states; rather, the Court simply acknowledged that in the context of surrogacy decisions on behalf of incompetents, states were not acting unconstitutionally when they required clear and convincing evidence of the incompetent’s personalized decision.⁵⁶

As of 1990, the same year that tragedy befell Terri Schiavo, safeguarding the liberty interests of incompetents was the chief concern of the judiciary from state court judges to Supreme Court justices. The legal consensus had coalesced around this common law principle of autonomy, even in the face of challenges premised upon the State’s

⁵¹ *Id.* Interpreting the Missouri Living Will statute, the state’s highest court found a state policy strongly favoring the preservation of life. *Id.*

⁵² *Id.* at 277.

⁵³ *Id.* at 278-79 (citing, *inter alia*, *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990)).

⁵⁴ *Id.* at 280.

⁵⁵ *See id.* Furthermore, the Court stated that “a State may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.” *Id.* at 282.

⁵⁶ *See id.* at 285.

interest in preserving life.⁵⁷ As discussed more fully throughout this Article, and particularly in the Conclusion, it is this autonomy principle, buttressed by thirty years of legal precedent, ethics guidelines for the medical profession⁵⁸ and volumes of legal scholarship and commentary,⁵⁹ which correctly guided the judicial process in the *Schiavo* case. As a normative matter, this Article argues that this autonomy principle best safeguards individual, personalized decision-making in the midst of a pluralistic society that is increasingly religiously and politically polarized. Ultimately, in the context of a PVS diagnosis, where consciousness is permanently lost, the ability of a surrogate to implement a patient's final directive must be preserved. It is this private liberty interest at the end-of-life that is threatened by the rhetoric and agenda of Biblical BioPolitics that seeks to legislate a vitalist, "sanctity of life" regime that would result in the erection of high procedural barriers precluding feeding tube removal. These public policy concerns will be revisited in Part IV after a comprehensive examination of the most recent battle in the ongoing culture wars: the Terri Schiavo case.

⁵⁷ See Alan Meisel, *The Legal Consensus About Forgoing Life-Sustaining Treatment: Its Status and Its Prospects* (pt. 1), 2 KENNEDY INST. ETHICS J. 309, 332 (1992).

⁵⁸ See Lois Snyder & Cathy Leffler, *Ethics Manual, Fifth Edition*, 142 ANN. INT. MED. 560, 560-82 (2005).

⁵⁹ See Marjorie Maguire Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985) (recommending the creation of a distinct and independently protected interest in patient autonomy); Norman L. Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 ANNALS HEALTH L. 37 (2004) (arguing that the profoundly disabled have autonomy rights deserving of protection). *But see generally* Bruce Jennings, *The Liberal Neutrality of Living and Dying: Bioethics, Constitutional Law, and Political Theory in the American Right-to-Die Debate*, 16 J. CONTEMP. HEALTH L. & POL'Y 97, 125 (1999) (addressing physician assisted suicide and arguing against Ronald Dworkin's theory of liberal neutrality and its accommodation of the autonomy regime and suggesting an alternative approach focusing instead on a regime that would honor human dignity by protecting "the person who exists (even without consciousness) as an embodied self still entangled in relationships of care and memory"). *See generally* CARL E. SCHNEIDER, *THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS* (1998); and WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY: COERCION AND CONSTRAINTS IN A LIBERAL SOCIETY* (1996).

II. TERRI SCHIAVO AND JUDICIAL PROCESS⁶⁰

Theresa (Terri) Marie Schindler was born on December 3, 1963 to Robert and Mary Schindler.⁶¹ She was raised in a “normal, Roman Catholic nuclear family consisting of her parents and her brother and sister.”⁶² Terri met Michael Schiavo in the early 1980s, and after dating for two years, they were married on November 10, 1984.⁶³ By all accounts, the Schiavo and Schindler families were “close and friendly.”⁶⁴

In the early morning hours of February 25, 1990, both Michael’s and Terri’s lives changed dramatically when Terri, age twenty-six, suffered a cardiac arrest.⁶⁵ Michael, awakened by his wife’s collapse,

⁶⁰ In re-constructing Terri Schiavo’s legal saga, the author used two websites which provided links to many of the pleadings and opinions not otherwise available through official reporters or electronic databases. The author cites them with great appreciation. See generally Matt Conigliaro, Abstract Appeal, <http://www.abstractappeal.com> (last visited Feb. 27, 2006) (emphasizing Florida state law and the legal issues decided by the Eleventh Circuit Court of Appeals, which included the Terri Schiavo case); Kenneth W. Goodman & Kathy Cerminara, University of Miami Ethics Programs, Schiavo Case Resources, http://www.miami.edu/ethics/schiavo_project.htm (last visited Feb. 27, 2006) (providing information concerning the Schiavo case, including a timeline of key events, selected bibliography, informational web-links, and video of conference presentations); MICHAEL SCHIAVO, TERRI: THE TRUTH (2006); and MARY & ROBERT SCHINDLER, A LIFE THAT MATTERS: THE LEGACY OF TERRI SCHIAVO—A LESSON FOR US ALL (2006).

⁶¹ *In re Guardianship of Schiavo (Schiavo I)*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

⁶² *In re Guardianship of Schiavo*, No.90-2908GD-003, 2000 WL 34546715, at *1 (Fla. Cir. Ct. Feb. 11, 2000).

⁶³ See Jay Wolfson, Guardian Ad Litem for Theresa Marie Schiavo, A Report to Governor Jeb Bush and the 6th Judicial Circuit in the Matter of Theresa Marie Schiavo 7 (Dec. 1, 2003), <http://www.miami.edu/ethics/schiavo/wolfson%27s%20report.pdf> [hereinafter Wolfson Report]. Pursuant to the requirements of Florida House Bill 35-E (Chapter 2003-418, Laws of Florida) and the Order of Chief Judge David Demers, Mr. Wolfson was appointed Guardian Ad Litem for Terri Schiavo and given thirty days to report to the court and to the Governor on her condition. In formulating his report, Mr. Wolfson reviewed all relevant clinical, medical and court records, including all items of evidence, and met with members of both families and Terri’s caregivers. Mr. Wolfson also interviewed medical, legal, bioethical and religious practitioners and scholars and met regularly over the course of twenty days with Terri, his ward. *Id.* at 1-2. See also *Schiavo I*, 780 So. 2d at 177 (describing, generally, Terri Schiavo’s personal relationship with the persons involved in the lawsuit).

⁶⁴ Wolfson Report, *supra* note 63, at 7.

⁶⁵ *Id.* Despite subsequent accusations by her parents and sporadic media reports that Terri was the victim of domestic violence, the original trial before Judge Greer resulted in a finding that Ms. Schiavo’s heart attack was a result of a potassium imbalance, perhaps caused by the eating disorder bulimia nervosa. See *In re Guardianship of Schiavo*, 2000 WL 34546715, at *1; Wolfson Report, *supra* note 63, at 8. See also Vickie Chachere, *Schiavo Case Highlights Eating Disorders*, USA TODAY,

called 911. During the several minutes it took for paramedics to arrive, Mrs. Schiavo experienced a loss of oxygen to the brain for a period sufficiently long to cause permanent, irreversible loss of brain function.⁶⁶ Unable to resuscitate Mrs. Schiavo, who had slipped into a coma, doctors performed life-saving medical interventions, "without which she surely would have died."⁶⁷

Mrs. Schiavo had never executed a written medical directive or living will or otherwise memorialized her wishes in writing regarding the administration of extraordinary medical care.⁶⁸ On June 18, 1990, Mrs. Schiavo was adjudicated incompetent, and Mr. Schiavo was formally appointed by the court to serve as his wife's legal guardian. Her parents did not contest this appointment.⁶⁹

From 1990 through 1994, Mrs. Schiavo lived in a variety of nursing homes where Michael coordinated extensive rehabilitative therapy, including physical, occupational, speech and recreational thera-

Feb. 26, 2005, available at http://www.usatoday.com/news/health/2005-02-25-schiavo-eating-disorder_x.htm (discussing the possibility Terri Schiavo's potassium imbalance, resulting in her 1990 collapse, was caused by bulimia, and the subsequent malpractice case against the physician who neglected to treat the alleged bulimia); Gary D. Fox, *The Lost Lesson of Terri Schiavo*, ST. PETERSBURG TIMES, Oct. 26, 2003, at Sunday Journal (Terri and Michael's malpractice attorney discussing Terri's bulimia); *Larry King Live: Interview with Michael Schiavo* (CNN television broadcast Oct. 27, 2003). *But see* Jeff Johnson, *Doctor Says Schiavo Likely Victim of 'Some Kind of Trauma'*, CNSNEWS.COM, Oct. 28, 2003, <http://www.cnsnews.com/ViewCulture.asp?Page=\Culture\archive\200310\CUL20031028a.html>. Sodium and potassium maintain a vital chemical balance in the human body that can become imbalanced by aggressive weight loss, obsessive dieting and excessive hydration. *See* Wolfson Report, *supra* note 63, at 8. In addition to dramatic weight loss, she was also reportedly drinking ten to fifteen glasses of iced tea each day. *Id.* The eating disorder issue was the subject of a 1992 malpractice action filed by Michael Schiavo against the obstetrician who had been overseeing his wife's fertility therapy prior to her cardiac arrest. *See In re Guardianship of Schiavo*, 2000 WL 34546715, at *2. In late 1992, the malpractice case was resolved with a settlement and jury verdict resulting in \$300,000 award to Mr. Schiavo for loss of consortium and \$700,000 to the Guardianship of Theresa Marie Schiavo. *Id.* *See generally* Laura Griffin, *Malpractice Suit Brings \$2-Million to Woman Left in Vegetative State*, ST. PETERSBURG TIMES, Nov. 12, 1992, at 3B. These funds were dispersed in February of 1993, and soon resulted in a severance of the previously amicable relationship between Mr. Schiavo and the Schindlers, Terri's parents. *See* Wolfson Report, *supra* note 63, at 9. In his findings of fact, Judge Greer noted that the souring of these relations was "predicated upon money and the fact that Mr. Schiavo was unwilling to equally divide his loss of consortium award with Mr. and Mrs. Schindler." *In re Guardianship of Schiavo*, 2000 WL 34546715, at *2. Furthermore, Judge Greer also noted that "money overshadows this entire case and creates potential of conflict of interest for both sides." *Id.*

⁶⁶ Wolfson Report, *supra* note 63, at 7; *Schiavo I*, 780 So. 2d at 177.

⁶⁷ Wolfson Report, *supra* note 63, at 8.

⁶⁸ *In re Guardianship of Schiavo*, 2000 WL 34546715, at *3.

⁶⁹ Wolfson Report, *supra* note 63, at 8.

pies for his wife.⁷⁰ Clinical records reveal that she was not responsive to neurological and swallowing tests, and despite aggressive therapies, she did not reveal functional abilities or cognitive movements.⁷¹

Meanwhile, Mr. Schiavo and Mary Schindler, Terri's mother, "were virtual partners in their care of and dedication to Theresa."⁷² One court noted, in contrast to subsequent *ad hominem* attacks on Michael Schiavo swirling throughout the Internet and more traditional media, that

Theresa has been blessed with loving parents and a loving husband. Many patients in this condition would have been abandoned by friends and family within the first year. Michael has continued to care for her and visit her all these years. He has never divorced her. . . . As a guardian, he has always attempted to provide optimum treatment for his wife. He has been a diligent watch guard of Theresa's care, never hesitating to annoy the nursing staff in order to assure that she receives the proper treatment.⁷³

Over time, however, this spirit of cooperation between Mr. Schiavo and the Schindlers deteriorated.

Following the resolution of a medical malpractice action filed by Mr. Schiavo against his wife's obstetrician, relations between Michael and the Schindlers grew cold, and, ultimately, the parties stopped

⁷⁰ *Larry King Live: Interview with Michael Schiavo*, *supra* note 65. On May 12, 1990, following extensive testing, therapy and observation, Terri was discharged from Humana Northside Hospital to the College Park skilled care and rehabilitation facility. Wolfson Report, *supra* note 63, at 8. Later that summer, Ms. Schiavo spent three months in Bayfront Medical Center, St. Petersburg, Florida, receiving extensive and aggressive rehabilitation. In late autumn of 1990, following months of therapy and testing, and formal diagnoses of persistent vegetative state with no evidence of improvement, Michael took Terri to a California physician pioneering an experimental brain stimulator implant. *Larry King Live: Interview with Michael Schiavo*, *supra* note 65. Mr. Schiavo stated that "when this doctor looked at the CAT scans, that it was probably not going to work because there's just no brain left. But I did it anyway, because I loved Terri. And I wanted to bring my wife back." *Larry King Live*, *supra* note 65.

⁷¹ Wolfson Report, *supra* note 63, at 8-9.

⁷² *Id.* at 9. "There is no question but that complete trust, mutual caring, explicit love and a common goal of caring for and rehabilitating Theresa, were the shared intentions of Michael Schiavo and the Schindlers." *Id.*

⁷³ *Schiavo I*, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001).

speaking.⁷⁴ Additionally, as early as 1994, Mr. Schiavo was apparently beginning to lose hope that his wife might recover.⁷⁵

A. Florida End-of-Life Law

The Florida constitutional and case law applicable in the *Schiavo* case was well-established by 1990, the year that Terri Schiavo entered into PVS. In fact, in September of that same year, the Florida Supreme Court decided *In re Guardianship of Browning*, holding that all persons, competent and incompetent alike, enjoy a fundamental privacy right to self-determination.⁷⁶ The *Browning* Court recognized that under a broad privacy provision in the Florida Constitution, a person has the inherent right to make choices regarding medical treatment. Referencing *Cruzan* (published three months earlier in June 1990), the *Browning* Court concluded that this privacy right encompasses all medical choices, including refusal of life-saving hydration and nutrition.⁷⁷ Additionally, the *Browning* Court held that in the event a patient was not mentally able to make her medical wishes known, her guardian or surrogate was authorized to make the personal and private decision "which the patient would personally choose," pursuant to a "substituted judgment" standard.⁷⁸

Florida's legislative scheme authorizing termination of life-prolonging procedures in a situation involving PVS is established

⁷⁴ *In re Guardianship of Schiavo (2000 Trial Order)*, No. 90-2908GD-003, at 2-3 (Fla. Cir. Ct. 2000); Wolfson Report, *supra* note 63, at 8-11.

⁷⁵ Wolfson Report, *supra* note 63, at 10. During the previous four years, Michael had "insistently held to the premise" that Terri could recover, despite "consistent medical reports indicating that there was little or no likelihood for her improvement." *Id.*

⁷⁶ 568 So. 2d 4, 10 (Fla. 1990) ("privacy has been defined as an individual's 'control over or the autonomy of the intimacies of personal identity' . . ." (quoting Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 281 (1977))). See also *id.* ("privacy has been defined as . . . a 'physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large.'" (quoting Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 677 (1978))); *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . .").

⁷⁷ *In re Browning*, 568 So. 2d at 10. See also *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

⁷⁸ *In re Browning*, 568 So. 2d at 13. The Court noted that "[o]ne does not exercise another's right of self-determination or fulfill that person's right of privacy by making a decision which the state, the family, or public opinion would prefer. The surrogate decisionmaker must be confident that he or she can and is voicing the patient's decision." *Id.* (emphasis omitted).

under Florida Statutes, Chapter 765. First, "life-prolonging procedure" is statutorily defined as "any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function."⁷⁹ "Persistent vegetative state" means "a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of voluntary action or cognitive behavior of any kind [and;] (b) An inability to communicate or interact purposefully with the environment."⁸⁰ Lastly, a "terminal condition" is deemed "a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death."⁸¹

In the absence of a living will, Florida Statutes require that a surrogate be satisfied that "(a) The patient does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the patient [and;] (b) The patient has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal."⁸² Accordingly, pursuant to Florida law, a guardianship case at the end of life must first resolve the threshold question of medical status, i.e., whether the ward is in a condition from which she will never regain consciousness. Only after the medical prognosis is resolved may a court then move to the autonomy analysis, i.e., whether Mrs. Schiavo would choose to forgo life-prolonging procedures, including artificially provided sustenance and hydration.

B. Terri Schiavo's Case in the Court of Law

1. The 2000 Trial

By May 1998, Michael Schiavo had evidently accepted the fact that his wife's condition was irreversible, and as his wife's legal guardian, he filed a Petition for Authorization to Discontinue Artificial Life Support (the Petition), invoking the trial court's jurisdiction to serve as surrogate decision-maker and to make an independent determination of his wife's medical condition and to make the decision

⁷⁹ FLA. STAT. ANN. § 765.101(10) (West 2005).

⁸⁰ § 765.101(12). Similarly, "incapacity" or "incompetent" are defined as meaning "the patient is physically or mentally unable to communicate a willful and knowing health care decision." § 765.101(8).

⁸¹ § 765.101(17).

⁸² § 765.305(2).

whether to continue or discontinue life-prolonging procedures.⁸³ Mrs. Schiavo's parents, the Schindlers, objected to the Petition as "interested persons," and the action in the Pinellas County, Florida Circuit Court before probate Judge George W. Greer (the 2000 Trial) assumed the form of an adversary proceeding. Both Mr. Schiavo and the Schindlers presented copious evidence advancing their positions.⁸⁴

The first issue before Judge Greer was whether Mrs. Schiavo would ever regain consciousness. Indeed, Judge Greer correctly highlighted the confusing cruelty of PVS when he noted that Mrs. Schiavo would occasionally make moaning sounds and experience cycles of apparent wakefulness.⁸⁵ These characteristics are consistent with the definition and description of PVS as promulgated by both the American Academy of Neurology and the American Medical Association.⁸⁶

⁸³ *Schiavo I*, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001). "The Schindlers petitioned the court to remove Michael as Guardian. They made allegations that he was not caring for [Terri], and that his behavior was disruptive to [Terri's] treatment and condition." Wolfson Report, *supra* note 63, at 10. The court concluded, however, "that there was no basis for removal of Michael as Guardian [sic]. Further it was determined that he had been very aggressive and attentive in his care of [Terri]." *Id.* One nursing facility administrator labeled Michael "a nursing home administrator's nightmare" due to his demand for the meticulous care, and concern for the well-being, of Terri. *Id.*

⁸⁴ *Schiavo I*, 780 So. 2d 176, 179 (Fla. Dist. Ct. App. 2001). Michael actually requested that Judge Greer treat the petition as an adversary proceeding pursuant to Florida Probate Rule 5.025. As explained by the appellate court in *Schiavo II*, Michael, as guardian, could have filed a petition pursuant to Florida Probate Rule 5.900, which "contemplates a quick proceeding in which the trial court approves the decision already reached by the guardian." See *In re Guardianship of Schiavo (Schiavo II)*, 792 So. 2d 551, 557 (Fla. Dist. Ct. App. 2001). Given the years of bitter disagreement and dissension between the Schindlers and Michael, however, he instead filed a petition requesting the trial court function as the surrogate decision-maker. In this context, the trial court actually acted as Terri's guardian, and the appellate court in *Schiavo I* affirmed the trial court's discretion in not appointing a guardian *ad litem*, on the basis that such an appointment would have added "little of value to this process." *Schiavo I*, 780 So. 2d at 179.

⁸⁵ *Schiavo I*, 780 So. 2d at 177. Judge Greer's opinion regarding PVS and Terri's medical condition during the 2000 Trial was informed by the specific testimony of two Florida physicians.

