

ERRING TOO FAR ON THE SIDE OF LIFE: DÉJÀ VU ALL OVER AGAIN¹ IN THE SCHIAVO SAGA

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I. A CASE THAT CHALLENGES CONSENSUS ON INCOMPETENT PATIENTS' RIGHTS TO REFUSE LIFE-SUSTAINING TREATMENT

One disconcerting aspect of the Schiavo saga² was the sense of déjà vu. Is the nation destined repeatedly to watch as a young woman in a persistent vegetative state endures judicial analysis

1. Yogi Berra, *The Yogi Book* 30 (Workman Publ. 1998).

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2. The *Schiavo* case required significant judicial involvement and produced numerous opinions: *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. 2d Dist. App. 2001) [hereinafter *Schiavo I*]; *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. 2d Dist. App. 2001) [hereinafter *Schiavo II*]; *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. 2d Dist. App. 2001) [hereinafter *Schiavo III*]; *In re Guardianship of Schiavo*, 2002 WL 314817960 (Fla. Cir. Ct. 6th Dist. Nov. 22, 2002) [hereinafter *Schiavo IV*]; *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d Dist. App. 2003) [hereinafter *Schiavo V*]; *In re Guardianship of Schiavo*, No. 902908GD003 (Fla. Cir. Ct. 6th Dist. Feb. 11, 2000) [hereinafter *Schiavo VI*].

to determine whether her life-sustaining treatment may be withdrawn despite state interference?³ More troubling still is the inescapable question whether such issues, which once seemed settled legally, will ever be resolved.

In 1976, *In re Quinlan*⁴ focused national attention on the legal permissibility of withholding and withdrawal of life-sustaining treatment for incompetent patients.⁵ In the years following *Quinlan*, cases in a number of other courts in various states addressed these issues.⁶ The United States Supreme Court first addressed these issues in *Cruzan v. Director, Missouri Department of Health*⁷ in 1990. The Court's decision did not, however, provide a federal constitutional basis on which to build a solid legal consensus in this area of the law.⁸ As a result, state courts and legislatures continued to develop parameters for making decisions both inside and outside the judicial arena.⁹

The states' courts and legislatures have achieved a substantial degree of consensus in spite of the lack of federal legal authority.¹⁰ Notable issues remain, however, in which the law varies among the states. For instance, the clear-and-convincing-evidence standard's meaning and implementation regarding an incompetent person's choices about life-sustaining treatment remains unsettled, along with the acceptability and scope of substituted judgment.¹¹ These areas of disagreement and uncertainty continued

3. *E.g. Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 265 (1990); *In re Quinlan*, 355 A.2d 647, 647 (N.J. 1976).

4. 355 A.2d 647.

5. *See e.g.* Francis J. Flaherty, *A Right to Die? The Premier Privacy Issue of the 1980s*, Natl. L.J. 1 (Jan. 14, 1985) (describing *Quinlan* as "[t]he landmark opinion" in recognizing a right to die); Michael Norman, *Our Towns; The Quinlans and the Latest Right-to-Die Ruling*, N.Y. Times B4 (Jan. 24, 1985) (noting that a book and a movie were made about the *Quinlan* case).

6. *E.g. Rasmussen v. Mitchell*, 741 P.2d 674, 678, 681 (Ariz. 1987); *McConnell v. Beverly Enter.-Conn., Inc.*, 553 A.2d 596, 598 (Conn. 1989); *Severns v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334, 1336 (Del. 1980); *Kennedy Meml. Hosp. v. Bludworth*, 452 So. 2d 921, 922 (Fla. 1984); *In re Spring*, 405 N.E.2d 115, 117 (Mass. 1980); *In re Conservatorship of Torres*, 357 N.W.2d 332, 334 (Minn. 1984); *In re Welfare of Colyer*, 660 P.2d 738, 740 (Wash. 1983).

7. 497 U.S. 261 (1990).

8. *Id.* at 285-289.

9. *See generally* Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decisionmaking* (3d ed., Aspen L. & Bus. 2004 & Supp. 2005).

10. *Id.* at 2-5.

11. *Id.* at 2-6.

after *Cruzan*, in decisions such as *Conservatorship of Wendland*¹² and *In re Martin*,¹³ but such cases did not threaten the consensus that had been achieved.¹⁴

As the *Schiavo* case unfolded and gained public attention, it seemed to assume a life of its own.¹⁵ The case raised no novel ethical or legal issues, prompting a question as to why the matter was not previously resolved.¹⁶ Although the family dispute's bitterness provides part of the reason, it alone is not sufficient to explain either the length or spectacle of this odyssey.¹⁷

How did this case become an occasion for blatantly unconstitutional attempts by the Florida executive and legislative branches, and later by the United States Congress, to intervene and override years of judicial proceedings that had consistently upheld Ms. Schiavo's right to refuse life-sustaining treatment? Did these extraordinary events signal an erosion of the perceived consensus? Or did the facts of the case coincide precisely with the remaining areas of difference among state laws, thereby highlighting how refractory such cases remain to legal clarity, predictability, and finality?

II. EXTRA-LEGAL FACTORS IN THE SCHIAVO SAGA

Unsettled issues in state law were not the only factors that led to the *Schiavo* case's extraordinary culmination.¹⁸ Vocal groups seized the case as a means of narrowing the legal scope of

12. 28 P.3d 151 (Cal. 2001).

13. 538 N.W.2d 399 (Mich. 1995).

14. See e.g. *Wendland*, 28 P.3d at 159 (observing that "[f]ederal law has little to say about the competent person's right to refuse treatment, but what it does say is not . . . contrary [to state law]").

15. See Michael P. Allen, *Life, Death, and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 *Stetson L. Rev.* 55, 66–81 (2004) (setting forth the long procedural battle of the *Schiavo* case that led to intervention by the Florida Legislature and Governor Jeb Bush).

