
THE ROLE OF RELIGION IN THE SCHIAVO CONTROVERSY

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I. INTRODUCTION

The brief life of Theresa Marie Schiavo and the dispute over her end-of-life care captured public awareness in a way that few such cases have done. The reasons for the nearly unprecedented public attention to her case are two-fold. The decision by various religious groups and governmental entities to intervene in the dispute surrounding her care in order to promote conservative causes (some of them only tenuously related to her particular medical circumstances) prompted unusually intense media coverage. In addition, the ensuing publicity surrounding Theresa's tragic condition—an unexpected cardiac arrest left her in a permanent vegetative state at the age of twenty-six—provided a vivid and poignant reminder of the very precarious nature of life.

The case placed multiple issues in dispute. First, there was some debate over whether Theresa's medical condition was indeed hopeless.¹ Second, although the Florida courts repeatedly confirmed that the evidence of Theresa's wishes under the circumstances provided a legally sufficient basis for withdrawing life support, many onlookers questioned whether she would in fact choose to die.² In particular, the case raised questions about the appropriate role of Catholic and Christian principles in end-of-life decision-making. This essay focuses on the latter question in light of

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¹ See *infra* notes 4-7 and accompanying text (describing the permanent vegetative state and the evidence confirming it in Theresa Schiavo).

² See *infra* Part II.

the relevant ethical and legal principles, as well as guidance from the Catholic Church on end-of-life decision-making. As explained within, the Church's teachings fail to address the most complex issues, leaving many end-of-life decisions to the conscience of the individual patient. Adding to the difficulty, although courts certainly consider patients' religious principles in making determinations about end-of-life care, judicial inquiry into religious principles generally lacks nuance. Finally, the essay considers the effects of the intervention of various political and religious conservative organizations in the dispute over Theresa's care and examines the implications of such interventions for future cases.

II. FACTUAL BACKGROUND

In 1990, Theresa Schiavo lapsed into a permanent vegetative state (PVS) after a cardiac arrest deprived her brain of oxygen for an extended period of time.³ For the fifteen years that followed, a surgically-implanted tube that provided artificial nutrition and hydration kept her body alive.⁴ PVS differs from a coma. Because PVS patients experience waking and sleeping cycles, open their eyes, move their limbs, and utter sounds,⁵ some people, including Theresa's parents Robert and Mary Schindler, found it difficult to accept that Theresa lacked any capacity for thought, emotion, or other activities associated with consciousness.⁶ With the passage of years, Theresa's cerebral cortex deteriorated irrevocably, but her brainstem remained intact.⁷ Thus, she was able to breathe without

³ Much of the factual and legal background for this essay, though updated, is derived from Barbara A. Noah, *Politicizing End of Life: Lessons from the Schiavo Controversy*, 59 U. MIAMI L. REV. 107 (2004).

⁴ See Abby Goodnough, *Governor of Florida Orders Woman Fed in Right-to-Die Case*, N.Y. TIMES, Oct. 22, 2003, at A1.

⁵ See Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State*, (Pt. I), 330 NEW ENG. J. MED. 1499, 1500 (1994) [hereinafter *PVS Report (Pt. 1)*] ("Patients in a vegetative state are usually not immobile. They may move the trunk or limbs in meaningless ways. They may occasionally smile, and a few may even shed tears . . . utter grunts or, on rare occasions, moan or scream. . . . These motor activities may misleadingly suggest purposeful movements . . ."); see also *id.* at 1501; cf. Christopher M. Booth et al., *Is This Patient Dead, Vegetative, or Severely Neurologically Impaired?*, 291 JAMA 870 (2004) (evaluating data on neurological outcomes after cardiac arrest and concluding that several clinical signs that become apparent just twenty-four hours after cardiac arrest serve as reliable predictors of poor neurological prognosis).

⁶ See William R. Levesque, *Doctors Offer Voices for Terri Schiavo*, ST. PETERSBURG TIMES, Oct. 25, 2003, at B1.