⁸⁶ See John B. Oldershaw et al., Persistent Vegetative State: Medical, Ethical, Religious, Economic and Legal Perspectives, 1 DEPAUL J. HEALTH CARE L. 495, 498 n.12 (1997) (citing Executive Bd., Am. Acad. of Neurology, Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, April 21, 1988, 39 NEUROLOGY 125, 125-26 (1989) and Council on Scientific Affairs & Council on Ethical and Judicial Affairs, Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support, 263 JAMA 426, 426-30 (1990)). Commonly, patients in a PVS are able to open and move their eyes, spontaneously smile and vocalize guttural grunting noises. *Id.* at 498. These characteristics, in fact, prompted testimony from Terri's mother at the 2000

Mr. Schiavo presented medical evidence establishing the fact that since her heart attack in 1990, his wife's brain had severely deteriorated.⁸⁷ CT scans of Terri Schiavo's brain taken in 1996 revealed a severely abnormal structure not curable by medicine.⁸⁸ According to these CT scans, much of her cerebral cortex was no longer alive.⁸⁹ The medical testimony at the 2000 Trial confirmed that Mrs. Schiavo, in a PVS for the previous ten years, would never regain consciousness or mental awareness.⁹⁰ Furthermore, evidence presented at the 2000 Trial also established that testing performed throughout the early 1990s conclusively determined that Mrs. Schiavo did not have the capacity to swallow on her own.⁹¹ Judge Greer deemed the medical evidence presented by Michael "overwhelming" and "beyond all doubt that Theresa Marie Schiavo is in a persistent vegetative state or the same is [sic] defined by Florida Statutes Section 765.101(12)" and without "hope of ever regaining consciousness and therefore capacity."⁹²

Trial that, based on her perceptions, Terri was responsive. 2000 Trial Order, No. 90-2908GD-003, at 8 (Fla. Cir. Ct. 2000). In PVS, the brain stem and spinal cord remains intact, although the cerebral cortex is not functioning. See Oldershaw et al., *supra*, at 498; Quality Standards Subcomm. of the Am. Acad. of Neurology, *Practice Parameters: Assessment and Management of Patients in the Persistent Vegetative State (Summary Statement)*, 45 NEUROLOGY 1015, 1015-18 (1995).

⁸⁷ *Schiavo I*, 780 So. 2d at 177. On April 1, 2005, an exhaustive autopsy was performed revealing that Mrs. Schiavo's brain had "withered to half the normal size since her collapse in 1990" and that "[n]o amount of therapy or treatment would have regenerated the massive loss of neurons" or otherwise improved her condition. See Abby Goodnough, *Schiavo Autopsy Says Brain, Withered, Was Untreatable*, N.Y. TIMES, June 16, 2005, at A1, A24. Additionally, the autopsy revealed that Mrs. Schiavo's brain deterioration had left her blind. See *id.* at A1. The autopsy, however, could not confirm the cause of Terri's 1990 heart attack, nor could it confirm the diagnosis of PVS, as PVS is technically a clinical diagnosis. See *id.* at A24.

⁸⁸ *Schiavo I*, 780 So. 2d at 177. But see Benedict Carey, *New Signs of Awareness Seen in Some Brain-Injured Patients*, N.Y. TIMES, Feb. 8, 2005, at A1 (describing a study published in the journal Neurology suggesting that thousands of brain-damaged people who are treated as if they are almost completely unaware may in fact hear and register what is going on around them but be unable to respond).

⁸⁹ *Schiavo I*, 780 So. 2d at 177.

⁹⁰ Wolfson Report, *supra* note 63, at 8.

⁹¹ *Id.* at 27. In fact, three independent sets of barium swallowing tests were performed in 1991, 1992 and 1993. Each of these tests determined that Terri did not have sufficient neurological function to swallow without risk of aspiration of substances into her lungs (thereby subjecting her to risk of infection and subsequent death). *Id.*

⁹² *In re Guardianship of Schiavo*, No.90-2908GD-003, 2000 WL 34546715, at *4 (Fla. Cir. Ct. Feb. 11, 2000). Under the Health Care Advanced Directives chapter of the Florida statutes, "persistent vegetative state" is defined as "a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of volun-

At the conclusion of the week-long 2000 Trial during which the court heard testimony from eighteen witnesses, including friends, family, and medical experts⁹³ and considered CT scans, videotape of Mrs. Schiavo and other relevant evidence, Judge Greer concluded that “unless an act of God, a true miracle, were to recreate her brain, Theresa will always remain in an unconscious, reflexive state, totally dependent upon others” and unable to express her wishes to the court.⁹⁴

Having decided the threshold issue of capacity, the court then confronted the question of whether Terri Schiavo would choose to continue life-prolonging treatment in light of her current circumstances. Without a living will or any other written declarations on which to rely, Judge Greer was forced to rely upon the testimony of Mrs. Schiavo’s family and friends who recounted oral conversations in which Mrs. Schiavo had made known her feelings about artificial life support.⁹⁵ Judge Greer found the testimony of Scott Schiavo, Michael’s brother, and Joan Schiavo, Terri’s sister-in-law, to be particularly credible, and among the only testimony not impeached or otherwise discredited on cross-examination.⁹⁶ Both Scott Schiavo and Joan

tary action or cognitive behavior of any kind. (b) An inability to communicate or interact purposefully with the environment.” FLA. STAT. ANN. § 765.101(12) (West 2005). Although they would later change their opinion, throughout the 2000 Trial, even the Schindlers acknowledged that Terri was in a diagnosed persistent vegetative state. Wolfson Report, *supra* note 63, at 14.

⁹³ During the 2000 Trial, Dr. James Barnhill, a board-certified neurologist who had reviewed a CT scan of Terri’s brain and an EEG, testified that most, if not all, of Terri’s cerebral cortex was either totally destroyed or beyond repair. Based on the medical evidence received in court, Judge Greer also determined that “without the feeding tube she will die in seven to fourteen days” and that “such death would be painless.” *In re Guardianship of Schiavo*, 2000 WL 34546715, at *4.

⁹⁴ *Schiavo I*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001). At the time of the 2000 Trial, Terri had been fed and hydrated by tubes, with nursing staff changing her diapers regularly for the preceding ten years. *In re Guardianship of Schiavo*, 2000 WL 34546715, at *1. In adults with nontraumatic injuries, a persistent vegetative state can be considered to be permanent after three months. See The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* (Part 1), 330 NEW ENG. J. MED. 1499, 1499 (1994); The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State* (Part 2), 330 NEW ENG. J. MED. 1572 (1994).

⁹⁵ See *In re Guardianship of Browning*, 568 So. 2d 4, 15 (Fla. 1990) (recognizing that patients frequently fail to specify their wishes in the form of a living will and acknowledging that oral declarations made outside of court, i.e., hearsay, are admissible in end-of-life guardianship proceedings).

⁹⁶ *In re Guardianship of Schiavo*, 2000 WL 34546715, at *4. See also Raja Mishra, *Conflicting Memories About Schiavo’s Wishes*, BOSTON GLOBE, Mar. 28, 2005, at A1 (“Joan Schiavo, married to Michael Schiavo’s older brother William, was among Terri Schiavo’s closest friends” and testified that she and Terri “talked about

Schiavo recounted clear statements made by Terri Schiavo after she had visited her grandmother in intensive care and then again at a funeral luncheon she had attended for another family member.⁹⁷ In both contexts, Mrs. Schiavo was adamant that she would not “want to be kept alive on a machine” or live as a burden to others.⁹⁸ Additionally, following a television movie in which a man was left in a coma, she had plainly declared that “she wanted it stated in her will that she would want the tubes and everything taken out if that ever happened to her.”⁹⁹ The court found the testimony of Mrs. Schiavo’s in-laws, in addition to her husband’s testimony, to be reliable and credible.¹⁰⁰ Accordingly, the court held these statements to be Mrs. Schiavo’s oral declarations concerning her intentions as to what she would choose to do under the present circumstances.¹⁰¹

In its findings of fact and conclusions of law, the court found that Michael Schiavo had proven clearly and convincingly that his wife had made creditable and reliable oral statements supporting the relief Mr. Schiavo requested.¹⁰² Consistent with the court’s understanding of how Mrs. Schiavo would exercise her privacy interest, the court granted Michael Schiavo’s request and authorized the removal of his wife’s feeding tube.¹⁰³ From the bench, Judge Greer commented that

the issue about a dozen times because they knew a woman who had to remove a feeding tube from her baby. Terri Schiavo said, ‘If that ever happened to one of us, in our lifetime, we would not want to go through that,’ Joan Schiavo testified.”)

⁹⁷ *In re Guardianship of Schiavo*, 2000 WL 34546715, at *5.

⁹⁸ *Id.* See also Mishra, *supra* note 96, at A1 (Terri stated, “If I ever go like that, just let me go. I don’t want to be kept alive on a machine,” according to Scott Schiavo’s testimony).

⁹⁹ *In re Guardianship of Schiavo*, 2000 WL 34546715, at *6.

¹⁰⁰ *Id.*

¹⁰¹ Judge Greer did not find the testimony set forth by the Schindlers and their witnesses to be similarly clear and convincing. *Id.*, at *3, *5. Notably, throughout the course of the 2000 Trial members of the Schindler family voiced “the disturbing belief that they would keep Theresa alive at any and all costs.” Even if Terri had told them of her intention to have artificial nutrition withdrawn, “they would not do it.” Wolfson Report, *supra* note 63, at 14. Additionally, testimony on cross-examination elicited “gruesome examples” of the lengths to which the Schindler family agreed it would go to prevent Terri’s death, including amputation of each limb and open heart surgery, if necessary. “There was additional, difficult testimony that appeared to establish that despite the sad and undesirable condition of Theresa, the parents still derived joy from having her alive, even if Theresa might not be at all aware of her environment given the persistent vegetative state.” *Id.*

¹⁰² *In re Guardianship of Schiavo*, 2000 WL 34546715, at *6.

¹⁰³ *Id.* at *7. Although Judge Greer’s 2000 Trial Order used language of a “somewhat permissive nature[,] . . . the trial court was not actually giving [Michael] discretion on whether to discontinue the life-prolonging procedures”; rather, Michael was “obligated to obey” Judge Greer’s Order and discontinue Terri’s treatment. *Schiavo II*, 792 So. 2d 551, 559 n.5 (Fla. Dist. Ct. App. 2001).

this “was probably the most difficult case [he] had ever presided over.”¹⁰⁴

2. *Schiavo I, II and III*

In January 2001, Judge Greer’s decision was upheld on appeal (*Schiavo I*).¹⁰⁵ Importantly, the appellate court expressly stated that its “default position” was in favor of life, but that the evidence was clear and convincing that Mrs. Schiavo would have chosen to forgo artificial life support.¹⁰⁶ The Florida Supreme Court and the United States Supreme Court denied review of the case on April 23, 2001, and Judge Greer authorized Mr. Schiavo, as his wife’s guardian, to discontinue Mrs. Schiavo’s life-prolonging procedures.¹⁰⁷ On April 24, Terri Schiavo’s feeding tube was clamped, and she ceased receiving nutrition and hydration for the first time.¹⁰⁸

Two days later, on April 26, the Schindlers, bringing suit as their daughter’s parents and “natural guardians,” filed a new complaint against Mr. Schiavo alleging that he had perjured himself during the 2000 Trial, as well as a motion for emergency temporary injunction.¹⁰⁹ The case was randomly assigned to Judge Frank Quesada who convened an emergency hearing for 7:15 p.m. that same evening.¹¹⁰ After considering two affidavits from the Schindlers, Judge Quesada granted their request for an injunction and entered an order, contain-

¹⁰⁴ David Sommer, *Patient’s Life in Judge’s Hands*, TAMPA TRIB., Jan. 29, 2000, at 1.

¹⁰⁵ *Schiavo I*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001). The appeals court determined that Mrs. Schiavo’s prior oral statements regarding death and dying uttered to friends and family gave the trial court a sufficient basis to make this decision for her. *Id.* Moreover, the court eloquently stated:

In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, would choose to continue the constant nursing care and the supporting tubes in hopes that a miracle would somehow recreate her missing brain tissue, or whether she would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives. After due consideration, we conclude that the trial judge had clear and convincing evidence to answer this question as he did.

Id.

¹⁰⁶ *Id.* at 179-80.

¹⁰⁷ *Schiavo II*, 792 So. 2d at 555.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 555-56.

¹¹⁰ *Id.* at 556.

ing no findings, but requiring Mr. Schiavo to restore his wife's life-prolonging procedures.¹¹¹ Mrs. Schiavo's PEG tube was unclamped.

In response to Judge Quesada's injunction, Michael filed an emergency motion with the Second District Court of Appeal, seeking enforcement of the mandate from *Schiavo I* affirming Judge Greer's Order.¹¹² After considering expedited briefs and oral arguments, the appellate court issued its second decision (*Schiavo II*) on July 11, 2001.¹¹³

Although much of *Schiavo II* focused on sifting through the procedural irregularities of the Schindlers' unorthodox and desperate last-minute perjury allegations, the appellate court, noting that Florida's rules of civil procedure require a movant to establish "significant new evidence" or "substantial changes in circumstances," took the occasion to review and comment once again upon the medical evidence in the record regarding Mrs. Schiavo's medical condition.¹¹⁴ Specifically, the appellate court took pains to clarify that the only permanent way to stay removal of Mrs. Schiavo's PEG tube was for the Schindlers to establish that—since the 2000 Trial—their daughter's condition had dramatically and unexpectedly improved or medical research had made a discovery that would result in Mrs. Schiavo's condition no longer qualifying as "terminal" as defined by Florida law.¹¹⁵ Skeptical of the Schindlers' ability to establish such improvement or such medical breakthroughs, the appellate court, premised on its review of the record produced during the 2000 Trial, again concluded that

[a]lthough it is conceivable that extraordinary treatment might improve some of the motor functions of her brain stem or

¹¹¹ *Id.*

¹¹² J. Nealy-Brown, *Husband Appeals Again to Let Wife Die*, ST. PETERSBURG TIMES, May 1, 2001, 3B.

¹¹³ *Schiavo II*, 792 So. 2d at 551.

¹¹⁴ *Id.* at 559-60 (referencing FLA. R. CIV. P. 1.540(b)(5)).

¹¹⁵ *Id.* at 560. The appropriate Florida statute defines "terminal condition" as meaning "a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death." FLA. STAT. ANN. § 765.101(17) (West 2005). The *Schiavo II* court noted that during the 2000 Trial, "a board-certified neurologist who had reviewed a CAT scan of Mrs. Schiavo's brain and an EEG testified that most, if not all, of Mrs. Schiavo's cerebral cortex—the portion of her brain that allows for human cognition and memory—is either totally destroyed or damaged beyond repair. Her condition is legally a 'terminal condition.'" *Schiavo II*, 792 So. 2d at 560 (citing FLA. STAT. § 765.101(17) (2000)). Additionally, the court in *Schiavo II* noted that Judge Greer, acting as Terri's proxy, properly considered evidence of Terri's "values, personality, and her own decision-making process." *Id.*

cerebellum, the Schindlers have presented no medical evidence suggesting that any new treatment could restore to Mrs. Schiavo a level of function within the cerebral cortex that would allow her to understand her perceptions of sight and sound or to communicate or respond cognitively to those perceptions.¹¹⁶

The appellate court in *Schiavo II* dismissed the fraud action against Michael Schiavo brought before Judge Quesada and instructed the Schindlers to file any additional motions for relief (and attendant medical evidence) with Judge Greer by July 20, 2001, after which the guardianship court would be authorized to enforce its original order.¹¹⁷ Importantly, “[d]espite all of the published opinions and public interest,” the appellate court re-emphasized the fact that “it should not be overlooked that the courts in this case are attempting to honor Theresa Marie Schiavo’s constitutional right of privacy as it affects her medical decisions.”¹¹⁸

On remand following *Schiavo II*, Judge Greer, without an evidentiary hearing, summarily denied the Schindlers’ newly filed motion for relief, as well as their Petition for Independent Medical Examination, both of which relied on the affidavits of physicians—none of whom had actually examined her—stating that Mrs. Schiavo was no longer in a PVS.¹¹⁹ Again, the Schindlers immediately appealed Judge Greer’s ruling denying the Petition for Independent Medical Examination.¹²⁰ The appellate court filed its third opinion (*Schiavo III*) on October 17, 2001.¹²¹

In *Schiavo III*, the appellate court determined that the Schindlers’ new-found affidavits, while dubious, did in fact establish a “colorable entitlement” to relief concerning the limited issue of whether their daughter might elect to pursue a new medical treatment before withdrawing life-prolonging procedures.¹²² On this narrow question, the

¹¹⁶ *Id.* (citing FLA. STAT. §. 765.101(17)).

¹¹⁷ *Id.* at 561.

¹¹⁸ *Id.* at 564.

¹¹⁹ *In re Guardianship of Schiavo (Schiavo III)*, 800 So. 2d 640, 641-44 (Fla. Dist. Ct. App. 2001).

¹²⁰ *Id.* at 642-43.

¹²¹ *Id.*

¹²² Because the physicians’ affidavits reflected medical opinions based solely on a review of Mrs. Schiavo’s medical records, the impressions of lay people, and brief portions of video tape showing Terri “interact” with her mother, the court noted that their quality as evidence was marginal. *Id.* at 644-45. Dr. Fred Webber, an osteopathic physician, claiming that Terri was not in a PVS and that she exhibited “purposeful reaction to her environment” was considered to be particularly compelling to

appellate court ordered Judge Greer to re-open discovery and conduct an evidentiary hearing for the limited purpose of assessing Mrs. Schiavo's current medical condition, the nature of new medical treatments and technologies, and their probable efficacy in Mrs. Schiavo's situation.¹²³ Additionally, the court specified that both Mr. Schiavo and the Schindlers were each to choose two medical experts and agree on the selection of a fifth, independent physician, who was specifically ordered to be board-certified in neurology or neurosurgery.¹²⁴ All five designated experts were to be granted full access to Mrs. Schiavo, as well as her medical records and diagnostic results, so as to prepare a written report to be filed with Judge Greer.

3. The 2002 Hearing

In order to succeed at the evidentiary hearing (2002 Hearing) mandated by the appellate court in *Schiavo III*, the Schindlers had to establish—merely by a preponderance of the evidence—that new treatment offered Terri Schiavo “sufficient promise of increased cognitive function” in her cerebral cortex that would so significantly improve the quality of her life that she herself would elect to undergo the treatment and would personally favor reversal of Judge Greer's prior decision to withdraw life-prolonging procedures.¹²⁵ The Schindlers failed to meet their burden.¹²⁶

Over the course of the 2002 Hearing, Judge Greer heard testimony from six doctors—Mrs. Schiavo's treating physician and five medical experts.¹²⁷ Each physician had access to high-quality brain scans and

the court. The court deemed Dr. Webber's claim, under oath, that he might be able to restore “enhanced speech clarity and complexity, release of contractures, and better awareness of [Terri's] surroundings” to establish a “colorable entitlement” to relief sufficient to warrant an evidentiary hearing. *Id.*; Wolfson Report, *supra* note 63, at 15. Moreover, the appellate court “anticipated” that Dr. Webber would testify for the Schindlers and provide scientific support for his claim to be able to restore Terri's speech and some cognitive function. Curiously, however, Dr. Webber—whose affidavit had served as the basis for the Mandate issued in *Schiavo III* resulting in the 2002 Hearing—would make no further appearances in these proceedings. *See In re Guardianship of Schiavo (Schiavo IV)*, 851 So. 2d 182, 184 (Fla. Dist. Ct. App. 2003); Wolfson Report, *supra* note 63, at 16.

¹²³ *Schiavo III*, 800 So. 2d at 646-47.

¹²⁴ *Id.* at 646.

¹²⁵ *Id.* at 645.

¹²⁶ *In re Guardianship of Schiavo (2002 Hearing Order)*, No. 90-2908-GB-003, 2002 WL 31817960, at *5 (Fla. Cir. Ct. Nov. 22, 2002).

¹²⁷ *Id.* The five board-certified experts included two selected by Michael, two selected by the Schindlers and one independent expert selected by the court, as specified by the appellate court in *Schiavo III*.

each personally conducted a neurological examination.¹²⁸ Additionally, the court received into evidence “numerous exhibits including copies of published medical articles, copies of summaries of published medical articles, CT scans, and video of medical examinations.”¹²⁹ In contrast to the medical “testimony” that would subsequently percolate throughout the court of public opinion,¹³⁰ Judge Greer had the opportunity “to observe the witnesses when they testified, to note body language, pauses, inflections and other non-verbal factors utilized in determining credibility which would not appear in a transcript of these proceedings.”¹³¹ On this point, the court specifically stated that all five experts were well-prepared and provided “excellent medical testimony concerning the issue of persistent vegetative state, possible treatment options and how these may or may not have an effect on Terry [sic] Schiavo.”¹³²

Not surprisingly, the two testifying experts hired by Mr. Schiavo and the two hired by the Schindlers disagreed on the precise status of Mrs. Schiavo’s medical condition. Drs. Ronald Cranford and Marvin Greer, as well as Dr. Peter Bambakidis, the court-appointed expert, each testified that Terri was in a persistent vegetative state, although Dr. Bambakidis preferred the phrase *permanent* vegetative state.¹³³ These doctors felt that Terri’s actions were neither consistent nor reproducible but rather were random reflexes in response to stimuli. Drs. William Hammesfahr and William Maxfield, hired by the Schindlers, testified that Mrs. Schiavo was not in a PVS, emphasizing Terri Schiavo’s ability to track a balloon floating through the air and her ability to interact with her mother.¹³⁴ Indeed, despite the lack of

¹²⁸ *Schiavo IV*, 851 So. 2d at 185.