16. Compare *Schiavo III*, 800 So. 2d at 642 (discussing withdrawal of life support) with *Quinlan*, 355 A.2d at 651 (same); but see Allen, *supra* n. 15, at 79 (stating that Florida's Legislature and Governor were involved in the *Schiavo* case).

17. William Thompson, *Terri's Law: The Limit of the Florida Legislature to Decide an Individual's Right to Die*, 31 N.E. J. Crim. & Civ. Confinement 485, 495–517 (2005) (explaining the fifteen-year battle over Ms. Schiavo's life).

18. E.g. Allen, *supra* n. 15, at 82–89 (discussing the impact of procedural issues and abuses in the *Schiavo* case).

such refusal.¹⁹ Conservative Christian activist groups and some disability advocates portrayed the case as if the possibility of withdrawing Ms. Schiavo's treatment was so far beyond ethical norms and legal precedent as to be emblematic of a slide down the slippery slope to active euthanasia and social eugenics.²⁰

The pluralistic paradigm of modern bioethics has generally proceeded by grounding prevailing norms in widely accessible cultural values, rather than in particular confessional religious authorities.²¹ The *Schiavo* case, however, became an occasion for a "growing alliance of conservative Roman Catholics and evangelicals who have found common cause in the 'culture of life' agenda articulated by Pope John Paul II [and President Bush]."²² They claimed the rubric of "Christian bioethics" as though they purported to speak for the entire range of Christian thought, or at least advanced the exclusively normative Christian position.²³ This alliance also claimed Ms. Schiavo as a symbol for issues beyond refusal of treatment:

Terri is a person we can see and we can rally around her. . . . She is a silent spokesperson for the value of life and she doesn't even know it. She represents the medically vulnerable, the disabled and she also represents the tiny embryos at the center of the stem-cell debate. It's the same value for human life.²⁴

Joni Eareckson Tada, a quadriplegic who runs Joni and Friends, an evangelical ministry for disability rights in Los Angeles, said,

When you look at those videotapes, you are unable to rule out that she is in some way conscious or cognizant. When

19. *E.g.* The Terri Schindler-Schiavo Foundation, <http://www.terrisfight.org/> (accessed July 1, 2005).

20. *Not Dead Yet: The Resistance*, <http://www.notdeadyet.org/> (accessed July 1, 2005).

21. Fernando Cascais, *Bioethics: A Tentative Balance*, <http://utopia.duth.gr/~xirot/BIOETHICS/journal/vol01/04.pdf> (accessed July 1, 2005).

22. *E.g.* Laurie Goodstein, *Schiavo Case Highlights an Alliance between Catholics and Evangelicals*, N.Y. Times A1 (Mar. 24, 2005).

23. *Id.*

24. Vickie Chachere, *Culture War's Latest Chapter: Schiavo Case*, http://www.usatoday.com/news/nation/2005-03-29-schiavo-culture-war_x.htm (Mar. 29, 2005) (quoting Carrie Earll, Senior Policy Analyst for Focus on the Family).

reasonable doubts like that are raised, we who are disabled believe her condition should be exhaustively investigated.²⁵

III. ERRING ON THE SIDE OF LIFE

As the *Schiavo* case finally proceeded to its denouement, those opposed to removal of Ms. Schiavo's gastrostomy tube began to invoke a mantra of "err on the side of life."²⁶ Standing alone, the phrase sounds perfectly sensible. However, the repetition of this phrase, detached from the context of the case, the controlling legal authorities, and the scientifically and clinically substantiated medical evidence, distorted a crucial fact: by the time the executive and legislative branches of the State of Florida intervened, application of the law to this case had already erred on the side of life—to a fault.²⁷

Indeed, the idea of erring on the side of life may have plausibility for situations in which the two sides of a controversy are closely balanced by medical uncertainty, or when evidence as to the patient's choices is evenly weighted in both directions.²⁸ But the *Schiavo* case is not that situation although it was in the Schindlers' and the State's interests to portray it as such.²⁹ Analysis of the law, the medical diagnosis and prognosis, and their application to this case reveals quite the opposite conclusion.³⁰ If anything, Ms. Schiavo languished while the implementation of her rights was tragically delayed by a well-intentioned overabundance of erring on the side of life.³¹

25. Goodstein, *supra* n. 22.

26. CNN, *Schiavo Parents Appeal to U.S. Supreme Court*, <http://www.cnn.com/2005/LAW/03/23/schiavo/index.html> (updated Mar. 25, 2005, 1:16 a.m. EST) (quoting President George W. Bush).

27. *Schiavo II*, 792 So. 2d at 556, 561 (remanding for further proceedings after the Eleventh Circuit Court of Appeals granted motion for temporary injunctive relief from order discontinuing life-prolonging procedures).

28. See e.g. *Cruzan*, 497 U.S. at 285 (testimony that Cruzan would not want to live as a "vegetable" but no testimony regarding withdrawal of medical treatment).

29. E.g. Fla. Stat. § 744.3215 (2003) ("Terri's Law I") (reflecting that the Legislature opposed withdrawing treatment); Memo. of Gov. Bush, repr. in 19 Issues L. & Med. 137, 139 (Fall 2003) (relying on testimony of Ms. Schiavo's parents to oppose withdrawal of treatment).

30. *Schiavo I*, 780 So. 2d at 180.