⁷ See *PVS Report (Pt.1)*, *supra* note 5, at 1501 ("[T]he adjective 'persistent' refers only to a condition of past and continuing disability with an uncertain future, whereas 'permanent'

assistance, but she could not experience or interact with her environment, and she required comprehensive care, including artificial nutrition and hydration through a tube, to sustain her body.⁸ Numerous medical experts concluded that the damage to Theresa's brain was extensive and irreversible and that Theresa would never recover any measurable brain function, a conclusion that was ultimately confirmed by autopsy.⁹ Notwithstanding this expert opinion, her parents retained the hope that Theresa would benefit from unconventional efforts at rehabilitation.¹⁰

From 1998 until 2005, Theresa's husband, Michael Schiavo, having accepted the reality of Theresa's prognosis,¹¹ sought permission from the Florida courts to have her feeding tube removed so that she could die peacefully.¹² Michael based his request on Theresa's previously expressed wishes and values, explaining that Theresa would never have wanted to continue to exist in a vegetative

implies irreversibility. Persistent vegetative state is a diagnosis; permanent vegetative state is a prognosis."); see also Gary Kalkut & Nancy N. Dubler, *The Line Between Life and Death*, N.Y. TIMES, May 10, 2005, at A17.

⁸ See *id.*

⁹ Because Theresa's brain injury resulted from a non-traumatic cause (a cardiac arrest) she had essentially no chance of any measurable recovery after fourteen years. The autopsy of Theresa's remains found irreversible damage to the brain at a level which would not have improved with any amount of therapy. See Jon Thogmartin, Medical Examiner, *Report of Autopsy of Theresa Schiavo*, June 15, 2005, http://www.miami.edu/ethics2/schiavo/pdf_files/061505-autopsy.pdf (last visited Mar. 21, 2006); Steve Haidar & Kathy Cerminara, *Key Events in the Case of Theresa Marie Schiavo*, <http://www.miami.edu/ethics2/schiavo/timeline.htm> (last visited Mar. 21, 2006) [hereinafter Key Events] (concluding that the cause of death was "complications of anoxic encephalopathy," not dehydration and starvation); see also Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State*, (Pt. II), 330 NEW ENG. J. MED. 1572, 1572-73 (1994) [hereinafter *PVS Report (Pt. II)*] (explaining that the "prognosis for cognitive and functional recovery depends on the cause of the underlying brain disease" and that recovery of consciousness after three months is rare in adults with non-traumatic injuries to the brain). One year after non-traumatic brain injury, only fifteen percent of adults in the study had recovered any degree of consciousness and, for those few who regained consciousness, recovery of function was "extremely poor." See *id.* at 1573 & tbl. 5.

¹⁰ See Levesque, *supra* note 6 (quoting various family members who believed that Theresa responded to them with smiles and eye movements).

¹¹ Michael Schiavo also initially arranged for a variety of unconventional therapies to help improve Theresa's condition, but he ultimately accepted the medical prognosis that his wife's incapacity was permanent. See Arian Campo-Flores, *The Legacy of Terri Schiavo*, NEWSWEEK, Apr. 4, 2005, at 22 (describing the "variety of therapies" that Michael Schiavo sought out for Theresa, including physical and occupational therapy, the playing of tape-recorded familiar voices, and even Michael's enrollment in nursing school to enable him to learn more about how to care for Theresa); Joan Didion, *The Case of Theresa Schiavo*, 52 N.Y. REV. OF BOOKS 10 (June 9, 2005) (describing a "thalamic stimulator" that was surgically implanted in Theresa's brain as part of an experimental procedure in 1990).