¹²⁹ *2002 Hearing Order*, 2002 WL 31817960, at *1.

¹³⁰ See Sheryl Gay Stolberg, *Drawing Some Criticism, Legislators with Medical Degrees Offer Opinions on Schiavo Case*, N.Y. TIMES, Mar. 23, 2005, at A1 (quoting Oklahoma Republican Senator Tom Coburn, a family practice physician, “I don’t think you have to examine her. All you have to do is look at her on TV. Any doctor with any conscience can look at her and know that she does not have a terminal disease and know that she has some function.”).

¹³¹ *2002 Hearing Order*, 2002 WL 31817960, at *1.

¹³² *Id.* at *2.

¹³³ *Schiavo IV*, 851 So. 2d at 185.

¹³⁴ The court noted that “at first blush” the video of Mrs. Schiavo appearing to smile and look lovingly at her mother seemed to represent cognitive ability. The court, however, “carefully viewed the videotapes” in their entirety and determined that her “actions were neither consistent nor reproducible.” *2002 Hearing Order*, 2002 WL 31817960, at *2. In contrast with the “strong, academically based, and scientifically supported evidence” presented by Drs. Cranford, Greer and Bambakidis, all of whom are neurologists, the testimony of the Schindlers’ physicians (Hammesfahr is a neurologist and Maxfield is a radiologist/hyperbaric physician) was “substan-

complete agreement among the testifying experts, each, in fact, did agree that brain scans showed extensive permanent damage to her brain.¹³⁵

The quality of the evidence presented was “very high,” and each side had “ample opportunity to present detailed medical evidence, all of which was subjected to thorough cross-examination.”¹³⁶ After considering all of the evidence, however, Judge Greer found that Mrs. Schiavo did not consistently respond to her mother, track the balloon with her eyes or otherwise manifest cognitive function in consistent or constant response to stimuli.¹³⁷ “Viewing all of the evidence as a whole,” the court determined that “the credible evidence overwhelmingly supports the view that Terry [sic] Schiavo remains in a persistent vegetative state.”¹³⁸

The other issue before the court at the 2002 Trial was whether treatment options were available to Mrs. Schiavo and whether or not these options would offer any promise to “significantly improve her quality of life.”¹³⁹ The Schindlers’ two experts proposed vasodilatation therapy and hyperbaric therapy. Based on the testimony of the other three experts, the court determined that vasodilatation is not recognized in the medical community and that hyperbaric treatment would have no effect.¹⁴⁰ The appellate court in *Schiavo III* had expressly mandated that the evidence proffered by the Schindlers prove, by a preponderance of the evidence, “something more than a . . . hope of ‘some’ improvement” in the condition of Mrs. Schiavo’s cerebral cortex. Judge Greer determined that no such testimony was presented. On the contrary, Greer was convinced by the expert testimony and analysis of the evidence provided by Drs. Cranford, Greer and Bambakidis that “no treatment was available to improve [Mrs. Schiavo’s] quality of life,” and, therefore, the court entered an order once again

tially anecdotal, and was reasonably deemed to be not clear and convincing.” Wolfson Report, *supra* note 63, at 16.

¹³⁵ *Schiavo IV*, 851 So. 2d at 185.

¹³⁶ *Id.*

¹³⁷ *2002 Hearing Order*, 2002 WL 31817960, at *2.

¹³⁸ *Id.* at *3.

¹³⁹ *Id.*

¹⁴⁰ The 2002 Hearing’s findings of fact and conclusions of law reveal that no article or study shows vasodilatation therapy to be an effective treatment for persistent vegetative state patients. Because the expert advocating for hyperbaric therapy undermined his own credibility and produced no supporting case studies or medical literature, the court found this therapy too experimental to offer sufficient promise of increased cognitive function. See *2002 Hearing Order*, 2002 WL 31817960, at *3-5.

scheduling the withdrawal of her life-supporting PEG tube.¹⁴¹ Upon petition for appeal, the withdrawal was stayed.

4. *Schiavo IV*

The Schindlers, for the fourth time, appealed the order from Judge Greer's guardianship court to the Second District Court of Appeal (*Schiavo IV*).¹⁴² Reviewing Judge Greer's determination, the appellate court, on June 6, 2003, noted the likelihood "that no guardianship court has ever received as much high-quality medical evidence."¹⁴³ Indeed, the appellate court took the unusual approach of closely examining both the procedure and the evidence in the record for any abuse of discretion.¹⁴⁴ During its review of the 2002 Hearing, the appellate court "carefully" examined the videotapes of Mrs. Schiavo in their entirety.¹⁴⁵ With the "eyes of educated laypersons," the appellate judges examined the brain scans and considered the experts' explanations in the trial transcripts.¹⁴⁶ In the end, the appellate court determined that if called upon to review the guardianship court's decision *de novo*, it would affirm Judge Greer's conclusion.¹⁴⁷

Additionally, the appellate court again noted expressly that this case was not about the faith and hope of loving parents, but rather about the right of Terri Schiavo to make her own decision, independent of her parents and independent of her husband.¹⁴⁸ The court emphasized that in situations where families cannot agree, "the law [in Florida] has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures."¹⁴⁹

In affirming Judge Greer, the appellate court highlighted the duty of the trial judge to make a decision that "the clear and convincing evidence shows the ward would have made for herself."¹⁵⁰ In this instance, the court found that Judge Greer had undertaken this "thank-

¹⁴¹ *Id.* at *5.

¹⁴² *Schiavo IV*, 851 So. 2d at 183.

¹⁴³ *Id.* at 185.

¹⁴⁴ *Id.* at 186.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Furthermore, the appellate court noted that "[i]t is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding" and the "extensive additional medical testimony in this record only confirms once again the guardianship court's initial decision." *Id.* at 185.

¹⁵⁰ *Id.* at 187 (citing FLA. STAT. § 765.401(3) (2005)).

less task” with “care, objectivity and a cautious legal standard designed to promote the value of life.”¹⁵¹ The court continued,

[I]t is a necessary function if all people are to be entitled to a personalized decision about life-prolonging procedures independent of the subjective and conflicting assessments of their friends and relatives. . . . [T]he best forum we can offer for this private, personal decision is a public courtroom and the best decision-maker we can offer is a judge with no prior knowledge of the ward, but the law currently provides no better solution that adequately protects the interests of promoting the value of life.¹⁵²

The appellate court could not have possibly foreseen what would occur approximately four months later, when the forum for deciding Mrs. Schiavo’s fate would shift dramatically from a court of law to the court of public opinion, with the arbiters shifting from Florida’s judiciary to its state legislators and governor. Indeed, by October 2003, national media coverage, active involvement by the Religious Right and other groups advocating for Terri Schiavo’s “right to life,” as well as the attention of Florida Governor Jeb Bush and the Florida Legislature, had “catapulted” the *Schiavo* case into a “different dimension.”¹⁵³

Pursuant to *Schiavo IV*, Judge Greer issued a revised order, specifying 2:00 p.m. on October 15, at Hospice Woodside in Pinellas Park, Florida, as the time for Mrs. Schiavo’s PEG tube to be disconnected for the second time.¹⁵⁴ This ordered action was the culmination of six years of litigation, a week-long trial in 2000, seven days of expert medical testimony and evidentiary review in the 2002 Hearing, thirteen applications for appellate review, innumerable motions, petitions, hearings and proceedings, and three requests for federal court review. The Florida judicial system had taken careful and deliberate pains and expended a tremendous effort to follow all procedures in the resolution of the fate of one of its citizens in a persistent vegetative state.

Removing Mrs. Schiavo’s artificial supply of nutrition and hydration was an action ordered by the judiciary, based upon a finding—by clear and convincing evidence—that this was Terri Schiavo’s desire.

¹⁵¹ *Id.* at 187.

¹⁵² *Id.* On appeal, the Supreme Court of Florida declined to review this decision. See *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003).

¹⁵³ Wolfson Report, *supra* note 63, at 18.

¹⁵⁴ See *In re Guardianship of Schiavo (2003 Trial Order)*, No. 90-2908GD-003, at 2 (Fla. Cir. Ct. 2003) (ordering removal of Mrs. Schiavo’s PEG tube).

Faced with the question of how Mrs. Schiavo would wish to exercise her privacy rights, the Florida courts provided an unequivocal answer. This judicial finding had been repeatedly upheld on appeal. Likewise, this order to remove artificial hydration and nutrition, the known consequence of which was to allow Mrs. Schiavo to die, was taken only after the most thorough medical review ever undertaken in a Florida guardianship proceeding. On multiple occasions, these medical findings had been subjected to review by higher courts, and affirmed time and time again. The law was clear, and the law had been followed. In the midst of a bitter and protracted intra-family dispute, the judicial process cautiously and deliberately resolved an otherwise intractable dispute. The legal process did not fail Terri Schiavo.

With all of the Schindlers' formal legal avenues for appeal exhausted, Michael Schiavo, reasonably, believed that this tragic thirteen-year saga was finally over. It was not.

III. APPELLATE PROCEEDINGS IN THE COURT OF PUBLIC OPINION

A. Terri Schiavo's Case in the Court of Public Opinion (1990 – Oct. 2003)

Prior to the 2000 Trial, relatively few local news stories had appeared about Terri Schiavo.¹⁵⁵ In fact, throughout the 1990s, Mrs. Schiavo's tragedy was a private, intra-family affair, with public involvement limited to a couple of fundraisers to help pay for experimental therapy and public legal commentary limited to a brief story reporting on the malpractice judgment awarded to Mr. and Mrs. Schiavo in 1992.¹⁵⁶ Perhaps fueled by the human drama created by the contentiousness between Mr. Schiavo and the Schindlers, the local *St. Petersburg Times* and *Tampa Tribune* carried a series of stories documenting the 2000 Trial and Judge Greer's decision.

These stories apparently caught the attention of local, as well as national, right-to-life and anti-abortion organizations as well as other local religious activists.¹⁵⁷ Beginning with the 2000 Trial and

¹⁵⁵ See Griffin, *supra* note 65, at 3B; *St. Petersburg Beach Has Special Day for Coma Victim*, ST. PETERSBURG TIMES, Feb. 17, 1991, at 3; Hedly Murphey, *Beach Party to Aid Comatose Woman*, ST. PETERSBURG TIMES, Nov. 8, 1990, at City Times 1.

¹⁵⁶ See sources cited *supra* note 155.

¹⁵⁷ Anita Kumar, *Publicity Leads Nursing Home to Seek to Move Mrs. Schiavo*, ST. PETERSBURG TIMES, Feb. 25, 2000, at 1A (noting prayer vigil held by Terri's brother and sister and a group of area high school students); Anita Kumar,

continuing through October 2003, approximately two-thirds of all newspaper stories, including editorials and letters to the editor, and at least thirty-five television news programs reporting on Mrs. Schiavo's case framed the discussion in the familiar rhetoric of abortion politics, including references to "murder," "starvation," or "killing."¹⁵⁸ Additionally, twenty-nine newspaper reports and eleven television broadcasts referenced Mrs. Schiavo as a "disabled" or "handicapped" person or otherwise aligned her cause with disability rights activists. Examples included:

- "I consider [removing a feeding tube] murder in the first degree."¹⁵⁹
- "It's not right to starve someone to death."¹⁶⁰
- "I find it incomprehensible that a judge could rule to starve another human being to death by pulling out her feeding tube."¹⁶¹
- "[T]he Schindlers say she would starve to death . . ."¹⁶²

Motion Seeks Say in Fate of Woman, ST. PETERSBURG TIMES, Feb. 10, 2000, at 3B. One organization, Professionals for Excellence in Health Care (PEHC) filed a motion with Judge Greer to intervene on Terri's behalf. Formed for purposes of opposing physician-assisted suicide and euthanasia, PEHC is composed of about fifty Pinellas County, Florida doctors, nurses, pharmacists, attorneys and clergy and their spouses. *Id.* Anita Kumar, *When the Light Goes Out*, ST. PETERSBURG TIMES, Feb. 7, 2000, at 1B (citing commentary by the National Right to Life Committee).

¹⁵⁸ Using Lexis-Nexis Academic, I conducted a global search of all media outlets from Feb. 25, 1990 to Oct. 10, 2003, using the search terms: "Terri" or "Theresa" and "Schiavo." This search generated 390 hits. When focused by the terms "murder," "starv!" or "kill," eighty-four hits emerged. Each of these hits was individually analyzed to filter duplications and erroneous hits. The final tally was fifty-three. Similarly, Lexis-Nexis Academic was employed to search television transcripts from Feb. 25, 1990 to Oct. 10, 2003 and manually reviewed to filter duplications and erroneous hits.

¹⁵⁹ Anita Kumar, *Taking Care of Mick*, ST. PETERSBURG TIMES, Feb. 11, 2000, at 1B (comparing Terri Schiavo's condition to Dianne "Mick" Menchion, another person in a PVS, and quoting Lillian Menchion, Mick's mother, on their decision not to remove Mick's feeding tube).

¹⁶⁰ Anita Kumar, *Judge: Schiavo's Life Can End*, ST. PETERSBURG TIMES, Feb. 12, 2000, at 1A (quoting Jana Carpenter, a nurse and secretary for PEHC).

¹⁶¹ Judy Bader, *Letter to the Editor: Err on the side of life*, ST. PETERSBURG TIMES, Mar. 2, 2000, at 17A. Ms. Bader concluded her letter by stating that "[o]ur judicial system is sadly failing us when an innocent victim like Terri can be sentenced to death by the very system that should be protecting her." *Id.*

¹⁶² Anita Kumar, *Families Back in Court in Right-to-Die Appeal*, ST. PETERSBURG TIMES, Nov. 9, 2000, at 1B. *See also* Anita Kumar, *Court Rules Schiavo Can Let Wife Die*, ST. PETERSBURG TIMES, Jan. 25, 2001, at 1B ("the Schindlers say their daughter would starve to death . . ."); Anita Kumar, *Schiavo to Ask Judge to Let Wife Die Soon*, ST. PETERSBURG TIMES, Mar. 7, 2001, at 3B ("The Schindlers . . . are

- “The real issue is not whether Terri Schiavo has a ‘right’ to die, but whether we as a society have the right to kill her.”¹⁶³
- “I just can’t understand why these judges are in such a hurry to starve my daughter to death. . . . I just don’t understand. I think it’s cruel.”¹⁶⁴
- “I am disappointed that these judges are willing to starve Terri to death without giving her . . . a fair trial . . . There is nothing physically wrong with her.”¹⁶⁵
- “How do you deal with visiting your daughter knowing she’s starving?”¹⁶⁶
- “I would never do that to my wife, starve her to death.”¹⁶⁷
- “Every man of the cloth knows this is murder.”¹⁶⁸
- “I think people overlook that not even an animal would be allowed to starve to death.”¹⁶⁹

vehemently opposed to removing the [feeding] tube at all, saying she would starve to death.”); Anita Kumar, *Terri Schiavo’s Parents Get More Time to Fight*, ST. PETERSBURG TIMES, Mar. 23, 2001, at 3B; Anita Kumar, *Eight-Year Battle Over Wife’s Life Nears End*, ST. PETERSBURG TIMES, Mar. 30, 2001, at 3B; Anita Kumar, *Schiavo Case Goes to High Court*, ST. PETERSBURG TIMES, Mar. 31, 2001, at 3B; Anita Kumar, *Court: Appeal Can’t Stop Removal of Life Support*, ST. PETERSBURG TIMES, Apr. 12, 2001, at 1B.

¹⁶³ Jana Carpenter, *Letter to the Editor: “Right to Die” is Really About Killing*, ST. PETERSBURG TIMES, Feb. 9, 2001, at 19A (Ms. Carpenter is a member of PEHC).

¹⁶⁴ Kumar, *Court: Appeal Can’t Stop Removal of Life Support*, *supra* note 162, at 1B (quoting Bob Schindler).

¹⁶⁵ Anita Kumar, *Terri Schiavo’s Life, Case Enter Final Chapter*, ST. PETERSBURG TIMES, Apr. 19, 2001, at 3B (quoting Bob Schindler). *See also* David Sommer, *Justices Won’t Review Ruling in Schiavo Case*, TAMPA TRIB., Apr. 19, 2001, at 1 (quoting Bob Schindler stating that “[t]hey are going to starve [Terri] and it’s going to take up to two weeks. There is nothing physically wrong with her.”).

¹⁶⁶ David Sommer, *Woman’s Right to Die Upheld*, TAMPA TRIB., Apr. 24, 2001, at 1 (quoting the Schindlers’ first appellate lawyer, Joseph Magri).

¹⁶⁷ Joe Follick, *Bill Would Give Parents a Say Over Life, Death*, TAMPA TRIB., Apr. 25, 2001, at 3 (quoting Rep. Larry Crow, a Republican member of the Florida state House of Representatives). *See also* Ralph Vigoda, *Feeding Tube Battle Goes on in Florida, Woman’s Parents Want Her Kept Alive*, HOUSTON CHRON., Apr. 29, 2001, at A12 (reporting on efforts by Rep. Crow to amend Florida guardianship laws).

¹⁶⁸ Anita Kumar, *Ethical Storm Swirls after a Final Meal*, ST. PETERSBURG TIMES, Apr. 25, 2001, at 1A (quoting Rev. Raymond Vega, a retired missionary priest of the Missionaries of the Sacred Heart of Jesus, who was critical of the Diocese of St. Petersburg and Bishop Robert Lynch who refused to support the Schindlers and issued statement explicitly “refrain[ing] from characterizing the actions of anyone in this tragic moment”).

¹⁶⁹ Judy DeStefano, *Rants and Raves*, TAMPA TRIB., May 11, 2001, at BayLife

- “Before we kill her, we ought to find out if she is a candidate for death.”¹⁷⁰
- “To me, they’re going to murder this girl. . . . I think she’s gotten railroaded by this kangaroo court.”¹⁷¹
- “Well, the liberal court system has done it again. Michael Schiavo can be very thankful . . . that Judge Greer thinks it’s okay to starve handicapped people to death. . . . Judge Greer has opened the door to legalized murder”¹⁷²
- “In this era of judicial activism, courts have wrongly interpreted basic human rights to include the right to die. Lately that right to die has evolved into . . . a license to kill. . . . America has shamelessly given judicial sanction to the culture of death.”¹⁷³
- “Indeed, many courts have been making it progressively easier to kill disabled people”¹⁷⁴
- “I feel like we’ve never gotten a fair shake from Judge Greer. . . . Michael has been trying to kill my sister since 1993. We’re talking about starving a disabled human being to death.”¹⁷⁵
- “Mrs. Schiavo can smile when she hears music, blink when the doctors ask and cry when she is sad, but her appointment with a slow death by starvation has been set by the court for 2pm on October 15.”¹⁷⁶

5 (Ms. DeStefano’s remarks appeared in a collection of reader feedback).

¹⁷⁰ Rob Shaw, *Judges Extend Schiavo’s Feeding Beyond Tuesday*, TAMPA TRIB., Oct. 4, 2001, at Metro 4 (quoting the Schindlers’ 2000 trial attorney, Patricia Anderson). See also William R. Levesque, *Talks in Schiavo Case Fail to End Family Feud*, ST. PETERSBURG TIMES, Feb. 14, 2002 at 4B (quoting attorney Anderson, “As you might imagine, [Michael Schiavo’s] ardor to kill Terri is a little off-putting to the parents”).

¹⁷¹ Craig Pittman, *Judge: Schiavo Can’t Recover*, ST. PETERSBURG TIMES, Nov. 23, 2002, at 1A (quoting Bob Schindler).

¹⁷² Sue Hill, *Letter to the Editor: Calling Judge Kevorkian*, ST. PETERSBURG TIMES, Nov. 30, 2002, at 15A.

¹⁷³ Editorial, *Yet Another Court’s Recognition of Reality In Schiavo Case*, TAMPA TRIB., June 16, 2003, at Nation/World 10 (quoting Ken Connor, president of the Family Research Council. See *infra* Part III).