31. Thompson, *supra* n. 17, at 495–517.

IV. ERRING ON THE SIDE OF LIFE AND SUBSTANTIVE DUE PROCESS

During the congressional debate on the proposal to provide federal judicial review in the *Schiavo* case, the Fourteenth Amendment was repeatedly invoked as a federal constitutional warrant for a substantive due process right to life. For example, Congressman Sensenbrenner said on the floor of the House of Representatives:

Among the God-given rights protected by the Constitution, no right is more sacred than the right to life. . . . When a person's intentions whether to receive lifesaving treatments are unclear, the responsibility of a compassionate Nation is to affirm that person's right to life.³²

The selective rhetorical use of the Fourteenth Amendment Due Process Clause³³ was strikingly odd, in view of the fact that the textual right to life is paralleled by the right to liberty, which, astonishingly, was not even perfunctorily acknowledged by those invoking a right-to-life substantive concept of due process.³⁴ This use of the Fourteenth Amendment sharply contrasted with earlier court cases citing the same amendment as a basis for withholding or withdrawal of life-sustaining treatment.³⁵

Early cases, such as *Quinlan*, based decisions in part on the constitutional due process right to privacy.³⁶ This is not surprising in light of the prevailing line of United States Supreme Court cases that had recognized fundamental privacy rights based on substantive due process in several areas where aspects of the human life cycle involved medical attention.³⁷ Indeed, a statement

32. 151 Cong. Rec. H1701 (daily ed. Mar. 20, 2005) (state. of Rep. Sensenbrenner).

33. U.S. Const. amend. XIV, § 1.

34. See e.g. 151 Cong. Rec. H1700–1708 (daily ed. Mar. 20, 2005) (failing to acknowledge the right to liberty).

35. See e.g. *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. 4th Dist. App. 1978) (upholding the right to discontinue use of respirator); *Superintendent of Belchertown St. Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977) (discussing freedom of choice as an essential portion of privacy); *Rutherford v. U.S.*, 438 F. Supp. 1287, 1299 (W.D. Okla. 1977) (affirming the right of cancer patients to choose modes of treatment).

36. 355 A.2d at 662–665.

37. E.g. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (involving the right of a mother to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 446–447 (1973) (regarding the criminal distribution of contraceptives).

by the Court during this period stated that medical decisionmaking might well be one of the intimate relationships that fell under the penumbra of a due process fundamental privacy right:

[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.³⁸

By the time of *Cruzan*, however, some state courts based withdrawal of treatment decisions on other legal grounds, citing the uncertain scope of a federal constitutional due process right.³⁹ In 1989, for example, the Supreme Court of Illinois, noting the unclear boundaries of a federal privacy right, grounded the right to refuse treatment in the common law right to informed consent.⁴⁰ When the United States Supreme Court accepted *Cruzan*, it seemed that the uncertainty might be removed, one way or another.⁴¹

However, *Cruzan* did not clearly address the question of whether the Fourteenth Amendment provides a due process liberty interest in refusing medical treatment.⁴² In fact, the majority opinion remained almost agnostic about the existence of such a right.⁴³ Unwilling to acknowledge that prior rulings implied such a right, the majority allowed only that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may be inferred* from our prior decisions.”⁴⁴ The majority opinion does not confirm that such an inference would be legitimate.⁴⁵ The only clear ruling in *Cruzan* is that, even if such a due process liberty interest in refusal of treatment existed, Missouri was not constitutionally prohibited

38. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n. 13 (1973).

39. *In re Estate of Longeway*, 549 N.E.2d 292, 296–298 (Ill. 1989); *Cruzan v. Harmon*, 760 S.W.2d 408, 418 (Mo. 1988).

40. *Longeway*, 549 N.E.2d at 296–298.

41. Barry Furrow et al., *Health Law* § 16-2, 821 (2d ed., West 1990).

42. *Id.*

43. *Cruzan*, 497 U.S. at 279.

44. *Id.* at 278 (emphasis added).

45. *Id.*

from restricting that right by requiring evidence of the patient's choice to meet the clear and convincing standard, thereby ensuring the state's interest in the preservation of life.⁴⁶

The Court's tentative language about a protected interest in refusing life-sustaining treatment contrasted with the Court's clear assertion of a due process right to life.⁴⁷ Whereas a right to refuse life-sustaining treatment "may be inferred," and for purposes of this case merely assumed, "It *cannot be disputed* that the Due Process Clause protects an interest in life. . . ."⁴⁸ The majority's tepid language about a due process interest in refusing life-sustaining treatment amounts to damning by faint praise. Thus, a person who would have challenged a state's restrictions on the common law right to refuse treatment would have had to show that no rational relationship existed between the restricting legislation and the state's interest in the preservation of life.

The *Cruzan* dissenters noted that a state's assertion of a general interest in life, distinguishable from protecting an individual's own interest in life, is not legitimate.⁴⁹ The majority's notion of a state's general interest in the preservation of life is merely presumed with neither explanation nor argument to support the proposition that it outweighs the individual's liberty interest.⁵⁰ The state's interest in an individual's life makes sense only in the context of protecting it from another person, disease, or condition that threatens that life against the individual's will—including a mental disease that renders the individual harmful to herself. The notion that the state has a substantive interest in the individual's life that subsumes or transcends the individual's own interest in life cannot be justified, short of a rationale that smacks of statism.

Since *Cruzan* did not secure the fundamental right to refuse life-sustaining treatment, it is impossible to know what refusal of treatment jurisprudence would look like if the dissenters had prevailed. Perhaps the best example of the difference a fundamental constitutional right to refuse treatment might make is provided

46. *Id.* at 280.

47. *Id.* at 279.

48. *Id.* at 281 (emphasis added).

49. *Id.* at 313 (Brennan, Marshall, & Blackmun, JJ., dissenting).

50. *Id.* at 312–314.

by the seminal Florida case, *In re Guardianship of Browning*,⁵¹ decided one year after *Cruzan*.

Browning articulates a more robust constitutional basis for refusal of life-sustaining treatment than the assumed right in *Cruzan*—in no small part because the Florida Constitution provides an explicit privacy amendment.⁵² *Browning* described the Florida constitutional right to privacy as a fundamental liberty interest, similar to the language of the United States Supreme Court's substantive due process jurisprudence prior to *Bowers v. Hardwick*,⁵³ indicating strict-scrutiny analysis:

“Privacy” has been used interchangeably with the common understanding of the notion of “liberty,” and both imply a fundamental right of self-determination subject only to the state’s compelling and overriding interest.⁵⁴

The Florida Supreme Court grounds the right to refuse treatment in the concept of autonomy.⁵⁵ However, the right does not merely recognize that the patient is the most likely person to know her own best interest:

More is involved in respect for self-determination than just the belief that each person knows what’s best for him- or herself. . . . Even if it could be shown that an expert (or a computer) could do the job better, the worth of the individual, as acknowledged in Western ethical traditions and especially in Anglo-American law, provides an independent—and more important—ground for recognizing self-determination as a basic principle in human relations, particularly when matters as important as those raised by health care are at stake. . . . We conclude that a competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one’s health.⁵⁶

51. 568 So. 2d 4 (Fla. 1990).