¹² See Campo-Flores, *supra* note 11, at 22.

state after all hope of recovery had vanished.¹³ At the same time, her parents vigorously objected to this request, arguing that the evidence of Theresa's wishes was insufficient and that its source was suspect.¹⁴ Nevertheless, in a series of judicial decisions, state and federal courts repeatedly confirmed the legal propriety of acceding to Michael's request, finding evidence of Theresa's wishes legally sufficient to support the removal of life supportive technology.¹⁵

On September 17, 2003, a Florida court broke the deadlock between Michael Schiavo and Theresa's parents, ordering the feeding tube removed and, four weeks later, the hospice providing Theresa's care complied with this order.¹⁶ After they had exhausted available legal avenues of appeal, the Schindlers turned to Florida Governor Jeb Bush for help and, six days after Theresa's feeding tube was removed, the Florida legislature enacted a special bill authorizing the Governor to intervene in the dispute and order a "stay" of the court's decision.¹⁷ Governor Jeb Bush immediately acted on that authority, directing health care providers to reinsert the

¹³ See *id.*

¹⁴ During the latter years of the controversy, much was made of suspected marital problems between the couple and of Michael Schiavo's decision to live with and father two children with another woman. In fact, these matters became a point of argument for conservative religious groups who intervened in the case. See *Too Vigorously Assisted Suicide*, NAT'L REV., Apr. 11, 2005 (describing "ugly allegations all around" and explaining that "[s]ome of those who have fought to keep Mrs. Schiavo alive, including some congressmen, have speculated rather too freely about Mr. Schiavo's perfidy He has fathered two children with another woman, to whom he has gotten engaged. It is not necessary to judge that behavior harshly to think that his desire to move on, however understandable, compromises his ability to represent his wife fairly.").

¹⁵ See, e.g., *Schindler v. Schiavo*, 851 So. 2d 182 (Fla. 2003). For a detailed timeline of the protracted litigation, see Key Events, *supra* note 9.

¹⁶ See Key Events, *supra* note 9.

¹⁷ See H.B. 35-E, 418th Sess. (Fla. 2003). The pertinent part of the legislation provides that:

- (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:
 - (a) That patient has no written advance directive;
 - (b) The Court has found that patient to be in a persistent vegetative state;
 - (c) That patient has had nutrition and hydration withheld; and
 - (d) A member of that patient's family has challenged the withholding of nutrition and hydration.
- (2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of that authority does not impact the validity or effect of any stay issued pursuant to this act.

See also Adam Liptak, *In Florida Right-to-Die Case, Legislation That Puts Constitution at Issue*, N.Y. TIMES, Oct. 23, 2003, at A14. The bill was popularly known as "Terri's Law."

tube so that the delivery of artificial nutrition and hydration to Theresa could resume.¹⁸

Michael Schiavo then filed a challenge to the constitutionality of the legislature's action and the intervention of the executive branch.¹⁹ Governor Bush invited a prominent right-to-life attorney to serve as lead counsel in the defense of the special legislation,²⁰ prompting commentators to speculate about the not-so-hidden conservative religious and political agenda motivating his decision to intervene. Meanwhile, the American Center for Law and Justice (ACLJ), a pro-life group established by Christian Coalition founder Pat Robertson, allied itself with Theresa Schiavo's parents, offering to assist the Schlinder's attorneys in defending the constitutionality of "Terri's Law."²¹ Throughout the litigation, various other conservative social and religious organizations also took up the cause.²²

¹⁸ Of course, the term "stay" was a misnomer; it did not refer to a temporary delay to allow the courts to consider additional evidence about the merits of their decision. The special legislation did include a provision requiring the appointment of a guardian *ad litem* to represent Theresa's interests and to provide advice to the Governor about how to proceed after issuing the "stay," but, because the guardian failed to persuade Jeb Bush to reconsider, the "stay" remained in effect indefinitely. The appointed guardian assumed the unenviable task of meeting with the interested parties and with physicians providing Theresa's care. Although he concluded that the situation was medically hopeless and that the court's order to terminate support was "firmly grounded within Florida statutory and case law," he was unable to sway the Governor. See Jay Wolfson, *A Report to Governor Jeb Bush in the Matter of Theresa Marie Schiavo*, Dec. 1, 2003, at 37, available at <http://abstractappeal.com/schiavo/WolfsonReport.pdf> (last visited Mar. 24, 2006).