¹⁷⁴ Debra J. Saunders, *Erring on the Side of Death*, S.F. CHRON., Aug. 19, 2003 at A21.

¹⁷⁵ William R. Levesque, *Judge Sets Day for Feeding Tube Removal*, ST. PETERSBURG TIMES, Sept. 18, 2003, at 1B (quoting Bobby Schindler, Jr., Terri’s brother).

¹⁷⁶ Ian Ball, *Family Vows to Fight on for Coma Victim*, SUNDAY TELEGRAPH (LONDON), Sept. 21, 2003, at 30.

As early as February 7, 2000, over a year before Mrs. Schiavo's PEG tube would be clamped for the first time, the media was already reporting, and in some instances promoting, characterizations of the removal of the feeding tube as tantamount to murder of a handicapped person by starvation.¹⁷⁷ "Without the [swallowing] test, she's going to be killed," commented Dr. Jay Carpenter, an internist who, despite not having examined Terri Schiavo, testified about her condition on behalf of the Schindlers at the 2000 Trial.¹⁷⁸ Dr. Carpenter is a founding member of Professionals for Excellence in Health Care (PEHC)—"a group of physicians, attorneys, nurses, pharmacists, and related health care professionals dedicated to the ethical treatment of persons, born and unborn" and active "pro-life" lobbyists at the state level.¹⁷⁹

Dr. Carpenter's PEHC organization brought the *Schiavo* case to the attention of a neighboring organization, Children of God for Life, "A Pro-Life Outreach Source Designed To . . . Provide Truthful, Accurate and Updated Information[,] Research Facts For You[,] Educate The Public[,] [and] Provide Seminars and Training[.]"¹⁸⁰ Children of God for Life, a Roman Catholic lay organization, began its efforts to "save Terri" in 2001.¹⁸¹ By the fall of 2002, pro-life advocates had launched www.terrisfight.org, a website devoted to publicizing Terri Schiavo's situation, featuring links to court documents, video clips of her "interacting" with her mother, and various avenues for making donations.¹⁸² The online conservative religious news outlet *World Net*

¹⁷⁷ See Kumar, *When the Light Goes Out*, *supra* note 157, at 1B (National Right to Life Committee spokesperson arguing that patients in PVS are not terminal, so starving them is tantamount to murder).

¹⁷⁸ Anita Kumar, *Judge Rejects Swallowing Test for Schiavo*, ST. PETERSBURG TIMES, Mar. 8, 2000, at 3B. Dr. Carpenter, who did not actually examine Terri, testified at the 2000 Trial that "without [additional swallow testing] she's going to be killed." Lynn Porter, *Largo Nursing Home Agrees Not to Evict Comatose Woman*, TAMPA TRIB., Mar. 3, 2000, at Florida/Metro 9.

¹⁷⁹ Meet the Director, <http://www.cogforlife.org/bio.htm> (last visited Mar. 27, 2006). Notably, one day before Judge Greer was set to issue his ruling in the 2000 Trial, PEHC filed a request to intervene on behalf of the Schindlers. See Kumar, *Motion Seeks Say in Fate of Woman*, *supra* note 157, at 3B. Judge Greer rejected PEHC's request, advising the group to take its philosophical arguments to the state legislators in Tallahassee. See *Judge Rejects Intervention of Group in Schiavo Case*, ST. PETERSBURG TIMES, Feb. 11, 2000, at 10B.

¹⁸⁰ See Children of God for Life, Who We Are, <http://www.cogforlife.org/coginfo.html> (last visited Mar. 24, 2006). Children of God for Life is located in Largo, Florida, which is approximately fifteen minutes from Terri's Pinellas Park hospice facility and ten minutes from Clearwater.

¹⁸¹ See Terri's Page, <http://www.cogforlife.org> (follow "Special Report: The Terri Schiavo Page . . ." hyperlink) (last visited Apr. 10, 2005).

¹⁸² Terri Schindler Schiavo Found., <http://www.terrisfight.org> (last visited Mar. 24, 2006).

Daily began publicizing the *Schiavo* case during the 2002 Hearing.¹⁸³ The online conservative news outlet *Cybercast News Service* began running stories about Mrs. Schiavo in August.¹⁸⁴ By late summer 2003, various religious communities—in both the blogosphere and throughout religious media outlets—were buzzing about Terri Schiavo’s case. A petition drive seeking Governor Jeb Bush’s intervention was underway, and state officials were being inundated by thousands of e-mail messages.

As October 15, 2003 drew near these loosely-organized grassroots tactics were about to intensify with “appeals” for intervention by the legislative and executive branches of both state and federal government. Additionally, a seasoned culture warrior was about to emerge as the Schindlers’ field general.

B. The Radical Religious Right, Randall Terry, & Terri’s Law I

From approximately 2001 through the early fall of 2003, the activism encouraged by Children of God for Life and the Internet presence of those supporting the Schindlers intensified slowly. With Mrs. Schiavo’s PEG tube set to be withdrawn on October 15, 2003, however, the efforts to convince a judge and jury beyond the court of law to “save Terri” were desperately in need of an experienced culture-of-life advocate. Enter Randall Terry, the prolific and notorious anti-abortion activist who founded Operation Rescue in 1986 and currently heads the Society for Truth and Justice headquartered near Jacksonville, Florida.¹⁸⁵ In what follows, this part of the Article presents a

¹⁸³ See Diana Lynne, *Life, Death Tug of War in Florida Courtroom*, WORLDNETDAILY.COM, Nov. 13, 2002, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=29505.

¹⁸⁴ Jeff Johnson, *Florida Woman to Be Allowed to Die Despite Family’s Wishes*, CNSNEWS.COM, Aug. 5, 2003, <http://www.cnsnews.com/ViewNation.asp?Page=/Nation/Archive/200308/NAT20030805b.html>.

¹⁸⁵ Barbara Miner, *Randall Terry Resurfaces*, IN THESE TIMES, Nov. 24, 2003, http://www.inthesetimes.com/site/main/article/randall_terry_resurfaces/ (last visited May 3, 2005) (characterizing Mr. Terry as a “pioneer in aggressive harassment of women seeking abortions and an advocate of a ‘Christian-based’ nation” and quoting a 1995 speech where Mr. Terry reportedly said of doctors who perform abortions, “When I, or people like me, are running the country, you’d better flee, because we will find you, we will try you and we will execute you.”). On June 22, 2005, Randall Terry announced that he was running for the Florida state legislature, challenging twenty-year incumbent state Senator Jim King in the 2006 Republican primary. Although Sen. King drafted Terri Law’s I in October 2003, he ultimately teamed with Democrats to block last-ditch efforts orchestrated by Gov. Bush in February and March 2005. Ron Word, *Schiavo Activist Challenges Jim King*, GAINESVILLE SUN, June 23, 2005, available at <http://www.gainesville.com/apps/pbcs.dll/article?AID=/20050623/LOCAL/50623024&SEARCHID=73229460359922>.

behind-the-scenes description of Mr. Terry's machinations, providing an important step-by-step account of the early evolution of a largely grassroots effort that morphed into an international cause célèbre.¹⁸⁶

On October 11, Mary Parker Lewis, former chief of staff to William Bennett¹⁸⁷ and current chief of staff for Alan Keyes,¹⁸⁸ and Phil Sheldon, founder of an Internet-based, grassroots activist website, ConservativePetitions.com,¹⁸⁹ contacted Mr. Terry, explaining that "Terri Schiavo is going to die; we've got to do something."¹⁹⁰ Within hours, Mr. Terry was on the telephone introducing himself to Robert Schindler, Terri's father, and trumpeting his history of right-to-life activism and considerable media connections.¹⁹¹ Mr. Schindler's response gave Mr. Terry and his cadre of cohorts the green light they

¹⁸⁶ See generally Gail Russell Chaddock, *Why Schiavo is a Cause Célèbre*, CHRISTIAN SCI. MONITOR, Mar. 21, 2005, at 1, available at <http://www.csmonitor.com/2005/0321/p01s03-uspo.html>.

¹⁸⁷ Bennett, former Secretary of Education in the Reagan Administration, is a Distinguished Fellow at the politically conservative Heritage Foundation.

¹⁸⁸ Keyes, a perennial Republican candidate for the Senate and the Presidency and former State Department official during the Reagan administration, is currently a leader of the grassroots organization Renew America, which exists to "return [America] to its founding [biblical] principles." Renew America, <http://www.renewamerica.us/> (last visited May 30, 2006).

¹⁸⁹ Conservative Petitions.com is an independent website that exist[s] to provide the opportunity for conservative Americans to make a difference by taking action on their beliefs and standing up to be counted. . . . It is the belief of ConservativePetitions.com that America was created by individuals who had a respect for God Almighty and that this nation was founded on biblical principles, based on God's law found in the Scriptures. We thus focus on helping today's citizens recognize, support and protect our nation's conservative and Godly heritage.

ConservativePetitions.com, <http://www.conservativepetitions.com/petitions.php?action=faq> (last visited Mar. 24, 2006).

¹⁹⁰ Randall Terry, *Saving Terri Schiavo: How an Avalanche of Media and Sympathy Won Her Reprieve*, Soc'y for Truth and Justice, Oct. 26, 2003, <http://www.societyfortruthandjustice.com/prod01.htm>.

¹⁹¹ *Id.* Mr. Terry's background in activism includes over forty arrests related to patient harassment and blockades at abortion clinic protests during the 1980s and 1990s, and a total of at least twelve months spent in various prisons and jails around the United States. Perhaps most notably, Mr. Terry was sentenced to jail for five months for conspiring to present a fetus to President Clinton during the 1992 Democratic National Convention. His media work includes appearances on *60 Minutes*, *Nightline*, *Oprah*, *Donahue*, *Hannity & Colmes*, *Crossfire*, *The 700 Club*, *Trinity Broadcasting Network*, *Meet the Press*, all major network news broadcasts, and scores of TV shows in America and throughout the world. See, e.g., Michael Powell, *Family Values; Terry Fights Gay Unions; His Son No Longer Will*, WASH. POST, Apr. 22, 2004, at C1; Lynn Smith, *Randall Terry: Operation Rescue's Man with Bullhorn*, L.A. TIMES, Mar. 24, 1989, at A3; *Who is Randall Terry?*, Media Matters for Am. (Mar. 21, 2005), <http://mediamatters.org/items/200503220001>.

desired to remove the case of Terri Schiavo from the legitimate jurisdiction of the Florida state courts to a more sympathetic forum: the court of public opinion. A grateful Robert Schindler would end up getting far more than he could have ever expected. "Our family asked Randall Terry to come, and we gave him carte blanche to put Terri's fight in front of the American people. [Randall Terry] did exactly what we asked, and more. Randall organized vigils and protests, he coordinated the media, he helped us meet with Governor Bush."¹⁹²

On Sunday, October 12, Mr. Terry was joined by Gary McCullough, his "media man."¹⁹³ Mr. McCullough, the former public relations director for Operation Rescue, is currently the director of the Christian Communication Network (CCN), an organization with a two-fold purpose of serving as a public relations firm for "pro-life and pro-family organizations" and organizing news and media reports for broadcast on Christian radio, Christian television, and Christian newspapers.¹⁹⁴ On the evening of October 12, Mr. Terry and Mr. McCullough met with Robert and Mary Schindler, and Mrs. Schiavo's adult siblings, Suzanne Carr and Robert Schindler, Jr., to outline a seven-point strategy for combating "the radical left" and its "death grip on the judiciary."¹⁹⁵ The verbatim strategy, in first person as posted on Mr. Terry's website, was as follows:

1. A 24-hour a day, non-stop vigil in front of the hospice where Terri was [being] held starting the next day (Monday), [October 13] at noon.
2. Focus our public cry for help squarely on Governor Jeb Bush.
3. To garner national press coverage, we would use a noon press conference Monday to notify the media that Randall Terry, the founder of Operation Rescue, was leading the efforts to make Terri's plight known to the nation. (We did this

¹⁹² See Miner, *supra* note 185.

¹⁹³ See Terry, *supra* note 190. In March 2005, during the final days of the fight to "save" Terri, Mr. McCullough was sending as many as five news releases daily on the Schiavo case to 6,000 recipients. See Maya Bell, *Sophisticated Tactics Aid Schiavo's Parents*, BRADENTON HERALD (Florida), Mar. 14, 2005, at Local 6.

¹⁹⁴ See Christian Commc'n Network, <http://www.earnedmedia.org/ccn.htm> (last visited Mar. 17, 2006).

¹⁹⁵ See All Things Considered: Struggle by Religious Conservatives to Overcome What They See as Judicial Tyranny Regarding Their Social Agendas, *supra* note 4 ("[t]here's no question that the radical left has a death grip on the judiciary. And they are frantic to keep that death grip because they know they could never achieve their bizarre agenda legislatively, because they're selling and most of us ain't buying.").

because in the news media world, this announcement was sure to get their interest, and get the press present at the hospice. The family's voice could then be heard across the nation through the media, who up to this point had largely ignored Terri's plight.)

4. We crafted a short statement asking Florida Governor, Jeb Bush to intervene ('Governor Bush, I appeal to you as one father to another, please save my daughter') and communicating to Terri's errant husband ('he could have the money, we just want our daughter.').

5. We would need a motor home to park near the hospice where we could strategize and rest. We needed food, water, and signs [e.g., "Euthanasia Takes Place Here," "Is This Hospice or Auschwitz?" "God Numbers Your Days—Not Man," and "Judge Greer Murderer"] for those who responded to our call to join the vigil.

6. We would solicit local clergy and politicians for support.

7. Those present would send out emails and make phone calls to everyone they knew locally to come to the vigil. Furthermore, we would utilize larger lists, such as 'conservativepetitions.com' and 'Terri's List' to alert people around the nation to what we were doing, and implore their help. (People came from all over Florida as well as Georgia, Texas, Colorado, Illinois, and Pennsylvania. And Focus on the Family and other national organizations rallied their troops, as well.)¹⁹⁶

At noon on Monday, October 13, Randall Terry held his first press conference, while thirteen friends and family members convened to begin the twenty-four-hour vigil, which they vowed would last until either Mrs. Schiavo died or Judge Greer's order was delayed or reversed.¹⁹⁷ A press release issued by Mr. Terry stated that Terri Schiavo "has clearly communicated that she does not want to be starved to death."¹⁹⁸ The impact of Mr. Terry's statement, however,

¹⁹⁶ Terry, *supra* note 190. Additionally, Mr. Terry explained to the family "that the media would come, and that most of them (especially the 'big shots') would probably not care about the Schindler family. They were exploiting the drama and sorrow of the situation for their 'need for news.' That being true, the Schindler's needed to 'use' the media to get their daughter's plight to Governor Bush and the nation. ('It's a mutually exploitative relationship!')" *Id.*

¹⁹⁷ See Rick Barry, *Schiavo's Father, Sister Lead Vigil Outside Hospice*, TAMPA TRIB., Oct. 14, 2003, at 1. Mr. Terry's self-published website account reports that the vigil began "with about 25 people present." See Terry, *supra* note 190.

¹⁹⁸ See Barry, *supra* note 197, at 1. No mention was made about the well-documented fact that at both the 2000 Trial and 2002 Hearing, extensive medical

would not be fully magnified until the release of significantly redacted video clips of Terri appearing to interact with her mother and to follow a Mylar Mickey Mouse balloon around her hospice room.¹⁹⁹

The next day, Mr. Terry held his second press conference, during which he played a five minute clip of Mrs. Schiavo's mother, Mary Schindler, "interacting with Terri."²⁰⁰ After showing Terri Schiavo groaning loudly and staring apparently at her mother as her mother leaned over the bed and spoke to her, Mr. Terry proclaimed, "This is someone who's cognitive, folks. This is not a person in a vegetative state."²⁰¹ Hoping this footage would "win [the American people's] hearts" and garner sympathy with the media, Mr. Terry's efforts were immediately rewarded with an influx of national media and onslaught of television and radio interview requests.²⁰² The release of this video footage and its characterization by Mr. Terry of a cognitive person interacting with her mother was, perhaps, the single most powerful and galvanizing moment in Mr. Terry's presentation of Terri's case to the public.

On Wednesday, October 15, the day that Terri's PEG tube was to be removed, Mr. Terry and Robert Schindler met for thirty minutes with Governor Bush, who promised to try to find a way to "stop [the removal] from happening."²⁰³ As reported by Mr. Terry, Governor Bush "seemed genuinely sympathetic with Terri's plight, and clearly stated he did not believe she should starve to death," although his initial position was that his "hands are tied."²⁰⁴ Mr. Terry, however, would not relent, inquiring whether Bush would intervene if it could be shown that executive intervention was constitutional and not in violation of the separation of powers doctrine.²⁰⁵

evidence had demonstrated that since February 25, 1990, Ms. Schiavo had been unable to communicate anything at all.

¹⁹⁹ These brief portions of video were edited from the approximately four hours of video-taped medical examinations performed in preparation of the 2000 Hearing, as well as segment of video tape the Schindlers filmed without the knowledge or permission of Michael Schiavo, Terri's legal guardian.

²⁰⁰ See Terry, *supra* note 190.

²⁰¹ Abby Goodnough, *A Right-to-Die Battle Enters Its Final Days*, N.Y. TIMES, Oct. 15, 2003, at A12.

²⁰² See Terry, *supra* note 190.

²⁰³ *Id.* Apparently, Mr. Terry was able to arrange this meeting in a matter of hours because, coincidentally, Governor Bush was already in a nearby community attending a ceremony, and, aggressively, Mr. Terry "suggested" that his team would hold a "protest vigil" outside the ceremony if Bush refused to take a meeting. *Id.* See also David Sommer & Stephen Thompson, *Fight Fades to Vigil*, TAMPA TRIB., Oct. 16, 2003, at Nation/World 1.

²⁰⁴ See Terry, *supra* note 190.

²⁰⁵ *Id.*

Prompted by Mr. Terry's insistence, Governor Bush stated that "he would do whatever is legally possible for him to turn this thing around and use every resource he has to save Terri's life."²⁰⁶ Upon exiting the meeting, Governor Bush admitted: "I am not a doctor, I am not a lawyer. But I know that if a person can be able [sic] to sustain life without life support, that should be tried."²⁰⁷ Mr. Terry "began a mad dash of calling every legal firm [he] could think of asking for a 'memorandum of law' within the next twelve hours, outlining the legal arguments of how the Governor could intervene."²⁰⁸ Attorneys from Virginia, Michigan and throughout Florida answered Mr. Terry's call, providing brief explications of the executive authority created by Florida Constitution Article IV, Section 1(a) as well as quotations from Blackstone and Hamilton regarding the balance of powers between the judiciary and executive branches.²⁰⁹

At 2:00 p.m. on October 15, pursuant to Judge Greer's court order, artificial nutrition and hydration to Mrs. Schiavo was ceased for the second time, as her PEG tube was completely removed.²¹⁰

By Thursday, October 16, the political forces were beginning to coalesce. Mr. Terry and his team distributed several legal memoranda to the press.²¹¹ Simultaneously, Mr. Terry organized a ten-person rally to "turn up the political heat" in Jacksonville, Florida, where Governor Bush was attending a ribbon cutting ceremony.²¹² Meanwhile, joining the effort back at Hospice House Woodside in Pinellas Park was State Representative Frank Peterman Jr., who held a press confer-

²⁰⁶ Abby Goodnough, *Feeding Tube Is Removed in Florida Right-to-Die Case*, N.Y. TIMES, Oct. 16, 2003, at A14.

²⁰⁷ William R. Levesque, *Battles End with Quiet Removal of Feeding Tube*, ST. PETERSBURG TIMES, Oct. 16, 2003, at 1A.

²⁰⁸ See Terry, *supra* note 190.

²⁰⁹ See, e.g., Letter from Gibbs Law Firm, P.A., to Honorable Jeb Bush, Governor, State of Florida (Oct. 16, 2003), http://www.societyfortruthandjustice.com/new_page_5.htm; Letter from Thomas More Law Ctr. to Honorable Jeb Bush, Governor, State of Florida (Oct. 15, 2003), http://www.societyfortruthandjustice.com/new_page_6.htm; Letter from John B. Thompson, Attorney, to Honorable Jeb Bush, Governor, State of Florida (Oct. 16, 2003), http://www.societyfortruthandjustice.com/new_page_2.htm; Memo from Brian Fahling, Esq., to Christa Calamas, General Counsel to Florida Governor Jeb Bush (Oct. 16, 2003), http://www.societyfortruthandjustice.com/new_page_3.htm; Email from Herbert W. Titus, Attorney, Troy A. Titus A. Titus, P.C., to Christa Calamas, General Counsel to Florida Governor Jeb Bush (Oct. 15, 2003), http://www.societyfortruthandjustice.com/new_page_4.htm. These memoranda were used as the legal basis for Mr. Terry's writ of mandamus. See *infra* note 213.