52. Fla. Const. art. I, § 23.

53. 478 U.S. 186 (1986).

54. *Browning*, 568 So. 2d at 9–10.

55. *Id.* at 9–12.

56. *Id.* at 10–11 (quoting Pres.’s Commn. for the Study of Ethical Problems in Med. & Biomed. & Behavioral Research, *Making Health Care Decisions* 44–45 (1982)).

Cruzan and *Browning* differ not only regarding the competent person's right to refuse treatment, but also regarding whether such a right extends to incompetent patients. The *Cruzan* Court reasons that the incompetent patient's right to refuse treatment is precluded by his incompetence.⁵⁷ Therefore, because an incompetent patient's right to refuse treatment is not the same as that of a competent patient, the state's interest in protecting the incompetent patient's life allows it to limit the incompetent patient's right to refuse by procedural measures that err on the side of life.⁵⁸

In *Browning*, the Florida Supreme Court reasoned that the failure to extend the same right of privacy to incompetent patients would render the right illusory.⁵⁹ The difference between the opinions is apparent in the range of protections that *Cruzan* allowed states to impose for the protection of life, as opposed to the more careful way in which the *Browning* Court narrowly tailored the state's interest in protecting life, so as to maximize the incompetent patient's right to refuse unwanted treatment.⁶⁰

V. ERRING ON THE SIDE OF LIFE AND PROCEDURAL DUE PROCESS

Non-judicial means of resolving disputed cases, such as healthcare ethics committees and alternative dispute resolution, have been able to avoid judicial involvement in many cases. In cases in which these measures prove futile, however, resolution requires judicial intervention. Accordingly, the *Browning* Court emphasized "the importance of rules that provide such patients with certain access to the courts and the ability to swiftly resolve their claims when nonlegal means prove unsuccessful."⁶¹ The procedural history of *Schiavo* is not a good model for the use of procedural rules to provide patients a means of swift claim resolution.⁶²

57. 497 U.S. at 280.

58. *Id.*

59. 568 So. 2d at 17.

60. *Id.* at 14–16.

61. *Id.* at 16, n. 17.

62. See generally Allen, *supra* n. 15 (discussing how procedural rules differ in end-of-life cases).

The Schindlers' first of several attempts to remove Mr. Schiavo as his wife's guardian and take control of her medical care occurred in 1993.⁶³ Over the next twelve years, the Schiavo-Schindler conflict over Ms. Schiavo's medical care went before the Pinellas County Probate Court more than twenty times, the Pinellas County Circuit Court five times, the Florida Second District Court of Appeal seventeen times, the Florida Supreme Court five times, the United States District Court for the Middle District of Florida eight times, the United States Court of Appeals for the Eleventh Circuit three times, and the United States Supreme Court five times.⁶⁴ It is absurd on its face to claim that the procedural due process afforded to the Schindlers and the State of Florida was inadequate, yet that is precisely the claim of those in the United States Congress who rammed through an "emergency" bill mandating federal judicial review.⁶⁵ This might plausibly be called due process run amok.

During this legal odyssey of trial court and appellate court proceedings, both state and federal, Mr. Schiavo's position as guardian and medical decision-maker was upheld on the merits of the substantive issues.⁶⁶ The Schindlers' as well as the State's claims to the contrary were found to be legally insufficient.⁶⁷ Yet, the impulse toward erring on the side of life provided momentum to maintain the case itself on a type of judicial life support, in part by treating this case differently because it entailed end-of-life issues.⁶⁸

As one commentator has shown, the Florida Second District Court of Appeal assumed the unusual role of advisor to the Schindlers' attorney.⁶⁹ Although the court upheld the trial court judge's dismissal of the Schindlers' motion, the court took the extraordinary step of instructing the Schindlers' attorney on alternative procedural grounds for a challenge and staying the trial

63. Kathy Cerminara & Kenneth Goodman, *Key Events in the Case of Theresa Marie Schiavo*, <http://www.miami.edu/ethics2/schiavo/timeline.htm> (accessed July 2, 2005).

64. *See generally id.* (outlining events and attention on the *Schiavo* timeline).

65. Sen. 686, 109th Cong. (Mar. 20, 2005).

66. *E.g. Schiavo I*, 780 So. 2d at 180; *Schiavo II*, 792 So. 2d at 563; *Schiavo III*, 800 So. 2d at 645.

67. *E.g. Schiavo I*, 780 So. 2d at 179; *Schiavo II*, 792 So. 2d at 562; *Schiavo III*, 800 So. 2d at 645.