¹⁹ The Governor responded with a series of procedural maneuvers, beginning with a motion to dismiss the constitutional claims on the grounds that the case did not conform to the technical requirements relating to venue and service of legal documents, a move apparently designed to delay judicial resolution of the constitutional challenges. See Abby Goodnough, *Florida Governor Seeks to Toss out Suit on Feeding Tube*, N.Y. TIMES, NOV. 6, 2003, at A28. Attorneys for the Governor also attempted to force the judge assigned to hear the constitutional challenge to recuse himself on the grounds of "bias" because he had previously ruled that it was ethically and legally appropriate to remove the feeding tube based on the facts at trial. *Id.*

²⁰ See William R. Levesque, *Terri's Law Defender Lashes Out*, ST. PETERSBURG TIMES, NOV. 6, 2003, at B1 (describing the lead counsel, Ken Connor, as a "leader in Florida's right-to-life movement" and as a former president of the Family Research Council, a conservative think tank).

²¹ See William R. Levesque, *Terri Schiavo's Parents Seek Stake in Lawsuit*, ST. PETERSBURG TIMES, OCT. 31, 2003, at B1 (quoting the ACLJ chief counsel, who has opined that the Schiavo case is "no different" from a situation in which the Governor uses his acknowledged authority to intervene to save the life of someone on death row). Although Florida's Constitution expressly grants clemency power to the Governor, see FLA. CONST. art. IV, § 8, it contains no such provision authorizing gubernatorial intervention in end-of-life disputes.

²² See Key Events, *supra* note 9 (providing link to various religious groups supporting the Schlinders' petition for relief from judgment); see also Didion, *supra* note 11 (explaining that "conservative action groups," including National Right to Life, Focus on the Family,

Ultimately, the Florida Supreme Court concluded that Terri's Law was unconstitutional on separation of powers grounds.²³

Once again, in 2005, after a series of state and federal court hearings, the Florida court ordered that the hospice remove Theresa's feeding tube.²⁴ On March 18, 2005, the hospice complied with the court order and additional frantic legal maneuvering ensued, including motions filed with the United States Supreme Court, the Federal District Court for the Middle District of Florida, and the Florida Supreme Court.²⁵ Remarkably, the United States Congress also opted to intervene in the dispute.²⁶ First, the House issued subpoenas for Michael Schiavo and Theresa Schiavo to "testify" before it and filed a related motion to delay removal of the feeding tube in order to permit Theresa to "testify."²⁷ Congress then enacted special legislation granting the Schindlers the right to file suit in federal court requesting *de novo* review of any state court proceedings relating to the removal of nutrition or hydration from Theresa.²⁸ Some Republicans were quick to grasp the political advantages of supporting the legislation. As explained in an unsigned memo written

The Family Research Council, the Traditional Values Coalition, and Operation Rescue "adopt[ed] the case as their own").

²³ See *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). On January 24, 2005, in response to a petition by the Florida Governor, the United States Supreme Court declined to grant certiorari. 543 U.S. 1121 (2005). For a more detailed analysis of the 2003 Florida special legislation and its separation of powers implications, see Noah, *supra* note 3, at 114-20, 124-26.

²⁴ See Key Events, *supra* note 9 (providing links to the various court proceedings, including the Feb. 25, 2005 order).

²⁵ See *id.*

²⁶ See *id.*

²⁷ Apparently, lawyers in the House of Representatives hoped that the subpoena would provide Theresa with protections as a federal witness, thereby preventing the removal of her feeding tube. See Tamara Lytle, *Schiavo Battle Prompts Proposal on Feeding*, ORLANDO SENTINEL, Apr. 20, 2005, at A18; see also Maura Reynolds, *After Schiavo, GOP's Push on End-of-Life Issues Fades*, L.A. TIMES, Apr. 7, 2005, at A17 (describing how "two congressional committees scheduled hearings and, dramatically, called as a witness [Theresa Schiavo]"). The absurdity of issuing a subpoena for Theresa Schiavo requires no elaboration, but I will provide a citation anyway. See Norman Cantor, *Our Shining Knights to the Rescue*, NEW JERSEY L. J., Apr. 25, 2005 (commenting that "the ignorance is pretty glaring. A congressional committee wanted to subpoena Schiavo to testify, when for fifteen years she had been unable to communicate to anyone . . .").

