Biblical Biopolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond

Joshua E. Perry
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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 Commission

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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the people. And when the people respond, their leaders had better listen.
–Dr. James Dobson, founder and chairman of Focus on the Family

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 Council

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)

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. 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

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).
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 sup-
port in the United States each year. Why then did Terri Schiavo’s
story capture the attention of the nation? Why did people around off-
...
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.” 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. “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. 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” slogans 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 misrepresented 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.”

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

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.\textsuperscript{13}

\textsuperscript{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.  

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, 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. 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/20050621-1738-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. . . .").

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


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, 21\(^{st}\) 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...
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.\textsuperscript{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

\textsuperscript{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. 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. 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.

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

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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.
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. Twenty 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. 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. 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."

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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... ").


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: Upon 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. 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. 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. 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." 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." 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:

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

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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)).
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. Collester, 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. Bludworth, 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 counterveiling [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.  

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)).
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.'

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. 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."

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. 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.
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-

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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").

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 halfway 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. 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 profession and volumes of legal scholarship and commentary, 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.

II. TERRI SCHIAVO AND JUDICIAL PROCESS

Theresa (Terri) Marie Schindler was born on December 3, 1963 to Robert and Mary Schindler. She was raised in a "normal, Roman Catholic nuclear family consisting of her parents and her brother and sister."

Terri met Michael Schiavo in the early 1980s, and after dating for two years, they were married on November 10, 1984. By all accounts, the Schiavo and Schindler families were "close and friendly."

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. Michael, awakened by his wife’s collapse, re-constructed 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).

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


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).

Wolfson Report, supra note 63, at 7.

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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{66} Wolfson Report, supra note 63, at 7; \textit{Schiavo I}, 780 So. 2d at 177.
\textsuperscript{67} Wolfson Report, supra note 63, at 8.
\textsuperscript{68} \textit{In re Guardianship of Schiavo}, 2000 WL 34546715, at \textsuperscript{*}2.
\textsuperscript{69} Wolfson Report, supra note 63, at 8.
pies for his wife.\textsuperscript{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.\textsuperscript{71}

Meanwhile, Mr. Schiavo and Mary Schindler, Terri’s mother, “were virtual partners in their care of and dedication to Theresa.”\textsuperscript{72}

One court noted, in contrast to subsequent \textit{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.\textsuperscript{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

\textsuperscript{70} \textit{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. \textit{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.” \textit{Larry King Live}, supra note 65.

\textsuperscript{71} Wolfson Report, supra note 63, at 8-9.

\textsuperscript{72} \textit{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.” \textit{Id}.

\textsuperscript{73} \textit{Schiavo I}, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001).
speaking. Additionally, as early as 1994, Mr. Schiavo was apparently beginning to lose hope that his wife might recover.

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. 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. 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.

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

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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

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. 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.

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. 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.

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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 dissention 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.\textsuperscript{87} CT scans of Terri Schiavo's brain taken in 1996 revealed a severely abnormal structure not curable by medicine.\textsuperscript{88} According to these CT scans, much of her cerebral cortex was no longer alive.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{92}
At the conclusion of the week-long 2000 Trial during which the court heard testimony from eighteen witnesses, including friends, family, and medical experts 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.

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. 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. Both Scott Schiavo and Joan...
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.\(^7\) 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.\(^8\) 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.”\(^9\) The court found the testimony of Mrs. Schiavo’s in-laws, in addition to her husband’s testimony, to be reliable and credible.\(^10\) 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.\(^11\)

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.\(^12\) 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.\(^13\)

From the bench, Judge Greer commented that

\(^{7}\) In re Guardianship of Schiavo, 2000 WL 34546715, at *5.
\(^{8}\) 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).
\(^{9}\) In re Guardianship of Schiavo, 2000 WL 34546715, at *6.
\(^{10}\) Id.
\(^{11}\) 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.
\(^{12}\) In re Guardianship of Schiavo, 2000 WL 34546715, at *6.
\(^{13}\) 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."  

2. Schiavo I, II and III

In January 2001, Judge Greer’s decision was upheld on appeal (Schiavo I).  

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.  

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.  

On April 24, Terri Schiavo’s feeding tube was clamped, and she ceased receiving nutrition and hydration for the first time.