68. Allen, *supra* n. 15, at pt. I(C).

69. *Id.* at 72-74.

court's order to remove treatment until the Schindlers' attorney could implement the appellate court's advice.⁷⁰ The court's action exemplifies another way in which erring on the side of life resulted in an overabundance of procedural due process that compromised Ms. Schiavo's right to refuse treatment, without changing the outcome or even any substantial reason to believe that the outcome should be changed. Moreover, the court went to unusual lengths to provide the Schindlers with the opportunity to introduce new medical testimony, to give the trial court detailed instructions on the type of medical expertise to secure,⁷¹ and to perform constructive de novo review of the hours of videotape and medical testimony.⁷²

We have repeatedly examined the videotapes [of Ms. Schiavo], not merely watching short segments but carefully observing the tapes in their entirety. We have examined the brain scans with the eyes of educated laypersons and considered the explanations provided by the doctors in the transcripts. We have concluded that, if we were called upon to review the guardianship court's decision de novo, we would still affirm it.⁷³

Whatever the courts' problems in providing swift resolution to particular cases, the judicial process at its worst is better suited to the fair, accurate, ordered, or deliberative resolution of a case than legislative and executive attempts to do so. Legislatures play an important role in providing a general and balanced public policy approach to enable individuals to maximize their end-of-life choices and to address the concerns of caregivers and other affected parties, such as family members. An appropriate way exists to develop such a public policy, and the history of the Florida Legislature's activity on this topic is exemplary prior to the ill-advised attempts in 2003 and again in 2005 to intervene in *Schiavo*.⁷⁴

In the late 1990s, the Florida Legislature created the Panel for the Study of End-of-Life Care to solicit citizen testimony in

70. *Id.* at 74–75.

71. *Id.* at 76–77, n. 119 (citing *Schiavo III*, 800 So. 2d at 642).

72. *Schiavo V*, 851 So. 2d at 186.

73. *Id.*

74. *Infra* nn. 110–124 and accompanying text (discussing H. Bill 701).

public hearings around the State; secure expert advice from the multiplicity of disciplines and settings of care; identify current problems; and, recommend to the Florida Legislature legal, regulatory, and policy changes that would provide comprehensive improvements for end-of-life care in Florida.⁷⁵ The process took a year and produced a consensus document with a wide array of proposed solutions from the public, medical care providers, social services, bioethics consultants, and legal experts in elder law, guardianship, and health law.⁷⁶ Of the Panel's twenty-three recommendations, the Legislature implemented nine entirely and ten partially into Florida law after minor revision in the relevant legislative committees.⁷⁷

This exemplary approach to public policy on end-of-life issues provides an instructive contrast to the approach of the same legislative body after its entanglement in the chaotic and precipitous passage of Terri's Law I,⁷⁸ involving an emergency session characterized by misinformation and open disregard for existing Florida statutory and constitutional law.⁷⁹

The same contrast may be made with the Congressional emergency sessions⁸⁰ leading to another unconstitutional attempt to substitute legislative action for judicial process. Indeed, the only attempt to have public hearings about end-of-life issues during the *Schiavo* litigation was the threat of bringing Ms. Schiavo herself to Capitol Hill for testimony before the United States House Committee on Government Reform,⁸¹ motivated not by a search for accurate information, but rather as a ruse for additional delay in the court-ordered removal of Ms. Schiavo's nutrition and hydration tube. The Committee's claimed purpose to review the role of the federal government in "the cost, treatment,

75. Robert G. Brooks et al., *Advancing End-of-Life Care: Lessons Learned from a Statewide Panel*, 6 J. Palliative Med. 821, 822 (2003).

76. See generally Panel for the Study of End-of-Life Care, *Interim Report* (Pepper Inst. on Aging & Pub. Policy 1999) (suggesting solutions to end-of-life care issues arising in Florida).

77. Brooks, *supra* n. 75, at 826–827.

78. Fla. Stat. § 744.3215.

79. See generally *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (discussing the importance of separation of powers).

80. Gwyneth K. Shaw, *Lawmakers Send Schiavo Case on to U.S. Court*, Balt. Sun 1A (Mar. 21, 2005).

81. Manuel Roig-Franzia, *Schiavo's Feeding Tube Is Removed; Congressional Leaders' Legal Maneuvering Fails to Stop Judge's Order*, Wash. Post A01 (Mar. 19, 2005).

personnel and any management inefficiencies involved”⁸² in the long term care of incapacitated patients does not even pass the straight-face test, let alone constitutional scrutiny.

VI. ERRING ON THE SIDE OF LIFE AND CLEAR AND CONVINCING EVIDENCE

The clear and convincing evidence standard is required by both the *Browning* case⁸³ and the Florida Statutes.⁸⁴ The appropriate justification for requiring the clear and convincing evidence standard, however, should not be either solely or primarily to err on the side of life.⁸⁵ Indeed, the clear and convincing evidence standard should be imposed to protect the patient’s right to refuse treatment as well as her right to life.⁸⁶ If evidence purporting to show what the incompetent patient would have chosen—either to accept or to refuse treatment—does not constitute clear and convincing evidence, then the subjective or substituted judgment standard is not dispositive, and the best interest standard must control.⁸⁷

Schiavo was widely reported as if it were simply Michael Schiavo’s unsupported substituted judgment against the Schindlers’ conflicting substituted judgment. Actually, both sides provided testimony from non-parties as well as Mr. Schiavo and the Schindlers about oral statements Ms. Schiavo had made prior to her loss of decisional capacity.⁸⁸ The trial court judge applied the clear and convincing evidence standard to the testimony of both sides, not simply to the evidence offered by Mr. Schiavo.⁸⁹

Judge Greer explained his assessment of the evidence, concluding that the evidence offered by Mrs. Schindler and a friend of Ms. Schiavo’s, asserting Ms. Schiavo’s opinion regarding Karen Ann Quinlan, made when Ms. Schiavo was eleven or twelve years

82. H.R. Govt. Reform Comm., *Emergency All-Writs Petition*, 109th Cong. 7 (Mar. 18, 2005).

83. *Browning*, 568 So. 2d at 16.

84. Fla. Stat. §§ 765.202(7), 765.401(3) (2004).

85. *Cruzan*, 497 U.S. at 282–283.

86. *Id.*

87. *Id.* at 273.