²¹⁰ Levesque, *supra* note 207, at 1A.

²¹¹ See correspondence cited *supra* note 209.

²¹² See Terry, *supra* note 190.

ence declaring that he would personally support Governor Bush's intervention on Terri Schiavo's behalf.²¹³

Over the course of the next three days, the media saturation and public protests intensified.²¹⁴ Encouraged and coached by Mr. Terry, the Schindlers made several television appearances, and prayer and fasting vigils were held by supporters both at the Governor's mansion and office.²¹⁵ From October 11 through October 20, at least sixteen newspaper stories and twenty-eight local and national television programs reported on Mrs. Schiavo's case in terms of "murder," "starvation," or "killing, while as many as fifteen newspaper stories and eleven television reports repeated the description of Terri Schiavo as "disabled" or "handicapped."²¹⁶

In a mere nine days, Randall Terry had implemented a plan that, with a large measure of assistance from video clips of Mrs. Schiavo, successfully sensationalized and personalized the Terri Schiavo story in a manner that generated "tens of thousands of phone calls and emails" to Florida politicians from throughout Florida and across the nation.²¹⁷ This grassroots response was aided by a deafening talk radio

²¹³ *Id.* State Representative Peterman is Pastor/Founder of The Rock of Jesus Missionary Baptist Church in St. Petersburg, Florida, and currently seeking an M.A. in Biblical Studies from Dallas Theological Seminary. See Florida House of Representatives, Rep. Frank Peterman Jr., <http://www.myfloridahouse.gov/Sections/Representatives/details.aspx?MemberId=4217&SessionId=42> (last visited Mar. 20, 2006).

²¹⁴ In addition to his popular appeal, Mr. Terry summoned Michael Hirsch, a "good friend" and attorney in Tallahassee, Florida, to file an emergency writ of mandamus in Leon County asking that Governor Bush be compelled to intervene under his executive authority and duty to protect and defend the right to enjoy life, regardless of physical disability. See Terry, *supra* note 190; Allison North Jones, *Courts Turn Down Action on Schiavo*, TAMPA TRIB., Oct. 18, 2003, at Metro 1. Leon County Circuit Court Judge Jonathan Sjostrom rejected the petition on the basis that he was "without power to act," because the Tallahassee-based court did not have any jurisdiction in the Schiavo case. Jones, *supra*, at Metro 1. In addition to its spurious legal analysis, Mr. Terry's last minute petition was the casualty of a first-year civil procedure jurisdictional miscalculation. See Jones, *supra*, at Metro 1 ("[T]he petition should have been directed to Pinellas County courts, where Schiavo's guardian, husband Michael, lives.").

²¹⁵ Terry, *supra* note 190. Indeed, about fifteen protestors, members of Not Yet Dead, even gathered outside the White House to urge President Bush to intervene on behalf of Ms. Schiavo. *Metro; In Brief*, WASH. POST, Oct. 20, 2003, at B3 ("She is not a vegetable; she is a conscious human being," said protestor Marcie Roth, one of the protestors outside the White House, as the group waved placards, including one that read 'Disabled Is Not Dead.'").

²¹⁶ See *supra* note 158. In total, research for this Article discovered fifty-nine newspaper stories reporting on the Terri Schiavo story during these nine days.

²¹⁷ Terry, *supra* note 190. See also Rick Barry, *Toughest Decision: Letting Go*, TAMPA TRIB., Oct. 19, 2003, at Pinellas 1. Additionally, both Michael and Judge

roar from religious broadcasting stalwarts Janet Parshall²¹⁸ and James Dobson,²¹⁹ the latter of whom organized a panel discussion including Joni Eareckson Tada,²²⁰ Carrie Gordon Earl,²²¹ and Janet Folger²²² for his nationwide radio audience.²²³

On Monday, October 20, “the miracle happened” as Governor Bush expanded the mandate of a previously called special session of Florida’s state legislature, allowing for the introduction and almost immediate passage of House Bill 35-E (Terri’s Law I) by the Florida House of Representatives.²²⁴

The next day the Senate passed an identical version of the bill, and Governor Jeb Bush signed the bill into law. Terri’s Law I purported to give the Governor authority “to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003,” the patient “has no written advance directive,” “the court has found that patient to be in a persistent vegetative state,” “that patient has had nutrition and hydration withheld,” and “a member of that patient’s family has challenged the withholding of nutrition and hydration.”²²⁵

Greer were receiving death threats by mail, email and telephone. See David Sommer, *Bush Pressured in Schiavo Case*, TAMPA TRIB., Oct. 17, 2003, at Metro 3.

²¹⁸ Ms. Parshall is the former special assistant to Beverly LaHaye, president of Concerned Women for America, and current host of a nationally syndicated, religiously conservative television and radio talk show, *Janet Parshall’s America*, which reportedly “reaches 3.5 million listeners five days a week.” See James R. Edwards, Jr., *Good Press*, AM. OUTLOOK Summer 2003, at 12, 13 (The American Outlook is a quarterly magazine of the politically conservative Hudson Institute).

²¹⁹ See *infra* Part IV.

²²⁰ Ms. Tada is the founder of Joni and Friends, an international Christian ministry to the disabled community and frequent guest on James Dobson’s Focus on the Family daily radio broadcast.

²²¹ Ms. Earle is a senior policy analyst for bioethics at Focus on the Family.

²²² Ms. Folger is the former legislative director for Ohio Right to Life, as well as the former National Director for the Center for Reclaiming America, founded by Dr. D. James Kennedy of Coral Ridge Ministries located in Fort Lauderdale, Florida.

²²³ See *Focus on the Family: Terri Schiavo—Life is Sacred* (Syndicated radio broadcast Oct. 23, 2003). Additionally, James Dobson eagerly took a portion of the credit for passage of Terri’s Bill I: “I have a radio program that’s heard on 2,000 stations across North America, and we weren’t the only ones. There are many people in Florida and many other radio stations around the country that have been asking for a response [from Florida politicians].” *Nightline: Critical Condition* (ABC television broadcast Oct. 21, 2003). Dobson’s weekly U.S. radio audience is estimated at 7.5 million listeners. Edwards, Jr., *supra* note 218, at 13.

²²⁴ Terry, *supra* note 190.

²²⁵ H.B. 35-E, 2003-E S. Spec. Sess. (Fla. 2003). Although the law did not mention Terri Schiavo by name, pursuant to its operating provisions, it could only apply to Terri.

Governor Bush immediately issued Executive Order Number 03-201, requiring “all medical facilities and personnel providing medical care to Theresa Schiavo . . . to immediately provide nutrition and hydration . . . by means of a gastronomy tube. . . .”²²⁶ For the second time, Terri’s artificial administration of hydration and nutrition resumed, as the PEG tube was surgically reinserted six days after it had been removed.

Additionally, Randall Terry had successfully implemented a strategy that circumvented the judiciary, generating enough public pressure and political cover for the executive and legislative branches to out-flank the rule of law. Commenting on the larger scope of his agenda, he stated,

Well, certainly it was a great victory for Terri Schiavo. She is now not being starved to death. And, for me, the exciting thing was that, for once, an executive and a legislative body stood up to judicial tyranny. You know how many cases are decided not by legislators, not by the voters, not by self-government, but by judicial decree. So we were elated for Terri and for *the bigger picture*.²²⁷

C. Terri’s Law I in the Court of Law

On October 21, 2003, the same day that Terri Schiavo’s PEG tube was surgically re-inserted, Michael Schiavo filed a state-court lawsuit against Governor Jeb Bush arguing that Terri’s Law I was unconstitutional on its face and unconstitutional as applied to Mrs. Schiavo because, *inter alia*, it violated her right to privacy by permitting the governor to override unilaterally Mrs. Schiavo’s “medical treatment choice” and violated the separation of powers doctrine by permitting the executive to override a final judicial decision.²²⁸

On May 6, 2004, Pinellas County Circuit Judge W. Douglas Baird found that the actions of the Florida Legislature and Governor Bush “violated Mrs. Schiavo’s right to privacy, due process, and the separa-

²²⁶ Exec. Order No. 03-201 (Fla. 2003)

²²⁷ *Anderson Cooper 360 Degrees* (CNN television broadcast Oct. 22, 2003) (emphasis added).

²²⁸ In addition to these reasons, Michael also argued that Terri’s Law I violated Terri’s right to equal protection because it singled-out vegetative patients as persons whose medical treatment wishes could be overridden and also constituted a “special law” in violation of Article III, Section 10 of the Florida Constitution. Michael also sought an injunction to stop reinsertion of the Terri’s PEG tube. Petition for Declaratory Judgment and Request for Temporary Injunction, *Schiavo ex rel. Schiavo v. Bush*, No. 03-008212-C1-20 (Fla. Cir. Ct. Oct. 21, 2003) (on file with author).

tion-of-powers doctrine,” and accordingly ruled that Terri’s Law I was unconstitutional both facially and as applied to Mrs. Schiavo.²²⁹ As for the former, the court found the law to be an unconstitutional delegation of legislative power to the Governor and an unjustified authorization of power to “summarily deprive Florida citizens of their constitutional right to privacy.”²³⁰ With respect to its application to Mrs. Schiavo, the court determined that because Governor Bush “interfered with the court’s prior final adjudication of Mrs. Schiavo’s rights through the exercise of powers textually assigned by the Constitution to the judiciary, his executive order [was] unconstitutional.”²³¹ Moreover, the circuit court found that as applied, Terri’s Law I was “unquestionably unconstitutional” as retroactive legislation because the Governor was granted “unbridled power to overrule a final judgment determining and declaring the constitutional privacy rights of a Florida citizen.”²³²

On certified appeal directly to the Supreme Court of Florida, the state’s highest court affirmed the circuit court’s finding that Terri’s Law I violated the “fundamental constitutional tenet of separation of powers,” and, therefore, held it unconstitutional both on its face and as applied to Mrs. Schiavo.²³³ The high court first noted that no party disputed the fact that the guardianship court had authorized Michael Schiavo to proceed with the discontinuance of his wife’s artificial life support only after “the issue was fully litigated” in an adversary proceeding in which Terri’s parents were afforded the opportunity to present evidence on all issues.²³⁴ The Court noted that six days after re-

²²⁹ Order Granting Petitioner’s Motion for Summary Judgment, at 21, *Schiavo ex rel. Schiavo v. Bush*, No. 03-008212-C1-20 (May 5, 2004) (on file with author).

²³⁰ *Id.* at 2. Recognizing the presumed sincerity of Florida lawmakers, but noting the highly-charged political atmosphere in which Terri’s Law I was crafted and passed, the court quoted nineteenth-century constitutional lawyer Daniel Webster:

Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

Id. at 10.

²³¹ *Id.* at 14 (citing *B.H. v. State*, 645 So. 2d 987, 992 (Fla. 2004)).

²³² *Id.* at 20. “It is difficult to imagine a clearer deprivation of a judicially vested right by retroactive legislation than that which has occurred in this case.” *Id.*

²³³ *Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004). Finding the separation of powers issue to be dispositive, the court did not reach the other constitutional issues addressed by the circuit court. *Id.* at 328.

²³⁴ *Id.* at 331. This order as well as the order denying the Schindlers’ motion for relief from judgment were affirmed on direct appeal. *Id.* (citing *Schiavo I*, 780 So.

removal of the feeding tube by court order, the Florida Legislature passed Terri's Law I and the executive issued an order, resulting in the surgical reinsertion of the nutrition and hydration tube.²³⁵ On these facts, the Court found that Terri's Law I, as applied in this case, "resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary."²³⁶

The Court noted that, in Florida, circuit courts are charged with adjudicating life and death issues regarding incompetent individuals.²³⁷ The Court did not elaborate on these points at length; rather, it simply stated that "[t]he trial courts of this State are called upon to make many of the most difficult decisions facing society."²³⁸ "[I]t is without question an invasion of the authority of the judicial branch," the Court concluded, "for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination of a case."²³⁹ Accordingly, the Court found Terri's Law I unconstitutional.²⁴⁰ The Schindlers appealed to the United States Supreme Court, which denied *certiorari* on January 24, 2005.²⁴¹ With this line of appeals exhausted, the path was clear to schedule the third and final removal of Terri's PEG tube.

2d at 177; *Schiavo IV*, 851 So. 2d at 182).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 331-32.

²³⁸ *Id.* at 332. *But see* O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 81 (2005) ("In short, there is nothing intrinsically judicial in nature about the guardianship or end-of-life domain.").

²³⁹ *Bush v. Schiavo*, 885 So. 2d at 332.

²⁴⁰ *Id.* Additionally, the court concluded that Terri's Law I was unconstitutional on its face because the Legislature failed to provide any standards by which Governor Bush should determine whether a stay should be issued, for how long and under what circumstances a stay might be lifted. *Id.* at 334 ("This absolute, unfettered discretion to decide whether to issue and then when to lift a stay makes the Governor's decision virtually unreviewable.") *Id.*

²⁴¹ *Bush v. Schiavo*, 543 U.S. 1121 (2005).

D. Randall Terry (Redux) and Terri's Law II ²⁴²

By mid-February 2005, Terri Schiavo's PEG tube was once again nearing another withdrawal date and Randall Terry had been re-called by the Schindlers to coordinate efforts in the court of public opinion.²⁴³ The Schindlers once again began holding regular press conferences, prayer vigils, and protests, both in front of their daughter's hospice facility, Michael's house, and in front of Governor Jeb Bush's residence and office. Desperate to wrest control of Terri Schiavo from the Florida judiciary, where they continued filing a flurry of last-minute motions and petitions, the Schindlers, directed by Mr. Terry, consistently attempted to convince Governor Bush to intervene unilaterally and "take protective custody" of Terri.²⁴⁴ Although Governor Bush never took such unilateral action, he did encourage the state legislature to act, even in the wake of the stinging rebuke by the Florida Supreme Court finding Terri's Law I unconstitutional.

On February 24, during a nationally televised interview, Focus on the Family's James Dobson was asked by Sean Hannity what action was being planned to prevent the removal of Mrs. Schiavo's PEG tube, and Dobson referenced Terri's Law I, stating:

²⁴² Following the October 2003 intervention of Mr. Terry and the groundswell of pro-life, religiously conservative activism that resulted in the passage of Terri's Law I and subsequent reinsertion of Terri's PEG tube, the treatment of this case in the court of public opinion continued to emphasize the "murder," "killing" and "starvation" of a "disabled" or "handicapped" woman. Between October 21, 2003 and March 31, 2005, at least 550 local and national television programs and as many as 275 newspaper reports characterized Terri's case as one of state- or judicially-sanctioned "murder," "killing" or "starvation." Additionally, at least 300 local and television newspaper programs and approximately 375 newspaper stories during this same time period either compared Terri to or analogized her situation to "disabled" or "handicapped" persons. See *supra* note 158. This highly emotional language—this rhetoric—played a dominant role in shaping the public's perception in the seventeen months following Mr. Terry's emergence on the scene. The notion that Terri, a "disabled person" was being "starved" to death at the hands of a "tyrannical judiciary" was repeated by the Schindlers, their supporters, and certain members of the media.

²⁴³ William R. Levesque, *Schiavo Lawyers Prepare Another 11th Hour Fight*, ST. PETERSBURG TIMES, Feb. 22, 2005, at 1B. Because of the national attention garnered by the intervention of President Bush's brother in 2003, Mr. Terry had little difficulty re-energizing his base of supporters or re-communicating the strategy to religious conservatives and pro-life activists on the national level.

²⁴⁴ See *Scarborough Country* (MSNBC television broadcast Mar. 24, 2005) (Randall Terry, while being interviewed by Joe Scarborough, stated, "[Jeb Bush] is the governor of the state. Come on. He can take her into custody with DCF agents and with the Florida Department of Law Enforcement. He can go in there and he can take her to a hospital . . . [W]hat is so sad is that Judge Greer is showing more courage to kill Terri than people in this state are showing to save her.").

I will ask for the support of people who are concerned about this all across the country and hope they besiege those who are making this decision and those who act to save her. . . . It happened in 2003, where the legislature passed a bill to protect her, and they reinserted the [PEG] tube. . . . And I hope that that will happen again. We just can't sit by and watch this woman starve to death and be dehydrated.²⁴⁵

Indeed, due in large part to the efforts of religious and conservative radio broadcasters, Florida politicians were "besieged" with e-mails and telephone calls from around the nation.²⁴⁶ Accordingly, legislative efforts to pass legislation blocking the removal of Mrs. Schiavo's feeding tube were debated in Florida's General Assembly—and supported by both Governor Bush and the Florida House of Representatives—although, ultimately, Florida lawmakers were unable to pass new legislation to "save" Terri.²⁴⁷

Although frustrated by the inability of politicians in Tallahassee to "save" Terri, the Schindlers and their supporters discovered eager allies in Washington, D.C. Ken Connor, the attorney representing Governor Bush before the Florida Supreme Court in *Bush v. Schiavo* and the former president of the Family Research Council, contacted Congressman David Weldon, a Florida Republican and physician, explaining that the "save Terri" coalition wanted "to accord the same protections to the handicapped and disabled that we do to death row inmates."²⁴⁸ On March 8, 2005, Representative Weldon introduced the "Incapacitated Persons Legal Protection Act of 2005" (Terri's Law II), legislation designed to extend habeas corpus protections to incapacitated persons unable to communicate decisions regarding medical

²⁴⁵ See *Hannity & Colmes: Interview with James Dobson* (Fox News Network television broadcast Feb. 24, 2005).

²⁴⁶ In two days, Gov. Bush received 24,000 e-mails and 200 letters; House Speaker Allan Bense received more than 11,500 e-mails and 1200 telephone calls. See William R. Levesque et al., *Schiavo Debate Extends to Friday*, ST. PETERSBURG TIMES, Feb. 24, 2005, at 1A. As of March 14, Gov. Bush's office was reporting 50,000 e-mails and more than 107,000 petitions urging him to take immediate action to stop Terri's "forced starvation." Bell, *supra* note 193, at Local 6.

²⁴⁷ Jerome R. Stockfisch, *Bush Still Pushing for Schiavo Legislation*, TAMPA TRIB., Mar. 22, 2005, at Nation/World 11. Legislation that would have prohibited the removal of a feeding tube from someone in PVS if there was no written directive or there was no clear and convincing evidence of specific instructions regarding artificial hydration and nutrition did pass the Florida House of Representatives, but was blocked by Republicans in the Florida Senate. *Id.*

²⁴⁸ See David D. Kirkpatrick & Sheryl Gay Stolberg, *The Schiavo Case: The Campaign; How Family's Cause Reached the Halls of Congress*, N.Y. TIMES, Mar. 22, 2005, at A1.

treatment.²⁴⁹ Explaining his rationale for filing the bill, Representative Weldon attacked the Florida courts, citing the “failure of the [judicial] system.”²⁵⁰ Filing similar legislation in the Senate, another Florida Republican, Mel Martinez, informed his Senate colleagues that Mrs. Schiavo “deserves to have her due process rights discussed before her death sentence is carried out by court order” and characterized the court order to remove the PEG tube as “cruel and unusual punishment since she will essentially be starved to death without due process of law.”²⁵¹

By the morning of Friday, March 18, the U.S. Congress was still unable to pass legislation creating the federal court jurisdiction necessary for the Schindlers to pursue a federal remedy. In an unprecedented action, Republicans on the House Government Reform Committee issued subpoenas to Mrs. Schiavo, her physician and hospice caregivers, and her husband, Michael, compelling their attendance at a congressional hearing set for March 25.²⁵² Hoping a similar tactic would succeed in barring enforcement of the court order removing the PEG tube, the United States Senate Health, Education, Labor, and Pensions Committee formally invited both Michael and Terri to appear and testify on issues related to end-of-life care.²⁵³

Unconvinced that Congress had jurisdiction to preclude enforcement of an order emanating from a Florida guardianship proceeding, Judge Greer declined to stay his order, and for the third time, Mrs.