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.  

The case was randomly assigned to Judge Frank Quesada who convened an emergency hearing for 7:15 p.m. that same evening.  

After considering two affidavits from the Schindlers, Judge Quesada granted their request for an injunction and entered an order, contain-

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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.  
106 IId. 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.  

107 Id. at 179-80.  
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.\textsuperscript{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 \textit{Schiavo I} affirming Judge Greer’s Order.\textsuperscript{112} After considering expedited briefs and oral arguments, the appellate court issued its second decision (\textit{Schiavo II}) on July 11, 2001.\textsuperscript{113}

Although much of \textit{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.\textsuperscript{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.\textsuperscript{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

\begin{quote}
Although it is conceivable that extraordinary treatment might improve some of the motor functions of her brain stem or
\end{quote}

\begin{footnotes}
\item[111] \textit{Id.}\\
\item[112] \textit{J. Nealy-Brown, Husband Appeals Again to Let Wife Die, ST. PETERSBURG TIMES, May 1, 2001, 3B.}\\
\item[113] \textit{Schiavo II, 792 So. 2d at 551.}\\
\item[114] \textit{Id. at 559-60 (referencing FLA. R. CIV. P. 1.540(b)(5)).}\\
\item[115] \textit{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 \textit{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.’” \textit{Schiavo II, 792 So. 2d at 560 (citing FLA. STAT. § 765.101(17) (2000)). Additionally, the court in \textit{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.” \textit{Id.}}}
\end{footnotes}
HEALTH MATRIX

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.\footnote{116}

The appellate court in \textit{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.\footnote{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.”\footnote{118}

On remand following \textit{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.\footnote{119} Again, the Schindlers immediately appealed Judge Greer’s ruling denying the Petition for Independent Medical Examination.\footnote{120} The appellate court filed its third opinion (\textit{Schiavo III}) on October 17, 2001.\footnote{121}

In \textit{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.\footnote{122} On this narrow question, the

\footnote{116 Id. (citing FLA. STAT. § 765.101(17)).}
\footnote{117 Id. at 561.}
\footnote{118 Id. at 564.}
\footnote{119 In re Guardianship of Schiavo (\textit{Schiavo II}), 800 So. 2d 640, 641-44 (Fla. Dist. Ct. App. 2001).}
\footnote{120 Id. at 642-43.}
\footnote{121 Id.}
\footnote{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. 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. 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. The Schindlers failed to meet their burden.

Over the course of the 2002 Hearing, Judge Greer heard testimony from six doctors—Mrs. Schiavo’s treating physician and five medical experts. Each physician had access to high-quality brain scans and
each personally conducted a neurological examination. 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.” In contrast to the medical “testimony” that would subsequently percolate throughout the court of public opinion, 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.” 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 Schiavo.”

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. 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. Indeed, despite the lack of

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128 Schiavo IV, 851 So. 2d at 185.
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.”).
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.  

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." 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. "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."  

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." 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. 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 Bam-bakidis that "no treatment was available to improve [Mrs. Schiavo's] quality of life," and, therefore, the court entered an order once again

\[\text{[135]}\text{Schiavo IV, 851 So. 2d at 185.}\]
\[\text{[136]}\text{Id.}\]
\[\text{[137]}\text{2002 Hearing Order, 2002 WL 31817960, at *2.}\]
\[\text{[138]}\text{Id. at *3.}\]
\[\text{[139]}\text{Id.}\]
\[\text{[140]}\text{The 2002 Hearing's findings of fact and conclusions of law reveal that no article or study shows vasodilatation therapy to be an effective treatment for persistent vegetative state patients. Because the expert advocating for hyperbaric therapy undermined his own credibility and produced no supporting case studies or medical literature, the court found this therapy too experimental to offer sufficient promise of increased cognitive function. See 2002 Hearing Order, 2002 WL 31817960, at *3-5.}\]
scheduling the withdrawal of her life-supporting PEG tube. 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*). 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.” 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. During its review of the 2002 Hearing, the appellate court “carefully” examined the videotapes of Mrs. Schiavo in their entirety. With the “eyes of educated laypersons,” the appellate judges examined the brain scans and considered the experts’ explanations in the trial transcripts. 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.

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. 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.”