88. See generally *Schiavo VI*, slip op. at 5 (discussing the testimony presented in the case).

89. *Id.* at 8–9.

old, could not be regarded as clear and convincing evidence of Ms. Schiavo's current situation.⁹⁰ He also concluded that comments Ms. Schiavo made about the situation of others regarding withdrawal of treatment were not relevant to Ms. Schiavo's own choices for this case, including one statement from Mr. Schiavo's witness.⁹¹ Further, Judge Greer noted that he did not have to rely solely on Michael Schiavo's testimony, because that testimony was corroborated by other witnesses' credible testimony about statements Ms. Schiavo made as an adult regarding what she would want for herself if she were ever maintained on life support.⁹² The problems that have been noted with the reliability of a loose concept of substituted judgment⁹³ were actually more applicable to the testimony of the Schindler witnesses, rather than the evidence presented by Mr. Schiavo's witnesses.⁹⁴

Following the Papal allocution on the morally obligatory status of artificial nutrition and hydration,⁹⁵ the Schindlers claimed that Ms. Schiavo, as a practicing Catholic, would have followed the Papal allocution and accepted continued artificial nutrition and hydration.⁹⁶ This provides a good illustration of why the clear and convincing standard should apply to evidence supporting continued treatment as well as evidence supporting removal. If the heightened evidentiary standard were required only to protect the state's interest in the preservation of life, would the state's interest in erring on the side of life justify a lower standard of evidence that the incompetent patient would have chosen to continue treatment? Moreover, if the state's interest in protecting life is unqualified, as the *Cruzan* court held,⁹⁷ would factfinders be obligated to take evidence such as either Ms. Schiavo's

90. *Id.* at 9.

91. *Id.*

92. *Id.* at 5, 9.

93. Meisel & Cerminara, *supra* n. 9, at § 4.02, 4–16 to 4–17.

94. *See Schiavo VI*, slip op. at 5 (describing the testimony of the witnesses called by the Schindlers).

95. Pope John Paul II, Address, *Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas* (Rome, Mar. 20, 2004) (transcript available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040320_congress-fiamc_en.html).

96. *Schiavo VI*, slip op. at 1–2.

97. *Cruzan*, 497 U.S. at 282.

statement at age twelve or her parents' claim that she would follow the Papal allocution as dispositive?

*VII. ERRING ON THE SIDE OF LIFE AND MEDICAL
CRITERIA FOR DIAGNOSTIC AND PROGNOSTIC
SUFFICIENCY*

When the patient's choices about refusal of life-sustaining treatment are supported by clear and convincing evidence, but there is significant diagnostic or prognostic uncertainty about the patient's condition, erring on the side of life is reasonable up to a point. Erring in the direction of treatment allows one to determine whether a trial of life-sustaining treatment will enable the patient to recover his or her baseline condition or to regain his or her capacity, so that the patient him or herself may determine whether the burdens of treatment outweigh its benefits.⁹⁸ If the trial progresses without the patient recovering or regaining capacity, the clinical possibility of recovery decreases. It is precisely because of the initial decision to err on the side of life that, once it becomes clear that the treatment will not achieve its goal, erring on the side of life must yield to erring on the side of protecting the patient's right to refuse. Continuing to err on the side of life after life-sustaining treatment has not achieved its goals effectively undermines the patient's right to liberty, reducing that right to a mere theoretical possibility.⁹⁹

To hear those opposed to the removal of Ms. Schiavo's treatment characterize her medical condition, one would believe that the diagnosis and prognosis was such a close call that credible medical evidence could be adduced on both sides of the issue.¹⁰⁰ Their position was reinforced by the misleading videotapes endlessly replayed on the web and television, by the distortions of Ms.

98. See *In re Guardianship of Schiavo II*, 792 So. 2d at 560 (referring to the possibility of recovery as a means of challenging the original assumption that the condition was terminal).

99. See *In re Guardianship of Browning*, 568 So. 2d at 12 (discussing the illusory nature of the right to privacy if it were not also extended to incompetent persons).

100. See e.g. Fred Barnes, *Facts First*, <http://www.weeklystandard.com/content/public/articles/000/000/005/385ttsvl.asp> (Mar. 21, 2005) ("There are legitimate questions about her initial diagnosis."); Imago Dei, *MSNBC's Caplan All Wrong on Schiavo*, http://www.imago-dei.net/imago_dei/2005/03/newsweeks_pathe.html (Mar. 19, 2005) ("We don't know how much ability Terri can recover.").

Schiavo's ability to respond claimed by her parents and attorneys, and by the irresponsible claims of physician legislators who were not neurologists and who never examined Ms. Schiavo.¹⁰¹ Actually, the most clearly established fact in the entire case was that Ms. Schiavo existed in a persistent vegetative state with such a profound degree of cerebral cortex deterioration as to render any possibility of rehabilitation or recovery medically impossible.¹⁰²

In fact, all but one of the neurologists who actually performed clinical examinations on Ms. Schiavo rendered this opinion.¹⁰³ In the trial court's exhaustive review of the medical evidence, all of the weight of scientific expertise, supported by published scientific studies, confirmed that Ms. Schiavo remained in a permanent state of unconsciousness—unable to be aware of, or to interact with, her environment.¹⁰⁴ The court found that the claims of the only non-neurologist examining her were not credible, pointing out that this radiologist could cite no instances of scientific support for his claims or that his proposed therapy could rehabilitate her.¹⁰⁵

Governor Bush's latter attempt to create a basis for a new hearing to delay the withdrawal of treatment involved another neurologist visiting Ms. Schiavo.¹⁰⁶ The neurologist was not an expert in persistent vegetative states and performed no clinical examination of Ms. Schiavo, yet managed to render an opinion.¹⁰⁷ It is somewhat ambiguous whether the neurologist's conclusion should be called a medical opinion or a personal ethical opinion. His affidavit concluded that although Ms. Schiavo demonstrated all of the essential clinical criteria for persistent vegetative state, he could not personally bring himself to withdraw her nutrition/hydration tube on the basis of his sense of her "presence."¹⁰⁸ It is quite unclear whether this conclusion was based on his medi-

101. Sheryl Gay Stolberg, *Drawing Some Criticism, Legislators with Medical Degrees Offer Opinions on Schiavo Case*, N.Y. Times A14 (Mar. 23, 2005).