²⁸ After Theresa's feeding tube was removed pursuant to a judicial order on Friday, March 18, 2005, Congress enacted special legislation on Monday, March 21, 2005 entitled "Relief of the Parents of Theresa Marie Schiavo" (Relief Act). See Key Events, *supra* note 9. This private bill extended federal court jurisdiction over a single dispute that had already been litigated to its conclusion in state courts. *Id.* The bill granted subject matter jurisdiction over the dispute to a federal court and permitted the federal court to make a *de novo* determination about the merits of the decision to withdraw artificial nutrition and hydration. See *id.*

by an aid to Florida Republican Senator Mel Martinez, the Schiavo dispute and the proposed legislation presented Republicans with “a great political issue,” also noting that “the pro-life base will be excited that the Senate is debating this important issue.”²⁹

The Schindlers promptly sought an injunction in federal court on the basis of the jurisdiction conferred by Congress in the special legislation.³⁰ After a hearing, the U.S. District Court for the Middle District of Florida declined to intervene in the case and denied the Schindlers’ request for a temporary restraining order on the grounds that the plaintiffs failed to demonstrate a substantial likelihood of success on the merits.³¹ In response to a second petition from the Schindlers, the federal district court rejected five additional arguments based on the Americans with Disabilities Act, the Rehabilitation Act of 1973, the 14th Amendment Due Process Right to substituted judgment based on clear and convincing evidence, the 8th Amendment prohibition on cruel and unusual punishment, and the 14th Amendment right to life.³² Most of the court’s discussion on these claims centered around the lack of state action involved and the concurrent conclusion that the plaintiffs had not demonstrated a substantial likelihood of success on the merits.³³ Ultimately, all of the courts that heard the Schindlers’ appeals declined to overturn the order directing removal of Theresa’s feeding tube.³⁴

²⁹ See Key Events, *supra* note 9; see also Mike Allen, *Counsel to GOP Senator Wrote Memo on Schiavo*, WASH. POST, Apr. 7, 2005, at A1 (explaining that the memo initially generated accusations from Democrats of exploitation of Theresa Schiavo’s case and accusations by Republicans that Democrats had, in fact, secretly written and leaked the memo to embarrass Republican leaders who had taken a public position on the legislation while it was pending).

³⁰ Schiavo v. Schiavo, No. 8:05-CV-530-T-27TBM, Mar. 22, 2005, available at www.findlaw.com (last visited Mar. 21, 2006).

³¹ See *id.* The order reviewed the five separate constitutional and statutory issues that the Schindlers claimed had prejudiced Theresa’s rights, including the 14th Amendment due process right to a fair trial (criticizing Judge Greer’s alleged dual role as judge and health-care surrogate for Theresa), 14th Amendment procedural due process rights (failure to appoint a guardian *ad litem* for Theresa), 14th Amendment equal protection rights, violation of free exercise of religion, and violation of Theresa’s rights under the Religious Land Use and Institutionalized Persons Act (claiming that the state-ordered removal of the feeding tube forced Theresa to engage in an activity, i.e., refusing artificial nutrition and hydration, that is contrary to her Roman Catholic faith, to which the court responded that, because Michael Schiavo and the hospice are not state actors, the claim fails). See *id.*

³² Schiavo *ex rel.* Schindler v. Schiavo, 358 F. Supp. 2d 1161 (M.D. Fla. 2005).

³³ Schiavo *ex rel.* Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1385 (M.D. Fla. 2005).

³⁴ See Key Events, *supra* note 9 (providing links to all relevant motions, orders, and decisions).