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.” In this instance, the court found that Judge Greer had undertaken this “thank-

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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.” 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.\(^\text{152}\)

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.”\(^\text{153}\)

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.\(^\text{154}\) 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.

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


Prior to the 2000 Trial, relatively few local news stories had appeared about Terri Schiavo. 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. 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. Beginning with the 2000 Trial and

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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; Heddy 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." 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." 
- "It's not right to starve someone to death." 
- "I find it incomprehensible that a judge could rule to starve another human being to death by pulling out her feeding tube."
- "[T]he Schindlers say she would starve to death . . ."

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).

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," "starve!" 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.

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).

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).

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.

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."  

• "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."  

• "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."  

• "How do you deal with visiting your daughter knowing she's starving?"  

• "I would never do that to my wife, starve her to death."  

• "Every man of the cloth knows this is murder."  

• "I think people overlook that not even an animal would be allowed to starve to death."  

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.  

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).  

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

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.”).  

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


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”).  

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."  

• "To me, they're going to murder this girl. . . . I think she's gotten railroaded by this kangaroo court."

• "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 . . . ."

• "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."

• "Indeed, many courts have been making it progressively easier to kill disabled people . . . ."

• "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."

• "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."

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.


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.
Daily began publicizing the Schiavo case during the 2002 Hearing.\textsuperscript{183} The online conservative news outlet Cybercast News Service began running stories about Mrs. Schiavo in August.\textsuperscript{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.\textsuperscript{185} In what follows, this part of the Article presents a


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.  

On October 11, Mary Parker Lewis, former chief of staff to William Bennett and current chief of staff for Alan Keyes and Phil Sheldon, founder of an Internet-based, grassroots activist website, ConservativePetitions.com, contacted Mr. Terry, explaining that "Terri Schiavo is going to die; we've got to do something." 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. Mr. Schindler's response gave Mr. Terry and his cadre of cohorts the green light they


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).


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.
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.)

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. A press release issued by Mr. Terry stated that Terri Schiavo "has clearly communicated that she does not want to be starved to death.’’

The impact of Mr. Terry’s statement, however,
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.  

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.” 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.” 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. 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.” 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.” 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.

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

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.

See Terry, supra note 190.


See Terry, supra note 190.

Id. Apparently, Mr. Terry was able to arrange this meeting in a matter of hours because, coincidently, 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.

See Terry, supra note 190.

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.” 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.” 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.” 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.

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.

By Thursday, October 16, the political forces were beginning to coalesce. Mr. Terry and his team distributed several legal memoranda to the press. 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. Meanwhile, joining the effort back at Hospice House Woodside in Pinellas Park was State Representative Frank Peterman Jr., who held a press confer-

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208 See [supra note 190](#).
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.\footnote{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).}

Over the course of the next three days, the media saturation and public protests intensified.\footnote{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, \textit{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.”).} 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.\footnote{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. \textit{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.’”).} 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.”\footnote{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.}

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.\footnote{Terry, supra note 190. \textit{See also} Rick Barry, \textit{Toughest Decision: Letting Go}, TAMPA TRIB., Oct. 19, 2003, at Pinellas 1. Additionally, both Michael and Judge
roar from religious broadcasting stalwarts Janet Parshall\(^{218}\) and James Dobson,\(^{219}\) the latter of whom organized a panel discussion including Joni Eareckson Tada,\(^{220}\) Carrie Gordon Earl,\(^{221}\) and Janet Folger\(^{222}\) 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 purposed 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.”\(^{225}\)

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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.

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.\(^{220}\)

Ms. Earle is a senior policy analyst for bioethics at Focus on the Family.\(^{221}\)

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.\(^{222}\)

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.\(^{223}\)

Terry, supra note 190.\(^{224}\)

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.\(^{225}\)
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)
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. 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.” 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.” 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.”

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. 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. The Court noted that six days after re-

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.
231 Id. at 10.
232 Id. at 14 (citing B.H. v. State, 645 So. 2d 987, 992 (Fla. 2004)).
233 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.
234 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.
235 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.
moval 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. 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." The Court noted that, in Florida, circuit courts are charged with adjudicating life and death issues regarding incompetent individuals. 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." 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." Accordingly, the Court found Terri's Law I unconstitutional.