102. *Schiavo VI*, slip op. at 6.

103. *Schiavo V*, 851 So. 2d at 184–185.

104. *Schiavo IV*, 2002 WL 31817960 at *3; *Schiavo VI*, slip op. at 6.

105. *Schiavo IV*, 2002 WL 31817960 at **3–5.

106. John Schwartz & Denise Grady, *A Diagnosis with a Dose of Religion*, N.Y. Times A20 (Mar. 24, 2005).

107. *Id.*

108. *Id.*

cal judgment as a neurologist or his judgment as a Christian bioethicist.¹⁰⁹

VIII. ERRING ON THE SIDE OF LIFE FOR NUTRITION/HYDRATION BY TUBE

During the last few weeks of the Schiavo saga, opponents of removing her gastrostomy tube introduced House Bill 701 into the 2005 session of the Florida Legislature.¹¹⁰ House Bill 701 attempted to impose a special level of erring on the side of life for refusal of artificial nutrition and hydration that was not required for refusal of other forms of life support.¹¹¹ Essentially, this legislative proposal would have required the following:

1. An incapacitated patient must be presumed to have chosen life-sustaining artificially administered nutrition and hydration;
2. No surrogate, proxy, or court is allowed to refuse nutrition/hydration for the incompetent patient, except when artificial nutrition/hydration:
 - a.) is medically impossible, would hasten death, or would not prolong life or provide comfort; or
 - b.) when a written advance directive or other clear and convincing evidence demonstrates that the patient explicitly refused artificial nutrition/hydration in the circumstances of her current medical condition.¹¹²

The proposed change to Florida's advance directive statute set artificial medical provision of nutrition and hydration apart from other forms of advanced medical care that may be accepted or refused as life-sustaining treatment.¹¹³ Provision of food and water to a person who can swallow (whether incompetent or not)

109. *Id.*

110. Fla. H. 701, Reg. Sess. (Feb. 4, 2005)

111. *Id.*

112. *Id.* at § 1.

113. *Id.* The provisions in the bill concerning nutrition and hydration explicitly supersede other provisions in the Florida Statutes concerning the withholding of medical care. *See id.* at §§ 2-3, 5-7.

may be distinguished from medical or surgical care as an obligation of humane caring and decency.¹¹⁴ The provision of nutrition and hydration through surgical measures, however, is clearly a form of medical care that patients may deem to be more of a burden than a benefit to their goals of care.¹¹⁵

The proposed change recognized that nutrition and hydration administered by a surgically implanted gastro-intestinal tube is a medical procedure that may be refused.¹¹⁶ The proposed change singled out gastro-intestinal provision of nutrition or hydration, however, as different than other forms of life-sustaining treatment, requiring that only this form be specifically named in any valid advance directive.¹¹⁷ No good reason exists to treat surgically placed nutrition and hydration differently than any other form of life support. Like cardiopulmonary resuscitation, mechanical respiration, or kidney dialysis, surgically implanted nutrition and hydration may preserve a person's life long enough for him or her to recover from the malady or injury, or it may preserve the person's life even without recovery when that person finds the benefits of the treatment to outweigh its burdens.¹¹⁸

The presumption implies that authorized decision-makers would be better able to know the incompetent's wishes about respiration or dialysis than about nutrition and hydration.¹¹⁹ There is no basis for this presumption, and nutrition and hydration

114. See e.g. Pope John Paul II, *supra* n. 95 (distinguishing between "natural" and "medical" acts, and the differing moral obligations they raise).

115. See *Cruzan*, 497 U.S. at 267–268 (recognizing artificial nutrition and hydration as among the procedures that may potentially be refused); *Quinlan*, 355 A.2d at 663 (recognizing the potential desire of a patient to refuse medical care necessary for the continuance of life).

116. Fla. H. 701 at § 1.

117. *Id.*

118. See *Cruzan*, 497 U.S. at 288 (O'Connor, J., concurring) ("Artificial feeding cannot readily be distinguished from other forms of medical treatment.").

119. If an authorized decision-maker had the same ability to know the incompetent's wishes regarding respiration or dialysis as he would about the wishes regarding nutrition or hydration, then no extra protections would be needed regarding statements concerning the latter. In the former instance, the decision-maker is presumed to have accurately reflected the incompetent's wishes under Section 765.205(1)(a) of the Florida Statutes (subject to review under Section 765.105) of the Florida Statutes. In the latter instance, the presumption is that the incompetent requested life-sustaining treatment, Fla. H. Bill 701 at § 1, rather than the presumption being that the decision-maker has particular knowledge of the incompetent's wishes.

should not be treated any differently than the other forms of life support.

The problem with the proposed change may best be illustrated by considering its application to a concrete case. A sixty-five-year-old male has been diagnosed with terminal bone cancer, a condition for which the pain is notoriously difficult to control. He writes an advance directive that says, "when my pain becomes so unbearable that the only way to control it is to give me large doses of narcotics, I want all forms of life-sustaining treatment discontinued, so that my dying process is not prolonged."

Florida law permits this choice. Further, if House Bill 701 had become law, his wife, whether she is named as his surrogate or is the first in line to serve as his proxy, could have directed

1. that no cardiopulmonary resuscitation be given if he has a cardiac arrest;
2. that mechanical ventilation be withheld or withdrawn;
3. that if his kidneys fail, no dialysis be initiated;
4. that if he contracts pneumonia, no aggressive antibiotic therapy be initiated;
5. that if surgery seems to be indicated for other conditions, none take place;
6. that if he has a hemorrhage, and is bleeding internally, no blood transfusions be given.¹²⁰

She may make all the above decisions and more without his specifically naming any of these procedures, but since he did not specifically say, "no percutaneous endoscopic gastrostomy tubes," she could not refuse surgical implantation of a tube for the medical administration of nutrition and hydration.¹²¹ Even though his rationale for refusal would be the same, and there is no reason to think that his refusal would apply any less to medical nutrition and hydration than all the other life-sustaining treatments, his wife could not refuse the provision of nutrition and hydration.