Although the district court focused exclusively on the substance of the dispute and declined to comment on the Congressional grant of subject matter jurisdiction,³⁵ the court's conclusion that the Schindlers were unlikely to prevail on the merits constituted an implicit criticism of the Congressional interference. In effect, the court suggested that, because the matter had been exhaustively litigated to its conclusion, resulting in a legally valid final judgment, there was no justification for additional federal judicial review in the Florida state courts. The court also suggested that the Congressional grant of jurisdiction to the federal court improperly interfered with a final judicial action in violation of separation of powers principles.³⁶

The Schindlers appealed immediately to the Court of Appeals for the Eleventh Circuit.³⁷ The three-judge panel voted two-to-one against intervening in the case, explaining that it concurred with the District Court's conclusions that the Schindlers had failed to demonstrate a likelihood of success on the merits.³⁸ The Eleventh Circuit also quickly rejected a follow-up petition for *en banc* review.³⁹ The Schindlers then appealed to the U.S. Supreme Court and, on Thursday, March 30, the Court declined, without comment, to hear the case.⁴⁰ On a further petition for review, the Eleventh Circuit and the U.S. Supreme Court again declined to intervene.⁴¹ In rejecting the second petition for review, 11th Circuit Judge Stanley Birch⁴² offered a scathing criticism of the Congressional intervention in the case.⁴³ In his concurring opinion, Judge Birch argued that "despite sincere and altruistic motivation, the legislative and executive branches . . . have acted in a manner demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people" when they

³⁵ See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1382-83 (M.D. Fla. 2005) ("While there may be substantial issues concerning the constitutionality of the Act, for purposes of considering temporary injunctive relief, the Act is presumed to be constitutional.").

³⁶ *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

³⁷ *Schiavo ex rel. Schindler*, 357 F. Supp. 2d at 1382-83.

³⁸ *Schiavo ex rel. Schindler*, 403 F.3d at 1226.

³⁹ *Id.*

⁴⁰ *Schiavo ex rel. Schindler v. Schiavo*, 544 U.S. 957 (2005).

⁴¹ *Id.*; *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1282 (11th Cir. 2005); see also Key Events, *supra* note 9.

⁴² Judge Birch was appointed to the 11th Circuit by former President George H.W. Bush. See Dana Milbank, *GOP, Democrats Look for Symbolism in the Schiavo Case*, WASH. POST, Apr. 1, 2005, at A12.

⁴³ *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005).

enacted legislation authorizing the Schindlers to seek redress in the federal courts.⁴⁴

Judge Birch explained that the federal legislation mandating federal court *de novo* review of the merits of the case, in spite of the fact that the state courts had litigated the matter to its conclusion and issued a final order, violated the principle of separation of powers.⁴⁵ According to the opinion, the federal legislation infringed on the independence of the judiciary as guaranteed in Article III of the Constitution because it did more than simply confer jurisdiction in the matter on the federal courts; it also instructed the federal courts about how to exercise their judicial function,⁴⁶ and it did so retroactively in the context of a specific single case, so it lacked the generality and prospectivity of legislation that separation of powers tenets generally require. As Judge Birch explained, the provision of a standard of review was not the problem *per se*; Congress has the authority to delineate these matters for the lower federal courts.⁴⁷ Instead, the problem arose from the fact that Congress dictated the standard of review in a single case rather than in a category of cases, and Congress did so with the intent to facilitate the overruling of a previously issued final judicial order by the court of original jurisdiction.⁴⁸ Unlike the Florida legislature that enacted “Terri’s Law” in 2003, the United States Congress genuinely attempted to avoid the separation of powers problem. Nevertheless, the ultimate goal of Congress’s special bill was to create a set of circumstances (*de novo* review in federal court) that would facilitate the overturning of a final judicial order in the Florida courts. As such, the bill was an indirect attempt to get Theresa’s feeding tube reinserted but, of course, Congress understood that it could not simply pass a bill directing reinsertion.⁴⁹

In this case, the same conservative political groups that regularly criticize so-called “activist judges” supported legislation that invited judicial activism, but they were rebuffed by the federal courts. In the concluding paragraph of his concurring opinion,

⁴⁴ *Id.* at 1271.