²⁴⁹ See H.R. 1151, 109th Cong. (2005). Representative Weldon later explained that he acted only after being approached by Mr. Connor. See Keith Epstein, *Congressmen Rush Schiavo Bill*, TAMPA TRIB., Mar. 9, 2005, at Nation/World 1. See *infra* Part IV for discussion of the Family Research Council.

²⁵⁰ See Epstein, *supra* note 249, at Nation/World 1.

²⁵¹ See *id.* See also Kirkpatrick & Stolberg, *supra* note 248 (noting that Ken Connor and Mel Martinez are former college roommates).

²⁵² Manuel Roig-Franzia, *Schiavo's Feeding Tube Is Removed: Congressional Leaders' Legal Maneuvering Fails to Stop Judge's Order*, WASH. POST, Mar. 19, 2005, at A1.

²⁵³ *Id.* Meanwhile, Senate Majority Leader Bill Frist issued a statement noting that it is a federal crime to interfere with someone's testimony before Congress. See Press Release, Frist Statement on Terri Schiavo (Mar. 18, 2005), http://frist.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1881. The Press Release stated:

Federal criminal law protects witnesses called before official Congressional committee proceedings from anyone who may obstruct or impede a witness' attendance or testimony. More specifically, the law protects a witness from anyone who—by threats, force, or by any threatening letter or communication—influences, obstructs, or impedes an inquiry or investigation by Congress. Anyone who violates this law is subject to criminal fines and imprisonment.

Id.

Schiavo ceased receiving artificially provided hydration and nutrition as her feeding tube was removed at approximately 1:30 p.m. on March 18.²⁵⁴

Referring to the removal of Terri Schiavo's PEG tube as "barbarism," "an act of medical terrorism," and "murder . . . against a defenseless American citizen," House Majority Leader Tom DeLay,²⁵⁵ in concert with Senator Frist worked throughout the weekend to orchestrate the so-called "Palm Sunday Compromise" resulting in the passage of Terri's Law II a few minutes after midnight on Monday morning, March 21.²⁵⁶ Having flown back from his Easter vacation at his Texas ranch earlier in the day, President George W. Bush was awakened in the middle of the night to sign the bill into law.²⁵⁷

The final version of Terri's Law II stated that the U.S. District Court for the Middle District of Florida "shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right . . . under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids or medical treatment necessary to sustain her life."²⁵⁸ Additionally, Terri's Law II also provides that the district court: (1) shall engage in "*de novo*" review of Mrs. Schiavo's constitutional and federal claims; (2) shall not consider whether these claims were previously "raised, considered, or decided in State court proceedings;" (3) shall not engage in "abstention in favor of State court proceedings;" and (4) shall not decide the case on the basis of "whether remedies available in the State courts have been exhausted."²⁵⁹ Over the next ten days, Terri's Law II would result in a flurry of eleventh hour filings throughout the Eleventh Circuit, despite lingering questions regarding its constitutionality.²⁶⁰

²⁵⁴ See Roig-Franzia, *supra* note 252, at A1.

²⁵⁵ *Id.* at A14. See also Kirkpatrick & Stolberg, *supra* note 248, at A1 (noting that Rep. DeLay addressed a meeting of the Family Research Council on Friday, March 18, stating "[o]ne thing that God has brought to us is Terri Schiavo, to help elevate the visibility of what is going on in America," and charging that "the whole syndicate" was "a huge nationwide concerted effort to destroy everything we believe in").

²⁵⁶ See Roig-Franzia, *supra* note 252, at A14.

²⁵⁷ See Anne E. Kornblut, *After Signing Schiavo Law, Bush Says 'It Is Wisest to Always Err on the Side of Life,'* N.Y. TIMES, Mar. 22, 2005, at A19 (Later that same day, Pres. Bush praised Congress for "voting to give Terri Schiavo's parents another opportunity to save their daughter's life"); Jennifer Frey, *Terri Schiavo's Unstudied Life*, WASH. POST, Mar. 25, 2005, at C1.

²⁵⁸ An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, § 1, 119 Stat. 15 (2005).

²⁵⁹ § 2, 119 Stat. at 15.

²⁶⁰ In a special written concurrence denying the Schindlers' final request for

The Schindlers immediately took advantage of this tailor-made private right to federal court review by initiating a federal case against Michael Schiavo, Judge Greer, and the hospice facility housing their daughter with a Motion for Temporary Restraining Order supported by five counts, including, *inter alia*, allegations that Mrs. Schiavo's Fourteenth Amendment rights were being violated. On March 22, District Court Judge James D. Whittemore ruled that the Schindlers had not demonstrated a likelihood of success on the merits and, accordingly, denied their request for an injunction that would have restored Mrs. Schiavo's supply of artificial hydration and nutrition.²⁶¹ In issuing this denial, Judge Whittemore specifically reviewed the 2000 Trial proceedings before Judge Greer for any evidence that Fourteenth Amendment rights to a fair, impartial trial and procedural due process had been violated. Judge Whittemore concluded that the Schindlers' contention that Judge Greer compromised the fairness of the proceedings or the impartiality of the court by presiding as both judicial fact-finder and neutral decision-maker was without merit.²⁶² Furthermore, the federal court concluded that "Theresa Schiavo's life and liberty interests were adequately protected by the extensive process provided in the state courts."²⁶³ On appeal, "[Judge Whittemore's] carefully thought-out decision to deny temporary relief in these circumstances" was upheld.²⁶⁴

Again, on March 24, the Schindlers filed an Amended Motion for Temporary Restraining Order, arguing five additional claims includ-

emergency *en banc* review, Circuit Judge Stanley F. Birch wrote that "[b]ecause these provisions constitute legislative dictation of how a federal court should exercise its judicial functions (known as a "rule of decision"), [Terri's Law II] invades the province of the judiciary and violates the separation of powers principle." Schiavo *ex rel.* Schindler v. Schiavo, 404 F.3d 1270, 1273-74 (11th Cir. 2005) (Birch, J., concurring).

²⁶¹ See Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005).

²⁶² *Id.* at 1385.

²⁶³ *Id.* at 1387.

²⁶⁴ Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1226 (11th Cir. 2005), *reh'g en banc denied*, 403 F.3d 1261 (11th Cir. 2005). Demonstrating the humanity of the court's members, contra wide-spread demonization noted throughout this Article, the Court wrote

[W]e all have our own family, our own loved ones, and our own children. However, we are called upon to make a collective, objective decision concerning a question of law. In the end, and no matter how much we wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws, and if we are to continue to be so, the pre-existing and well-established federal law governing injunctions . . . must be applied to her case.

Id. at 1229 (internal citation omitted).

ing, *inter alia*, violation of The Americans with Disabilities Act (ADA), the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's right to life.²⁶⁵ After hearing oral arguments, Judge Whittemore again determined that the Schindlers could not "establish a substantial likelihood of success on the merits or even a substantial case on the merits" of any of their federal constitutional or statutory claims.²⁶⁶ Again on appeal, the district court's denial of the temporary restraining order was affirmed, with the appellate court noting in dicta that "[t]o the extent [the Schindlers] claim a right to procedural due process . . . it has been afforded in abundance."²⁶⁷

Thus, despite renewed and reinvigorated rhetoric of "starvation" and "judicial murder" not only from Randall Terry and other pro-life religious organizations maintaining prayer vigils, but also from those elected leaders at the highest echelons of government power, and despite creative and unprecedented attempts at overruling the final judgment of the Florida courts, i.e., the rule of law, Terri Schiavo passed away on March 31, 2005.

While her personal tragedy ended in death, grassroots zeal for an agenda founded upon Biblical BioPolitics had been energized, and an effective rhetorical strategy had been tested and proven able to dominate the media's presentation of the *Schiavo* case. Although unsuccessful in their attempts to block the permanent removal of Terri Schiavo's PEG tube, politicized religious forces had clearly been successful in the artful exercise of rhetorical sloganeering and the deft implementation of a strategy for both eroding public confidence in and actually overriding via extra-judicial processes final judgments that had been repeatedly affirmed on appeal. To the extent that Religious Right rhetoric in the *Schiavo* case contributed to the growing sense of public unease or skepticism regarding the judiciary, this is unfortunate, as the judicial process described in Part II actually worked carefully, deliberately, and politically neutrally in adherence to principles of *stare decisis* and the rule of law.

²⁶⁵ See *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005).

²⁶⁶ *Id.* at 1164. As a threshold matter, the court determined that none of the defendants were state actors or otherwise acting under color of state law, thus fatally undermining the ADA, Eighth Amendment and Fourteenth Amendment substantive due process claims. *Id.* at 1164-65.

²⁶⁷ *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1295-96 (11th Cir. 2005); *In re Guardianship of Schiavo*, 916 So. 2d 814 (Fla. Dist. Ct. App. 2005) (listing twenty-one different proceedings related to Terri Schiavo and observing that "[n]ot only has Mrs. Schiavo's case been given due process, but few, if any, similar cases have been afforded this heightened level of process.").

In Parts IV and the Conclusion, however, I will turn to consider the legacy of the *Schiavo* case as a flashpoint in the ongoing culture wars. The remainder of this Article will specifically examine Biblical BioPolitics, its proponents, and the post-*Schiavo* legislative agenda that seeks to erode the right of an incapacitated person in a persistent vegetative state to refuse artificial hydration and nutrition that carries no promise of restoring the patient to health.

IV. BEYOND RANDALL TERRY AND TERRI SCHIAVO—THE RELIGIOUS RIGHT, RECKLESS RHETORIC, & BIBLICAL BIOPOLITICS

This Part begins with a brief description of the four most powerful and influential Religious Right organizations currently active on the national level: (1) James Dobson's "Focus on the Family," (2) Tony Perkins's "Family Research Council," (3) Richard Land's "Southern Baptist Ethics and Religious Liberty Commission," and (4) Jay Sekulow's "American Center for Law and Justice." These organizations and their leadership are generally cautious and deliberate regarding their political activities. Aware of the public relations missteps of the Moral Majority's Jerry Falwell and Christian Coalition's Pat Robertson, the four organizations identified in this Part constitute the new face of the Religious Right, and each is careful to avoid the label extremist and keen to curry political alliances with those (many of whom they have helped put) in power.

For instance, while all four of the groups analyzed in this Part were visible and outspoken about the Terri Schiavo case, none of the highest-ranking members in these groups attended protests or maintained vigil alongside Randall Terry outside Mrs. Schiavo's hospice facility in Pinellas Park, ground-zero in the movement to urge forces outside of the judiciary to intervene in the movement to "save Terri." The Terri Schiavo case, therefore, offers a helpful distinction between those on the "radical" or "old-school" Religious Right, most notably Randall Terry, discussed in Part III, and those in the "mainstream" or "21st Century" Religious Right, profiled in this Part, who enjoy an audience in the Oval Office, maintain mutually advantageous relationships with Congressional leaders, and routinely appear before the bar of the U.S. Supreme Court, as well as on national broadcast media outlets.

Although more sophisticated and mainstream than the grassroots workings of Randall Terry and those more "radical" factions of the Religious Right, the groups profiled here are equally invested in their commitment to Biblical BioPolitics. As discussed in the Introduction, Biblical BioPolitics refers to strategic attempts to use biblically-based

appeals to influence both the nature of the legal debate and the substance of the public policy in culture-war conflicts in the realm of bioethics issues. As noted by sociologist James Davison Hunter, proponents of what I label Biblical BioPolitics recognize that “what is ultimately at stake is the ability to define the rules by which moral conflict [in the realm of bioethics] is to be resolved.”²⁶⁸ Hunter correctly states that “those who define how a contest is to be played out will have the advantage of shaping its final outcome. Influencing the structure of the rules represents a critical part of the overall effort to reestablish an old or to formulate a new cultural hegemony.”²⁶⁹

In this Article I argue that politicized religious forces, i.e., the Religious Right, have adopted precisely this strategy, i.e., Biblical BioPolitics, in an effort to dictate the parameters of what is frequently termed the “culture of life.” As demonstrated in the *Schiavo* case, this strategy relies on the irresponsible use of rhetoric (1) to undermine the appropriate role of the judiciary and (2) to inflate the political significance of a tragedy such as Terri Schiavo’s case in order to advance a vitalist agenda in state legislatures that erodes personal autonomy in favor of a universalized presumption against removing artificial nutrition and hydration in the context of PVS. Unfortunately, the upshot of Biblical BioPolitics and potential legacy of the *Schiavo* case is, therefore, the adoption of new legal regimes limiting an incapacitated, persistently vegetative patient’s ability to forgo treatment that cannot restore the person to health.

A. The Mainstream, 21st Century Religious Right

Not every priest, preacher, rabbi or person of faith with conservative political or fundamentalistic religious leanings is necessarily a member of the Religious Right.²⁷⁰ Indeed, when using

²⁶⁸ HUNTER, *supra* note 12, at 271.

²⁶⁹ *Id.*

²⁷⁰ At various times throughout the history of the United States, involvement by religiously-inspired people has waxed and waned. See George M. Marsden, *Afterward: Religion, Politics and the Search for an American Consensus*, in RELIGION & AMERICAN POLITICS 380, 381-89 (Mark A. Noll ed., 1990). Since the late 1960s, however, conservatively religious people in the United States have emerged as an active political force. As Marsden narrates the history, by the late 1960s, the liberal New Deal consensus was breaking down, the war in Vietnam was intractable, African-Americans were rioting and the sexually liberated, rock ‘n’ roll counterculture was in full blossom. *Id.* at 387. Against this backdrop, “the illusion of a liberal-Protestant-Catholic-Jewish-secular-good citizenship-consensus America” began fading away. *Id.* By the early 1970s, an expressly religious coalition began to coalesce around “ethical issues such as anti-abortion, anti-pornography, anti-ERA, and symbolic religious issues such as school prayer.” *Id.* Having generally eschewed involvement in the

the term Religious Right in this Article I am primarily referring to a group of four organizations committed to a neo-conservative political agenda and a fairly homogeneous set of religious beliefs most closely aligned with American Evangelicalism.²⁷¹ The four groups that follow are related for several reasons. First, they are each politically-connected, well-established, and Evangelical in their theology.²⁷² Each has a nationally recognized spokesperson who capably articulates his organization's position, both to its constituency (most often via religious radio and television broadcasting and direct mail/e-mail) and to the general public via various mainstream media channels, advertisements and editorial commentary. An additional unifying feature is the fact that each group shares a Biblically-informed passion for the transformation of American culture and a resurgence of Christian influence on public policy through incremental changes in the way certain issues are discussed or identified and through appeals to direct democracy that circumvent judicial review. In short, these four groups are highly-visible, well-funded, and well-connected in the current George W. Bush administration and frequent contributors to the Sunday morning and week night cable television interview shows. In short, these four

mechanisms of law and engagement with cultural issues for at least the preceding fifty years, theologically conservative Protestants began forming political coalitions, legislative agendas and public policy think tanks. *Id.* at 387-89.

Building momentum with the Moral Majority of the 1980s and Christian Coalition of the 1990s, by 2000, the four groups identified in this Part had emerged as the heart of the Religious Right and were fully focused on societal transformation via recourse to any and all legal mechanisms, including federal courts, state courts and both federal and state legislative bodies. Notably, the executive branch—with which they had only flirted during the Reagan years—finally opened to them in 2000 with the election and subsequent re-election of George W. Bush, a result due in large measure to the efforts of Richard Land, James Dobson and the Family Research Council. By 2005, as demonstrated most notably throughout the final weeks of the Terri Schiavo saga, these four Religious Right organizations demonstrated their complete investment in the notion that politics matter and the belief that law can be the critical instrument for creating social change.

²⁷¹ Evangelicalism is, perhaps, the most misunderstood moniker in religious studies. The confusion is attributable to Evangelicalism's history of "shifting movements," "temporary alliances," and "impulses [that] have never by themselves yielded cohesive, institutionally compact, easily definable, well-coordinated, or clearly demarcated groups of Christians." MARK A. NOLL, *THE SCANDAL OF THE EVANGELICAL MIND* 8 (1994). The key ingredients of these impulses, as defined by the British historian David Bebbington, are: "conversion" (an emphasis on the "new birth" as a life-changing religious experience), "Biblicism" (a reliance on the Bible as ultimate religious authority), "activism" (a concern for sharing the faith), and "crucicentrism" (a focus on Christ's redeeming work on the cross). *Id.*

²⁷² See *id.* at 8.

groups have a dramatic ability to influence the national public discourse and to affect legal change.²⁷³

1. The Southern Baptist Convention: Richard Land

The Ethics and Religious Liberty Commission (ERLC) is the public policy arm of the sixteen-million member Southern Baptist Convention, the largest Protestant denomination in the United States.²⁷⁴ The ERLC's vision is "an American society that affirms and practices Judeo-Christian values rooted in biblical authority," and its mission is "[t]o awaken, inform, energize, equip, and mobilize Christians to be the catalysts for the Biblically-based transformation of their families, churches, communities, and the nation."²⁷⁵

Since 1988, the ERLC has been headed by Richard Land, an ordained Southern Baptist minister, who hosts two nationally syndicated radio programs, *For Faith and Family* and *For Faith and Family Insight*, which are carried on six hundred radio stations across the United States. Additionally, Land takes calls for three hours each Saturday during *Richard Land Live*, which is also broadcast on radio nationwide. Land is a frequent guest on network and cable television news programs.²⁷⁶ Labeled "God's Lobbyist" by *Time* magazine, Dr. Land is an advisor to President Bush on issues including gay marriage and abortion, and was appointed by President Bush to two terms on the United States Commission on International Religious Freedom.²⁷⁷

2. Focus on the Family: James Dobson

In 1977, Dr. James Dobson left his position as associate clinical professor of pediatrics at USC School of Medicine to found Focus on the Family (Focus). From inauspicious beginnings in a two-room, Arcadia, California office, Dr. Dobson now oversees a Colorado Springs, Colorado-based empire with a sprawling campus necessitat-

²⁷³ Despite their prominence on the national level, descriptions and discussions of these organizations is almost entirely nonexistent in the pages of law reviews. Thus, the following brief introductions are intended to begin filling a glaring gap in the legal literature.

²⁷⁴ The Ethics & Religious Liberty Comm'n, *For Faith and Family*, <http://www.erlc.com> (follow "About Us" hyperlink) (last visited Mar. 3, 2006).

²⁷⁵ The Ethics & Religious Liberty Comm'n, *For Faith and Family*, <http://www.erlc.com> (follow "About Us" hyperlink; then follow "Vision and Mission" hyperlink) (last visited Mar. 3, 2006).

²⁷⁶ See *Hannity & Colmes* (Fox News television broadcast Apr. 25, 2005); *Meet the Press* (NBC television broadcast Mar. 27, 2005).

²⁷⁷ See David Van Biema, *The 25 Most Influential Evangelicals in America*, TIME, Feb. 7, 2005, at 34, 42-43.

ing its own ZIP code. Focus consists of seventy-four different ministries. Its annual operating budget is well in excess of \$143 million. Its mailing list reaches 2.5 million members, and its daily radio broadcasts reach an estimated seven million people.²⁷⁸

In April 2004, Dr. Dobson created Focus on the Family Action (Focus Action), a legally-separate “cultural action organization” designed to allow Dobson greater personal freedom to lobby in Washington, D.C.²⁷⁹ While the primary work of Focus on the Family is education and resource-support related to childrearing and marital stability, both Focus Action and Focus on Social Issues (one of Focus’s seventy-four ministries) are designed to end the “nonstop, withering attack from social and political liberals that is tearing families apart, undermining marriage, belittling Christian values and endangering our children.”²⁸⁰ Focus on Social Issues, for example, features extensive educational materials on issues ranging from “bioethics/sanctity of human life” to “gambling” to “homosexuality and gender” to “political Islam.”²⁸¹ Information posted on these social issues is authored by Focus employees who are explicit in their objective of communicating “what the Bible says about these issues and how God would have us respond.”²⁸² In concert with the overtly political Focus Action, Dobson regularly summons his supporters to telephone and e-mail elected leaders in the executive and legislative branches and request specific political action.