The Schindlers appealed to the United States Supreme Court, which denied certiorari on January 24, 2005. With this line of appeals exhausted, the path was clear to schedule the third and final removal of Terri's PEG tube.

2 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.
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. 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. 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.  

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. 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.

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.” 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

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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.

Explaining his rationale for filing the bill, Representative Weldon attacked the Florida courts, citing the "failure of the [judicial] system." 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."

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. 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.

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. Schiavo's feeding tube was removed.

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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).


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

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.  
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. 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. 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." On appeal, "[Judge Whittemore's] carefully thought-out decision to deny temporary relief in these circumstances" was upheld.

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).


262 *Id.* at 1385.

263 *Id.* at 1387.

264 *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005), *rehearing en banc denied*, 403 F.3d 1261 (11th Cir. 2005). Demonstrating the humanity of the court's members, contra widespread 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.

\textsuperscript{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.
\textsuperscript{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." 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." 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 fundamentalist religious leanings is necessarily a member of the Religious Right. 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.\textsuperscript{273}

I. 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\textsuperscript{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.”\textsuperscript{275}

Since 1988, the ERLC has been headed by Richard Land, an ordained Southern Baptist minister, who hosts two nationally syndicated radio programs, \textit{For Faith and Family} and \textit{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 \textit{Richard Land Live}, which is also broadcast on radio nationwide. Land is a frequent guest on network and cable television news programs.\textsuperscript{276} Labeled “God’s Lobbyist” by \textit{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.\textsuperscript{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-
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.


\(^{279}\) 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.


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." 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. 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. Moreover, Mr. Perkins and other FRC representatives regularly appear as guests on network and cable television news programs. 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."

4. American Center for Law & Justice: Jay Sekulow

The American Center for Law and Justice (ACLJ) was founded in 1990 by Pat Robertson for the purposes of protecting the American
family, religious and constitutional freedoms and "God-given inalienable rights." 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. 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. Under Sekulow's guidance, the ACLJ has developed into "a powerful counterweight to the liberal American Civil Liberties Union (ACLU). 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. The ACLJ's explosive growth over the last fifteen years is due in large part to the media

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A CLJ, ACLJ Mission, supra note 289.

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).

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."

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


\(^{295}\) 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/A00000020.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.\footnote{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).}

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.\footnote{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.}

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.”\footnote{John-Thor Dahlburg & Richard Simon, Schiavo Taken Off Food Supply, L.A. TIMES, Mar. 19, 2005 at A1.} 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?\footnote{Meet the Press, supra note 276.}

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
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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 create 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.\footnote{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.} 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."\footnote{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 Heralding 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.} James Dobson, appearing on the MSNBC television program Scarborough Country, referred to Mrs. Schiavo as "mentally handicapped"\footnote{Scarborough Country (MSNBC television broadcast Mar. 29, 2005).} 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.”\footnote{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.} 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-
ily happen to others. And I think we have to support the sanctity of life.\textsuperscript{313}

Tony Perkins echoed this sentiment when he appeared on CBS’s Sunday morning program \textit{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.”\textsuperscript{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.”\textsuperscript{315}

Richard Land, appearing on the MSNBC television program \textit{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.\textsuperscript{316} Similarly, Jay Sekulow, appearing opposite Professor Laurence Tribe on PBS’s \textit{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.”\textsuperscript{317} Later that same night, on the MSNBC program \textit{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.”\textsuperscript{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-

\begin{footnotes}
\item[313] Id.
\item[314] \textit{Face the Nation} (CBS television broadcast Mar. 27, 2005).
\item[315] Epstein, supra note 249, at Nation/World 1.
\item[316] \textit{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.”).
\item[317] \textit{The NewsHour with Jim Lehrer} (PBS television broadcast Mar. 21, 2005).
\item[318] \textit{Scarborough Country} (MSNBC television broadcast Mar. 21, 2005).
\end{footnotes}
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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 protestors placards and political stump speeches of those abortion opponents who view Roe and its progeny as wrongly decided. 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.” 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.

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.”

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

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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).


\(^{324}\) 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.

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.  

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." 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 rational 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

333 Snead, supra note 238, at 87.
judicial adjudication—not in legislative corridors or executive offices. 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,

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.”

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.” 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-election or fundraising 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.
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.