120. Fla. H. 701 at § 5.

121. *Id.* at § 1.

House Bill 701 would force a physician to implant a tube into the patient's stomach to pump in a nutrient solution that would have the effect of prolonging the patient's dying.¹²²

Artificial nutrition and hydration is just as invasive as other forms of life-sustaining treatment, and many find it more burdensome than beneficial.¹²³ To label removal of a feeding tube from a patient that does not want such treatment as "starvation" is akin to labeling the withdrawal of a ventilator from someone refusing it as "smothering." There is no relevant difference between artificially provided nutrition and artificially provided respiration that would warrant treating them differently under the law or moral reasoning.

IX. CONCLUDING REFLECTIONS

It is too soon after *Schiavo* and the intense public drama that accompanied it to divine what the case will mean in terms of future public policy. But there were many indications that state and federal lawmakers would revisit the issues at some future point.¹²⁴ The strong feelings generated on all sides of the debate, not only about the end-of-life issues, but about the legislative and executive interventions, are likely to resonate in future political campaigns and the "culture wars."¹²⁵ *Schiavo* has already taken on symbolic and rhetorical meanings for advocates of various positions in these battles, depending on whether one sees state intervention to restart nutrition and hydration as "force feeding" or the removal of such as "starvation."¹²⁶

122. *Id.* at §§ 1, 5.

123. See David W. Moore, *Three in Four Americans Support Euthanasia*, Gallup Poll News Serv. (May 17, 2005) (available in LEXIS, NEWS library, ALLNEWS file) ("When it comes to being 'in a persistent vegetative state with no hope of . . . significant recovery,' eighty-five percent of Americans say they would want to have their life support removed.").

124. See Fla. H. 701 at § 1 (explaining that without specific refusal of such treatment, its medical administration cannot be avoided).

125. See Charles Babington & Mike Allen, *Left, Center and Right Prepare for Battle over High Court Vacancy*, Wash. Post A1 (July 3, 2005) (reporting on a television ad sponsored by the liberal MoveOn PAC, echoing the *Schiavo* litigation in the context of a Supreme Court nomination).

126. The term "starvation" was used frequently by those supporting the continued use of artificial nutrition and hydration. See e.g. Blogicus, *Terri Schiavo Starvation Begins Today*, http://www.blogicus.com/archives/terri_schiavo_starvation_began_today.php (Mar. 18, 2005) (a pro-life blog). The term "force-feeding" was used by those who supported the removal of the nutrition and hydration tube, most notably by George Felos, Mr.

Those who see the *Schiavo* case and its outcome as a reflection of a culture of death, indicating just how far down the slippery slope our culture has slid toward devaluing life, will continue to challenge the scope of legal provisions allowing individuals the right to refuse treatments that the individuals regard as more burdensome than beneficial. They will maintain that feeding tubes are natural acts, not medical treatments, and that individuals who are not literally at death's door are not terminally ill. The polling of public opinion throughout this case, however, consistently showed that the majority of people in the United States would not want to be kept on life-sustaining treatment if they were in Ms. Schiavo's situation.¹²⁷ The relative consensus on the options available for persons to control their own care at the end of life, at least in terms of refusing life-sustaining treatment, was upheld.¹²⁸ But the scope of that right to refuse is still under intense debate that will not abate anytime soon.¹²⁹ As the contours of that debate unfold in the coming political campaigns and legislative sessions, we are bound to hear more about erring on the side of life. The attempt to balance individual liberty with the state or society's value for life must not subsume individual liberty under such an expansive notion of the state's interest that "erring on the side of life" becomes an excuse to place the state's thumb on the scales at every stage of the process of personal, family, medical, and ultimately judicial decisionmaking.

The most disturbing and dangerous aspect of the majority's opinion in *Cruzan* was the claim that the state may "simply as-

Schiavo's attorney. See e.g. Interview by Chris Matthews with George Felos on *Hardball* (MSNBC Mar. 18, 2005) (TV series) (transcript available at <http://msnbc.msn.com/id/7255679/>).

The participants in the public debate on this topic have often chosen their rhetoric carefully. One example of this is the tendency of those who supported the continued use of artificial nutrition and hydration—who thereby sided with Ms. Schiavo's parents, Bob and Mary Schindler—to refer to the patient as "Terri Schindler-Schiavo." The foundation set up "to fight for [her] life" is known as the "Terri Schindler-Schiavo Foundation." Terri Schindler-Schiavo Foundation, *About Us*, <http://www.terrisfight.org/about.html> (accessed July 13, 2005). In addition, the religiously oriented Ave Maria University, in Naples, Florida, has established a Terri Schindler-Schiavo Scholarship. *New Catholic University Creates Schiavo Scholarship*, St. Petersburg Times 4B (July 9, 2005).

127. Moore, *supra* n. 123.

128. Frank Newport, *The Terri Schiavo Case in Review*, Gallup Poll News Serv. (Apr. 1, 2005) (available in LEXIS, NEWS library, ALLNEWS file).

129. See e.g. John Leo, *An Autopsy Won't End It*, 138 U.S. News & World Rep. 60 (June 27, 2005) (arguing the persistence of the underlying moral issues in the *Schiavo* case).

sert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.”¹³⁰ If the state’s interest in the preservation of human life is allowed to be unqualified—indeed, if that state interest is not affirmatively qualified by measures to protect the individual’s assessment of her own interest in her particular and unique life—we will continue to see unwarranted interventions by state actors with unbridled assurances that they know better than we do how to protect us from ourselves. Let us hope that when this scenario happens again, even though it may not be as blatant as the egregious examples in this case, the judicial branch continues to have the courage to place appropriate qualifications on overweening state interests, as it did in finally bringing the Schiavo saga to a merciful and just end, if not a happy one.

130. *Cruzan*, 497 U.S. at 282.