²⁷⁸ Internationally, Dr. Dobson’s radio broadcast reaches 220 million people in 161 countries in twenty different languages, 365 days a year. See Focus on the Family, <http://www.family.org> (last visited March 20, 2006); Paul Asay, *Still Focused*, GAZETTE (Colorado Springs, CO), April 9, 2006, at Life 65; Michael Crowley, *James Dobson: The Religious Right’s New Kingmaker*, SLATE, Nov. 12, 2004, <http://slate.msn.com/id/2109621> [hereinafter *Kingmaker*].

²⁷⁹ See Focus on the Family Action: About Us, <http://www.focusaction.org/Welcome/A000000105.cfm> (last visited Mar. 21, 2006). The new Focus Action organization—legally separate from Focus on the Family—and chartered as a 501(c)(4)—was required in order to comply with IRS regulations regarding tax-exempt gift status afforded Focus on the Family. In addition to lobbying, Dr. Dobson’s Focus Action also afforded him the opportunity to participate actively in George W. Bush’s 2004 re-election campaign as an advisor to Karl Rove. See generally *Kingmaker*, *supra* note 278.

²⁸⁰ Focus on the Family Action, Focus on the Family Action - About Us, <http://www.focusaction.org/Welcome/A000000105.cfm> (last visited Mar. 21, 2006).

²⁸¹ Focus on the Family, CitizenLink, Focus on Social Issues, <http://www.family.org/cforum/fosi> (last visited Mar. 3, 2006).

²⁸² Focus on the Family, CitizenLink, Focus on Social Issues, Bioethics/Sanctity of Human Life, <http://www.family.org/cforum/fosi/bioethics> (last visited Mar. 3, 2006).

3. Family Research Council: Tony Perkins

Founded in 1983 by James Dobson, the Family Research Council (FRC) exists to promote “the Judeo-Christian worldview as the basis for a just, free, and stable society.”²⁸³ In 1988, Gary Bauer, then a domestic policy advisor to President Ronald Reagan, became president of FRC, growing it into an organization with a \$10 million annual budget and a nationwide network of support. When Bauer resigned to run for United States President in 2000, Ken Connor, a Florida attorney, as well as past president of Florida Right to Life and vice chairman of Americans United for Life, assumed the leadership reins at FRC, launching the Center for Human Life and Bioethics and the Center for Marriage and Family.²⁸⁴ In 2003, Tony Perkins, a two-term Louisiana state representative (“recognized as the leading conservative voice” and “one of the state’s most vocal pro-life advocates”), succeeded Mr. Connor as president of FRC.

Like Dobson’s Focus and Land’s ERLC, FRC maintains a strong radio presence with its weekly half-hour program, *Washington Watch Weekly*, hosted by Mr. Perkins, who presents “Washington news from a conservative Christian perspective” to over 250 radio stations.²⁸⁵ Moreover, Mr. Perkins and other FRC representatives regularly appear as guests on network and cable television news programs.²⁸⁶ The operation of the FRC, like Focus and ERLC, is geared toward shaping “public debate” and formulating “public policy that values human life and upholds the institutions of marriage and the family.”²⁸⁷

4. American Center for Law & Justice: Jay Sekulow

The American Center for Law and Justice (ACLJ) was founded in 1990 by Pat Robertson²⁸⁸ for the purposes of protecting the American

²⁸³ Family Research Council, *20 Years Defending Family, Faith and Freedom*, http://www.frc.org/get.cfm?c=HISTORY_ABOUT (last visited Feb. 25, 2006).

²⁸⁴ In 2004, Ken Connor represented Jeb Bush in his fight before the Florida Supreme Court to prove the constitutionality of Terri’s Law.

²⁸⁵ Press Release, Family Research Council, *FRC Launches New Radio Program ‘Washington Watch Weekly’* (June 16, 2004), available at <http://www.frc.org/get.cfm?i=PR04F04&v=PRINT> (last visited Feb. 25, 2006).

²⁸⁶ See Family Research Council, *Biography of Tony Perkins*, <http://www.frc.org/get.cfm?i=BY03H27> (last visited Feb. 25, 2006); Family Research Council, *Biography of Tom McClusky*, <http://www.frc.org/get.cfm?i=BY03E09> (last visited Feb. 25, 2006).

²⁸⁷ See Family Research Council, *supra* note 283.

²⁸⁸ Pat Robertson, a graduate of Yale Law School, also founded the Christian Coalition, the 700 Club, and Regent University. Robertson, however, no longer maintains any visible affiliation with the day-to-day operations of the American Center for

family, religious and constitutional freedoms and “God-given inalienable rights.”²⁸⁹ According to its website, the ACLJ’s mission is to engage in litigation, provide legal services, render advice, counsel clients, provide education, and support attorneys who are involved in defending the religious and civil liberties of Americans.²⁹⁰ The ACLJ does not charge for its services, but rather relies “upon God and the resources He provides through the time, talent, and gifts of people” who share the ACLJ’s perspective on religious and constitutional freedoms. The ACLJ serves primarily as a practitioner, in contrast to the more theoretical think-tank operations of the ERLC, Focus and FRC.

Chief Counsel at the ACLJ is Jay Sekulow. In addition to the numerous oral arguments made before the United States Supreme Court, Mr. Sekulow defended Randall Terry in his unsuccessful appeal of a five-month prison sentence for a criminal contempt conviction arising from Mr. Terry’s involvement with a scheme to present then-Governor Bill Clinton with the remains of an aborted fetus at the 1992 Democratic National Convention.²⁹¹ Under Sekulow’s guidance, the ACLJ has developed into “a powerful counterweight to the liberal American Civil Liberties Union (ACLU).”²⁹² In fact, the operating budget for the ACLJ is approximately \$30 million, its membership roster boasts 940,000, and it employs over one hundred people, including thirty-five attorneys and five lobbyists.²⁹³ The ACLJ’s explosive growth over the last fifteen years is due in large part to the media

Law and Justice (ACLJ).

²⁸⁹ Am. Ctr. for Law and Justice (ACLJ), ACLJ Mission, <http://www.aclj.org/About/default.aspx?Section=9> (last visited Feb. 4, 2006). See also, Jeanne Cummings, *In Judges Battle, Mr. Sekulow Plays a Delicate Role*, WALL ST. J., May 17, 2005, at A1.

²⁹⁰ ACLJ, ACLJ Mission, *supra* note 289.

²⁹¹ See *United States v. Terry*, 17 F.3d 575 (2d Cir. 1994). In fact, Mr. Sekulow and the ACLJ have represented Mr. Terry in connection with his anti-abortion activities no fewer than seven times at the federal appellate court level. Mr. Sekulow has argued several cases before the United States Supreme Court that have impacted the legal landscape in the area of religious liberty litigation. See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (arguing the rights of public school children to form Bible clubs and other religious organizations on campus); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (arguing the rights of religious organizations to use public school facilities—after hours—for religious assembly).

²⁹² Van Biema, *supra* note 277, at 45. Mr. Sekulow was raised Jewish but converted to Christianity in college, and now self identifies as a “Messianic Jew.”

²⁹³ *Id.* See generally Tony Mauro, *Jay Sekulow’s Golden Ticket*, LEGAL TIMES, Oct 1, 2005, at 1, available at <http://www.law.com/jsp/dc/PubArticleFriendlyDC.jsp?id=1130332860379> (last visited Feb. 25, 2006); Cummings, *supra* note 287, at A9.

savvy of Mr. Sekulow, whose thirty-minute call-in show *Jay Sekulow Live* is carried by approximately 550 radio stations to 1.5 million listeners.²⁹⁴ The weekly television show *ACLJ This Week* finds a nationwide audience via the Trinity Broadcasting Network and FamilyNet.²⁹⁵ While these programs appear primarily on provincial religious broadcasting backwaters, Mr. Sekulow is a regular guest on mainstream television network and cable news programs, as well as featured columnist and oft-quoted as an expert in newspapers with national readership.²⁹⁶ Additionally, Mr. Sekulow serves on a four-member team of advisors that counsel President Bush and Senate Republicans on issues related to the federal judiciary.²⁹⁷

B. Biblical BioPolitics and the Effort to Undermine the Judiciary

The *Schiavo* case offers a magnifying glass through which to examine the Religious Right's increasing use of irresponsible rhetoric to foster distrust of and animosity towards the judiciary. James Dobson, for one, categorized the Terri Schiavo case as "one of the greatest miscarriages of justice in American history" and a "cooperative effort between the judiciary and the media to kill an innocent woman."²⁹⁸ Dobson pondered:

Is every mentally disabled human being now fair game . . . ?
Apparently, all they have to do is assert that starvation is what

²⁹⁴ ACLJ, About Jay Sekulow, <http://www.aclj.org/AboutJay/Default.aspx> (last visited Feb. 23, 2006); Cummings, *supra* note 289, at A9; Mauro, *supra* note 293.

²⁹⁵ ACLJ, About Jay Sekulow, *supra* note 294.

²⁹⁶ *Id.* See e.g., Cummings, *supra* note 289, at A1; Jay Sekulow, *A Recognition of Traditions*, USA TODAY, Mar. 2, 2005, at 12A (editorial arguing in favor of the posting and display of the Ten Commandments in government spaces).

²⁹⁷ Cummings, *supra* note 289, at A9 (the "four horsemen" include Sekulow, C. Boyden Gray, counsel to the White House during the administration of George H.W. Bush, Edwin Meese, former attorney general under Ronald Reagan, and Leonard Leo, executive vice president of the Federalist Society); Lorraine Woellert, *Inside Bush's Supreme Team: In Fight for the Courts, Three Behind the Scenes Players are Uniting the Right*, BUS. WEEK, Apr. 25, 2005, at 104.

²⁹⁸ James Dobson, *Life, Death and Judicial Tyranny*, FOCUS ON THE FAMILY ACTION, Apr. 2005, <http://focusaction.org/articles/A000000020.cfm>. Dobson also read the April newsletter verbatim on his April 2-3, 2005 radio shows, reportedly broadcast on at least two thousand radio stations around the world. A few days later Dobson attempted to match the extremism of his comparison of American judges to German Nazis when he compared "black-robed men" of today with the "men in white robes, the Ku Klux Klan that roamed the country in the South" and "did great wrong to civil rights and to morality." *Focus on the Family* (Syndicated radio broadcast, Apr. 11, 2005).

the victim wanted, and then find a wicked judge like George Greer who will order them subjected to slow execution. . . . It is eerily similar to what the Nazis did in the 1930s. They began by 'euthanizing' the mentally retarded, and from there, it was a small step to mass murder.²⁹⁹

Dobson's discussion of the *Schiavo* case and attacks on Judge Greer lead to his conclusion that "Terri's killing signifies conclusively that the judicial system in this country is far too powerful and totally out of control."³⁰⁰ "No agency of government can rival its reach," he continued.³⁰¹ "Not even the combined influence of the President, both Houses of the Congress and the Governor of Florida could override the wishes of a relatively low-ranking judge."³⁰² And yet, Dobson's conclusion is contradicted by the facts, outlined in Part II, that the judiciary, and particularly Judge Greer, displayed immense restraint in adhering strictly to Florida law and its requirement that Mrs. Schiavo's wishes be determined and followed. Indeed, reviewing courts repeatedly highlighted the lack of personal activism displayed by Judge Greer in his careful adjudication of the *Schiavo* case pursuant to the individual self-determination principles embedded in Florida case law and statutes. Had Judge Greer instead ruled that Mrs. Schiavo continue to be indefinitely kept alive via artificial hydration and nutrition on the basis that her parents desired it or the state's interest in the preservation of life required it, he would have surely been guilty of blatant judicial activism.

Writing in a concurring opinion in one of the final appeals by the Schindlers, federal appellate court Judge Stanley F. Birch addressed the activism argument:

Generally, the definition of an "activist judge" is one who decides the outcome of a controversy before him or her according to personal conviction, even one sincerely held, as opposed to the dictates of the law as constrained by legal precedent and, ultimately, our Constitution. In resolving the Schiavo controversy it is my judgment that, despite sincere and altruistic motivation, the legislative and executive branches of our government have acted in a manner

²⁹⁹ See Dobson, *supra* note 298. Dobson points to abortion rights rulings and a "judicial assault on the institution of marriage" as evidence that "unelected, unaccountable, arrogant and often godless judges" are sliding into "moral relativism." *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people—our Constitution.³⁰³

Dr. Dobson's suggestion that "Greer flouted the law, defiantly ignoring" Congressional subpoenas and "defied the Congress and the President" and "intimidated the governor of Florida" could be dismissed as rantings uninformed by the Constitutional separation of powers, if not for his ability to influence millions of people at the grassroots level, raise significant funds, and communicate directly with key leaders at the highest echelons of elected office.³⁰⁴

Richard Land has also been a relentless critic of the Florida judiciary, calling the court order to remove the feeding tube on March 18, 2005, "barbarous and cruel."³⁰⁵ As reported by Tim Russert on *Meet the Press*, Land stated on his weekly radio show:

Terri Schiavo has become the poster girl for whether or not our people are going to force the legal system to give us the society we want. . . . We are seeing this in case after case after case with homosexual marriage, with abortion, with the Terri Schiavo case. Are we going to have a government of the people, by the people, and for the people, or government of the judges, by the judges, and for the judges?³⁰⁶

When questioned about this statement, Land stated, "I'm talking about the judiciary in general. I think the judiciary's out of control. . . . And I think I speak for millions of Americans who feel that the

³⁰³ *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring). James Madison made the following statement in the *Federalist Papers*:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

THE FEDERALIST No. 44 (James Madison).

³⁰⁴ On April 24, 2005 (Justice Sunday), Senate Majority Leader Bill Frist addressed two thousand people at Highview Baptist Church and millions more watching a simulcast broadcast to other church meetings and over television, radio and the Internet. Justice Sunday was by Tony Perkins's "Family Research Council" and Dobson's "Focus on the Family." Both Dobson and Perkins were prominent speakers. See David D. Kirkpatrick, *In Telecast, Frist Defends His Effort to Stop Filibusters*, N.Y. TIMES, Apr. 25, 2005, at A14.

³⁰⁵ John-Thor Dahlburg & Richard Simon, *Schiavo Taken Off Food Supply*, L.A. TIMES, Mar. 19, 2005 at A1.

³⁰⁶ *Meet the Press*, *supra* note 276.

legal system in this country is broken when there cannot be a better adjudication of [the Terri Schiavo] case. . . .³⁰⁷ Surely by “better” Dr. Land refers to a substantive outcome with which he would agree and not the quality of the Florida judiciary’s adherence to rules of procedure and evidence and established legal precedent. Dr. Land’s Biblical BioPolitics rhetoric, however, is imprecise and irresponsible because it fails to distinguish between the quality of the judicial process and the outcome of the judicial process. Dr. Land’s rhetoric irresponsibly discredits the former while failing to explain his reasoning that would seek to change the latter. That reasoning, premised on a “sanctity of life” vitalism, would seek to alter the current autonomy regime in favor of a presumption that patients in a persistent vegetative state must be indefinitely treated with artificial hydration and nutrition, despite the fact that restoration to health is a medical impossibility.

The irresponsible rhetoric of Drs. Dobson and Land fundamentally distorts the legal process at work in Terri Schiavo’s case and confuses the Constitutional system by which an independent, neutral judiciary acts as a form of check and balances to politically partisan and democratically elected legislators and executives. Their rhetoric, therefore, at least in the context of the *Schiavo* case, undermines public confidence in the ability of the judiciary to rightly adjudicate an intra-family dispute regarding a patient in PVS. This Article argues that the judicial process, as it specifically operated in the *Schiavo* case and as it is designed to work more generally, offers the soundest procedural and substantive safeguards to a persistently vegetative individual’s right to forgo treatment if the dispute involving withdrawal of treatment cannot be resolved without recourse to litigation. The rhetoric that undermines the judiciary in favor of executive oversight or legislative meddling is viewed by this Article as an affront to that principle which must be protected in our contemporary, pluralistic society—namely patient autonomy.³⁰⁸

³⁰⁷ *Id.*

³⁰⁸ Although beyond the scope of this Article’s focus on PVS and patient’s rights to self-determination, it is worth noting that Religious Right distrust of the judiciary is particularly virulent in the context of the Pledge of Allegiance, Ten Commandments cases, “religious liberties” litigation, and gay marriage controversies. As listed at the Family Research Council’s website, the “Pledge Protection Act,” the “Religious Liberties Restoration Act,” and the “Marriage Protection Act” are prominent on FRC’s 2005 Top 10 Legislative Agenda and each piece of legislation would either limit federal court jurisdiction pursuant to Art. III, sec. 2 or created an amendment to the U.S. Constitution. JAYD HENRICKS & TOM MCCLUSKY, FRC’S TOP TEN LEGISLATIVE PRIORITIES FOR 2005, <http://www.frc.org/get.cfm?i=EF05A52#EF05A52> (last visited, Mar. 25, 2006).

C. Biblical BioPolitics and the Effort to Define the Terms of Debate

The Religious Right clearly demonstrated the power of emotive and value-laden language as it worked to “save” Terri Schiavo, protect the “sanctity of life,” preserve “a culture of life,” and generally advance a Biblical BioPolitics agenda customarily associated with abortion politics.³⁰⁹ Adding to the confusion and the emotive power of the rhetoric, Mrs. Schiavo’s case and her medical diagnosis were consistently represented as one of a “disabled person” being “starved to death” or “murdered” by “tyrannical” and “activist” courts.

Carrie Gordon Earll, Senior Policy Analyst for Bioethics in the public policy division of Focus on the Family, who was widely quoted in the mainstream media, promoted the view that Mrs. Schiavo was an “otherwise healthy mentally disabled woman.”³¹⁰ James Dobson, appearing on the MSNBC television program *Scarborough Country*, referred to Mrs. Schiavo as “mentally handicapped”³¹¹ and noted on the Fox News Channel’s *Hannity and Colmes*, in response to the question “if [Terri] died, would you consider that murder”, “I would consider it murder. . . . [i]f the courts have their way, Terri Schiavo is going to be deprived of food and water.”³¹² Dobson continued:

All those other people out there who are mentally handicapped or handicapped in some other—disabled in some other way are watching this case. And there’s a shudder going up and down their spines, because what’s about to happen to Terri as a result of a court decision, which I regret, could eas-

³⁰⁹ See George J. Annas, “Culture of Life” Politics at the Bedside - The Case of Terri Schiavo, 352 *NEW ENG. J. MED.* 1710, 1713-14 (2005); Laurie Goodstein, Schiavo Case Highlights an Alliance Between Catholics and Evangelicals, *N.Y. TIMES*, Mar. 24, 2005, at A20; Linda Feldmann, The Politics of a Life in the Balance, *CHRISTIAN SCI. MONITOR*, Mar. 22, 2005, at 1.

³¹⁰ Carrie Gordon Earl, *What You Need to Know about Terri Schiavo*, *FOCUS ON SOCIAL ISSUES*, Apr. 20, 2005, <http://www.family.org/cforum/fosi/bioethics/facts/a0027736.cfm>. See also Teresa Watanabe & Larry B. Stammer, *The Terri Schiavo Case*, *L.A. TIMES*, Mar. 24, 2005, at A21; Eric Gorski, *More Liberal Clerics Weighing in: Schiavo Debate Rages as Holy Week Marks Death Herald New Life*, *DENVER POST*, Mar. 23, 2005, at A21; Robin Toner & Carl Hulse, *Congress Ready to Approve Bill in Schiavo Case*, *N.Y. TIMES*, Mar. 20, 2005, at A1.

³¹¹ *Scarborough Country* (MSNBC television broadcast Mar. 29, 2005).

³¹² *Hannity & Colmes: Interview with James Dobson*, *supra* note 245. When asked whether a person has the right to decide whether or not she wants extraordinary measures taken in a situation like Terri’s, Dr. Dobson stated, “Well, I don’t think so. I don’t – I don’t believe in a right to die. I think that God is in control of our destiny, and I don’t think so.” *Id.*

ily happen to others. And I think we have to support the sanctity of life.³¹³

Tony Perkins echoed this sentiment when he appeared on CBS's Sunday morning program *Face the Nation* and insisted that because the Congress passed an Act for Relief of the Parents of Theresa Marie Schiavo, "those 30,000-plus Americans who, for reasons of disability, cannot feed themselves, cannot drink a glass of water, or any type of hydration without assistance, are a little bit . . . better off in terms of being safer today than they were a week ago."³¹⁴ On another occasion Mr. Perkins, supporting the passage of Terri's Law II "as an opportunity for Congress to finally check the power of runaway courts," stated that "we shouldn't execute the incapacitated by starvation."³¹⁵

Richard Land, appearing on the MSNBC television program *The Abrams Report* insisted that "killing" Mrs. Schiavo through removal of her dehydration and nutrition constituted "a cruel and unusual death," analogizing the situation to animal cruelty.³¹⁶ Similarly, Jay Sekulow, appearing opposite Professor Laurence Tribe on PBS's *NewsHour with Jim Lehrer*, stated that the Terri Schiavo is being subjected to "death by starvation, something that you cannot do . . . on death row . . . or to an animal."³¹⁷ Later that same night, on the MSNBC program *Scarborough Country*, Sekulow defended the federal court review afforded by Terri's Law II on the basis that Mrs. Schiavo was "getting the death penalty."³¹⁸

Characterizations of the *Schiavo* case as "murder" of a "disabled" person were in fact made by the Schindlers and their local "pro-life" supporters prior to October 2003 and the dramatic involvement of Randall Terry and subsequent mainstream Religious Right forces. The use, however, of emotionally-charged and value-laden vocabulary increased significantly once Mr. Terry became involved and exploded once James Dobson and Richard Land, in particular, began shaping the national conversation through their influential radio programs and mainstream television appearances.

Framing the discourse regarding withdrawal of artificial hydration and nutrition of a patient in a persistent vegetative state in terms of "murder" or "starvation" of a "disabled person" is no doubt a rhetori-

³¹³ *Id.*

³¹⁴ *Face the Nation* (CBS television broadcast Mar. 27, 2005).

³¹⁵ Epstein, *supra* note 249, at Nation/World 1.

³¹⁶ *The Abrams Report* (MSNBC television broadcast Mar. 23, 2005) ("If you did this to a dog or cat, you'd be charged with cruelty to animals.")

³¹⁷ *The NewsHour with Jim Lehrer* (PBS television broadcast Mar. 21, 2005).

³¹⁸ *Scarborough Country* (MSNBC television broadcast Mar. 21, 2005).

cally powerful device. Furthermore, use of rhetoric to advance one's political agenda is virtually sacrosanct in America—protected by First Amendment jurisprudence and historically celebrated at least as far back as Tom Paine's rabble-rousing pamphlet *Common Sense*. Moreover, as acknowledged earlier in this Article, use of rhetoric by religiously situated persons (appropriately) enjoys a rich history of persuasion and effectiveness in transforming the law and motivating persons to action.

The Biblical BioPolitics rhetoric displayed in the context of Mrs. Schiavo's tragedy and documented throughout this Article, however, irresponsibly and destructively polarizes the political discourse about medical-legal issues along largely the same lines of pro-life/pro-choice abortion politics. In other words, the use of "sanctity of life" and "murder" rhetoric echoes the protestor placards and political stump speeches of those abortion opponents who view *Roe* and its progeny as wrongly decided.³¹⁹ While rhetoric may have value and even legitimacy in the context of energizing the faithful and rallying the troops, the slogans and phrases continually repeated by the Religious Right when discussing Terri Schiavo and her legal case are now, unfortunately, poised to become permanent fixtures in the positive law of several states. Of particular concern is the threat to individual autonomy implicit in this post-*Schiavo* Biblical BioPolitics legislative agenda.

D. Beyond Terri Schiavo . . . Legislation Prompted by Biblical BioPolitics

In the wake of national publicity generated by the Terri Schiavo case, on March 8, 2005, legislators in Alabama introduced House Bill 592 (the Alabama Bill), the "Alabama Starvation and Dehydration of Persons with Disabilities Prevention Act."³²⁰ The Alabama Bill was

³¹⁹ Interestingly, after presenting a lecture on the Terri Schiavo case at a local college, a student in the audience asked me whether I am "pro-life" or "pro-choice." My lecture had focused solely on the legal chronology and analysis set forth in Part II *supra*, and I had not raised any of the normative critiques regarding Religious Right rhetoric advanced in this Article. The student's question betrayed the extent to which the Terri Schiavo case was co-opted as a battleground for yet another skirmish in the culture wars over medical-legal issues.

³²⁰ H.B. 592, 2005 Reg. Sess. (Ala. 2005) (introducing the "Alabama Starvation and Dehydration of Persons with Disabilities Prevention Act). The Alabama Bill, in fact, copies verbatim entire portions of Florida House Bill 701, introduced on February 18, 2005, for the express purpose of "saving" Terri Schiavo by prospective application "in litigation pending on the effective date" and supersession of "any court order issued under the law in effect before the effective date of this act . . ." See H.B. 701, 107th Reg. Sess. (Fla. 2005).

immediately praised by Carrie Gordon Earll, senior analyst for bioethics at Focus on the Family, who noted that "Alabama's legislation should be used as a model in every state."³²¹

Illustrating the maxim that hard cases make bad law, the Alabama Bill is written to address the precise factual scenario encountered in the Terri Schiavo case, and, in doing so, makes dramatic changes to current Alabama law. Current Alabama law, like many other states' laws regarding surrogacy and patients in a persistent vegetative state, relies upon a post-*Cruzan*, heightened standard of clear and convincing evidence before permitting a surrogate to implement an incapacitated patient's choice to withdraw artificial hydration and nutrition. Indeed, Alabama law currently states that once the attending physician determines to a reasonable degree of medical certainty that the patient is no longer able to comprehend and direct her medical treatment and has no hope of regaining such ability, then

[t]he surrogate shall consult with the attending physician and make decisions . . . that conform as closely as possible to *what the patient would have done or intended under the circumstances, taking into account any evidence of the patient's religious, spiritual, personal, philosophical, and moral beliefs and ethics*, to the extent these are known to the surrogate. Where possible, the surrogate shall consider *how the patient would have weighed the burdens and benefits of initiating or continuing life-sustaining treatment or artificially provided nutrition and hydration against the burdens and benefits to the patient of that treatment*; except, that any decision by a surrogate regarding the withdrawal or withholding of artificially provided nutrition and hydration from a person who is

³²¹ Steve Jordahl, *Alabama Law Could Set Standard for All States*, FAM. NEWS IN FOCUS, Mar. 23, 2005, available at <http://www.family.org/cforum/fnif/news/a0035962.cfm> Similar legislation prompted by the *Schiavo* case and encroaching on the self-determination of rights of incapacitated patients to forgo life-sustaining treatment was proposed in Louisiana on March 24, 2005, entitled "Human Dignity Act." See S.B. 40, 2005 Reg. Sess (La. Mar. 28, 2005); H.B. 675, 2005 Reg. Sess. (La. Apr. 15, 2005). Similar legislation was also proposed in Minnesota on April 7, 2005, entitled "Presumption of Nutrition and Hydration Sufficient to Sustain Life." See S.B. 40, 84th Leg. Sess., 84th Reg. Sess. (Minn. 2005); H.B. 2369, 84th Leg. Sess., 84th Reg. Sess. (Minn. 2005). Ohio also proposed a similar bill on April 19, 2005. See H.B. 201, 126th Gen. Assem., Reg. Sess. (Ohio 2005). In most instances, the language of these proposals tracks recommendations made by the National Right to Life Committee and Focus on the Family.

permanently unconscious shall only be made upon *clear and convincing evidence of the patient's desires*. . . .³²²

In essence, the proposed, post-*Schiavo* Alabama Bill would create a presumption “that every person legally incapable of making health care decisions” desires “nutrition and hydration to a degree that is sufficient to sustain life.”³²³ Additionally, “[n]o guardian, surrogate, public or private agency, court, or any other person shall have the authority to make a decision on behalf of a person legally incapable of making health care decisions to withhold or withdraw hydration or nutrition. . . .”³²⁴ This presumption against removal of artificial nutrition and hydration is rebuttable in two instances: if the patient previously executed a directive in accordance with the Alabama advance directive laws “specifically authorizing the withholding or withdrawal of nutrition or hydration;”³²⁵ or if clear and convincing evidence exist that the patient “gave express and informed consent to withdrawing or withholding hydration or nutrition *in the applicable circumstances*.”³²⁶

First, the addition of the phrase “in the applicable circumstances” in the context of receiving “express and informed consent” creates a condition that is potentially impossible to satisfy. It is, of course, impossible “to predict with precision details of future conditions and treatments.”³²⁷ Conversations with a physician, guardian, or potential surrogate in which consent is given, if literally required to encompass

³²² ALA. CODE § 22-8A-11 (1997) (providing for the authority for decision-making power in situations similar to that of Terri Schiavo) (emphasis added).

³²³ H.B. 592, 2005 Reg. Sess. (Ala. 2005).

³²⁴ *Id.*

³²⁵ *Id.* Indeed, the Alabama Bill would not apply the presumption in favor of sustaining life if the unconscious patient had executed a specific advance directive consistent with the Alabama advance directive laws. In light of the fact that the vast majority of people do not actually execute advance directives, however, this provision does not lessen the my concern that incapacitated patients with less education, financial means or other impediments to execution of a formal advance directive, may find their self-determination rights violated.

³²⁶ *Id.* (emphasis added). Additionally, the Alabama Bill creates a cause of action for injunctive relief against any person who is reasonably believed to be “about to violate or who is in the course of violating” the act, or, in the alternative, allows for a court petition to determine whether there is clear and convincing evidence that the patient gave “express and informed consent to withdrawing or withholding hydration or nutrition in the applicable circumstances.” *Id.*

³²⁷ See Kenneth W. Goodman et al., Florida Bioethics Leaders’ Analysis on HB701, at 2, (Mar. 7, 2005) (unpublished manuscript), available at <http://www.miami.edu/ethics2/schiavo/HB701-Ethics.doc> The Florida Bioethics Leaders include Profs. Goodman, Bill Allen, Kathy L. Cerminara, Robin N. Fiore, Ray Moseley, Ben Mulvey, Jeffrey Spike and Robert M. Walker.

all foreseeable circumstances, may realistically fail to account for any number of unforeseeable contingencies and details. The proposed change to existing Alabama law, therefore, creates a situation whereby a patient in a persistent vegetative state, whose express and informed consent was not specific enough to include "the applicable circumstances," may suffer a literal insult to injury in the form of undesired artificial hydration and nutrition in violation of that patient's bodily integrity.

Second, the title "Alabama Starvation and Dehydration of Persons with Disabilities Prevention Act" echoes the inaccurate and emotionally-laden rhetoric employed by Richard Land, Jay Sekulow, Tony Perkins and various representatives of Focus on the Family. Of course, the image of starving a person to death is abhorrent, and the inclusion of this concept in the Act skews the reality of what actually happens when artificial hydration and nutrition are removed from someone in PVS. Suggesting that disabled persons, for instance, must be protected from some element of society that wishes to starve them is a reckless mischaracterization of what it means to withdraw or withhold treatment in the form of artificial nutrition and hydration that has ceased to advance the physician's primary objective of restoring the patient to health.³²⁸

Additionally, the recurring refrain from the Religious Right, captured by the language of the Alabama Bill, that persons clinically deemed to be in a persistent or permanent vegetative state are akin to those members of the disabled community, constitutes a failure to responsibly distinguish between "individuals whose objective circumstances and prognosis are vastly different."³²⁹ For instance, "[t]o be disabled is to be in some way physiologically harmed or different such that the patient is unable in varying degrees to do or experience things that other people do or experience."³³⁰ Persons suffering from PVS, however, are unable to do or experience, as they are permanently unconscious. "If someone is unable to do or experience *anything*, it is incoherent to suggest that such a person is *disabled* in the sense of having less or different-than-customary capacity."³³¹

³²⁸ According to the American Academy of Neurology, "[t]he artificial provision of nutrition and hydration is analogous to other forms of life-sustaining treatment, such as the use of the respirator." Am. Acad. of Neurology, *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 NEUROLOGY 125 (1989).

³²⁹ See Goodman et al., *supra* note 327, at 4.

³³⁰ *Id.*

³³¹ *Id.*

The substantive changes to Alabama's current autonomy regime (that respects and protects "the patient's desires"), the very title of the Alabama Bill, and the enthusiastic support offered by the National Right to Life Committee and Focus on the Family (both of whom back the Alabama Bill as *a model for the nation*) betray a misguided over-reaction to the Terri Schiavo case and a turn for the worse with regard to public policy regarding the autonomy rights of patients in a persistent vegetative state.³³²

CONCLUSION

Contra the Religious Right rhetoric of "imperious and tyrannical judges," the Terri Schiavo case exemplified careful, deliberate adjudication of an end-of-life guardianship dispute and demonstrated the singular appropriateness of the judiciary for this task. In short, the judicial process did not fail Terri Schiavo. In the *Schiavo* case, the intractable family dispute between Mrs. Schiavo's husband and her parents resulted in litigation before a neutral finder of fact, insulated from the winds of political influence that blow through the halls of legislatures and frequently play a role when executives make decisions. Indeed, in the midst of a painful and private family dispute regarding an incapacitated family member and an end-of-life crisis regarding withdrawal of treatment unable to restore Mrs. Schiavo's health, Mrs. Schiavo's family turned to and relied upon a fair and deliberate judicial process to resolve their intractable dispute.

At least one legal commentator has argued that the arena of litigation, with its "stringent procedural guidelines and rigid evidentiary rules" lacks "the institutional flexibility necessary to adequately serve as a truth-finding mechanism in a manner appropriate to the [termination of life-sustaining treatment] context."³³³ On the contrary, Part II of this Article demonstrates that if a family cannot reach agreement, and if the dispute is beyond reconciliation in the context of a hospital ethics committee, then the judiciary alone is the appropriate venue for resolving end-of-life controversies. The public policy rationale is clear: Once an end-of-life dispute leaves the confines of the hospital ethics committee, impartial finders of fact, relatively private proceedings and strict, neutral procedural and evidentiary safeguards can only be assured within the confines of a court room. Time-tested and agreed-upon rules of evidence and procedure, as well as professional standards of rigorous and ethical advocacy, exist only in the context of

³³² See JON B. EISENBERG, USING TERRI: THE RELIGIOUS RIGHT'S CONSPIRACY TO TAKE AWAY OUR RIGHTS 219-25 (2005).

³³³ Snead, *supra* note 238, at 87.

judicial adjudication—not in legislative corridors or executive offices.³³⁴ Indeed, case-by-case adjudication of “such questions of life and death . . . require[s] the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created.”³³⁵

In the context of the *Schiavo* case, delineating and exercising Terri Schiavo’s personal autonomy rights, for example, were activities that could only occur—if at all—before a neutral fact finder pursuant to the rules of evidence and procedure afforded by a court of law. Presidents, governors, and legislators, guided (potentially) by (or at least susceptible to) public opinion and political pressure were, by contrast, ill-equipped to best determine Mrs. Schiavo’s beliefs regarding the notion of life’s sanctity and whether she would have personally determined to receive life-sustaining treatment that held no promise for restoring her to health or even consciousness.

Beyond Mrs. Schiavo’s misfortune, however, this Article has explored the national implications of Biblical BioPolitics and its concomitant rhetoric for national discourse about the issues raised by the *Schiavo* case. Indeed, both the legal philosopher Ronald Dworkin and sociologist James Davison Hunter have noted that long-standing culture war battles over bioethical issues, such as abortion, are really about the “intrinsic, cosmic value of a human life,”³³⁶ which means that those battles have at least a quasi-religious nature involving expressions of the “sacred.”³³⁷ Indeed, the abortion issue clearly demonstrates the existence of political and social hostilities rooted primarily in different systems of moral understanding.³³⁸

Moreover, as Professor Hunter argues, the “end to which these hostilities tend is the domination of one cultural and moral ethos over all others.”³³⁹ Indeed, “the culture war emerges over fundamentally different conceptions of moral authority, over different ideas and beliefs about truth, the good, obligation to one another, [and] the nature of community.”³⁴⁰ Or, as Professor Dworkin describes the dilemma, each of us is bound together by the idea “that our lives have intrinsic,

³³⁴ See Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1399 (1996) (“Public choice theory treats legislators and the chief executive as reelection maximizers. They are perfectly rational as individuals, since reelection maximizes each individual’s self-interest . . .”).

³³⁵ *Superintendent v. Saikewicz*, 370 N.E. 2d 417, 435 (Mass. 1977).

³³⁶ RONALD DWORKIN, *LIFE’S DOMINION* 15 (1993).

³³⁷ HUNTER, *supra* note 12, at 322.

³³⁸ *See id.* at 42.

³³⁹ *Id.*

³⁴⁰ *Id.* at 49.

inviolable value” but we are consistently divided “because each person’s own conception of what that idea *means* radiates throughout his entire life.”³⁴¹

Thus, while Biblical BioPolitics would argue that biological life trapped in a persistently vegetative state is nonetheless “sacred” and consequently inviolable, other factions of the American body politic locate life’s “sacredness” beyond mere biological function, in the realm of higher human awareness and creative activities that result in individual and communal flourishing. The point is this: divisions, many of which are rooted in religion, exist and this plurality of notions regarding the sacredness of human life requires a legal regime that affords each individual the freedom to make the decision whether or not to receive life-prolonging measures that offer no hope of restoring the patient to health. Furthermore, the specter of abortion politics and its enduring history as a divisive wedge issue ought not to be allowed to confuse the precise issues raised by Mrs. Schiavo’s tragic PVS circumstances.

As described in Part I, the currently dominant legal regime recognizes that individuals have the right to make “momentous personal decisions which invoke fundamental religious or philosophical convictions about life’s value.”³⁴² This right to determine one’s end-of-life care is threatened as soon as someone (a family member, health care provider or politician, for instance) disappointed by a judge’s decision files an appeal in the court of public opinion or convinces other branches of government to pass and execute special laws. Once politicians intervene, interests ranging from (at worst) crass political concerns over re-election³⁴³ or fundraising³⁴⁴ to (at best) sincerely held vitalist convictions, inevitably interfere with the personal autonomy rights of the individual. Indeed, “individuals have a constitutionally

³⁴¹ DWORKIN, *supra* note 336, at 28.

³⁴² See Brief for Ronald Dworkin et al. as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (No. 96-110) and *Vacco v. Quill*, 521 U.S. 793 (1997) (No. 95-1858) [hereinafter Dworkin Brief].

³⁴³ See David D. Kirkpatrick, *Schiavo Memo Is Attributed to Senate Aide*, N.Y. TIMES, Apr. 7, 2005, at A20 (reporting on a memo drafted by an aide to Florida’s Republican Senator Mel Martinez that circulated throughout the Capitol referring to the Terri Schiavo case as a great political issue for Republicans that would excite the pro-life base and singling out Florida’s other Senator Bill Nelson, a Democrat, as being vulnerable in the 2006 election for not co-sponsoring the legislation that became Terri’s Law II).

³⁴⁴ See William March & Keith Epstein, *Hat’s Off to Santorum, He Understands Politics*, TAMPA TRIB., Apr. 17, 2005, at Nation/World 6 (reporting that after Pennsylvania’s Republican Senator Rick Santorum visited with the Schindlers at the prayer vigil for Terri Schiavo, he attended fundraising events in the Tampa area and throughout the state, netting his 2006 re-election campaign \$250,000).

protected interest in making [end-of-life] judgments for themselves, free from the imposition of any religious or philosophical orthodoxy” by either the executive or legislative branch of government.³⁴⁵

As the nation moves beyond the immediacy of Mrs. Schiavo’s tragedy, the danger posed by the irresponsible rhetoric of Biblical BioPolitics is that our legal and moral national discourse regarding notions of life’s sacredness will be further polarized along the entrenched lines of the abortion debate. Appeals to “a culture of life” and a blurring of “pro-life/right-to-life/culture of life” sloganeering threatens to result in policies, as demonstrated by Alabama’s proposed legislation, intended to alter the statutory landscape in fundamental ways, rendering surrogates powerless to effectuate the desires of their incapacitated wards. Ultimately, this culture war phenomenon that I label Biblical BioPolitics is destructive both to a “genuine and peaceable pluralism,” as well as to the established regime that seeks, as described in Part I, to respect the individual’s beliefs about life’s sacredness, particularly when the individual is confronted with the wretched viciousness of PVS. To the extent that Terri Schiavo’s case continues to be co-opted by the Religious Right and used to advance assaults on the appropriateness of the judicial process and to undermine individual patient autonomy in the service of a larger, national Biblical BioPolitics agenda, Mrs. Schiavo’s legacy will be a tragic one indeed.

³⁴⁵ See Dworkin Brief, *supra* note 342.