⁴⁵ *Id.* at 1272-75.

⁴⁶ The legislation instructed the federal court to engage in *de novo* review of Theresa Schiavo’s constitutional and federal claims, not to consider whether these claims were previously raised or decided in state court, not to decide on the basis of whether state court remedies have been exhausted, and more. *See id.* at 1274-75.

⁴⁷ *Id.* at 1272-75.

⁴⁸ *See id.* at 1273-75.

⁴⁹ *See* Sheryl G. Stolberg, *The Dangers of Political Theater*, N.Y. TIMES, 2005, at 4.

Judge Birch correctly observed that, if the citizens of Florida wished to change the state's end of life law, they should seek recourse through the legislative process: "Were the courts to change the law, as petitioners and Congress invite us to do, an 'activist judge' criticism would be valid."⁵⁰ Astonishingly, following these events, certain prominent members of Congress threatened vague sorts of retribution against the federal judges who declined to intervene in the case.⁵¹

At the same time that this last ditch litigation progressed through the various courts, the Florida Department of Children and Families (DCF), at the direction of Jeb Bush, sought custody of Theresa.⁵² In early March, the DCF requested that a neurologist from the Mayo Clinic's Florida location examine Theresa.⁵³ That neurologist, Dr. William P. Cheshire, who was a conservative Christian, undoubtedly shared the state agency's concern about the potential withdrawal of life-supportive measures.⁵⁴ He also opined that, because Theresa's brain status had never been assessed with certain types of advanced imaging technologies, significant uncertainties remained concerning her level of brain function.⁵⁵ Nevertheless, Judge Greer declined to grant custody of Theresa to DCF.⁵⁶

On Thursday, March 31, 2005, just after 9:00 AM, Theresa Schiavo died.⁵⁷ After an autopsy confirmed that her brain was permanently and extensively damaged and that she would never have recovered any ability to interact with her environment, Governor

⁵⁰ *Schiavo*, 404 F.3d at 1276.

⁵¹ See Mike Allen, *DeLay Wants Panel to Review Role of Courts*, WASH. POST, Apr. 2, 2005, at A9 (explaining that House Majority leader Tom DeLay "plans to ask the Judiciary Committee to undertake a broad review of the courts' handling of the Terri Schiavo case" because of the courts' "failure" to protect Schiavo. DeLay announced that "the time will come for the men responsible for this to answer for their behavior.").

⁵² See DCF Motion to Intervene, available in Key Events, *supra* note 9 (claiming a "heretofore unrepresented interest in whether Theresa Marie Schiavo, the subject of a substantial number of allegations of abuse, neglect, and exploitation, remains a viable living adult during the pendency of DCF's investigation. Plainly stated, due to the investigation and the potential need for examination of the potential victim, . . . DCF is interested, directly and immediately, in that part of the guardianship proceeding which calls for the removal of life support because such action would deny DCF's ability to meet its statutory duty" and a separate interest in Theresa as a "vulnerable adult" who may require provision of DCF services).

⁵³ See Didion, *supra* note 11.

⁵⁴ *Id.*

⁵⁵ *Id.* (noting that Dr. Cheshire spent ninety minutes with Theresa and concluded that she might possibly be "minimally conscious," rather than in a permanent vegetative state).

⁵⁶ See Julia Duin, *Judge in Schiavo Case Faces Death Threats*, WASH. TIMES, Mar. 30, 2005, at A1.

⁵⁷ See Key Events, *supra* note 9.

Bush, in a final salvo, requested an investigation by the State Attorney's office into apparent discrepancies fifteen years earlier between the time of Theresa's cardiac arrest and Michael Schiavo's statements about when he called emergency medical services.⁵⁸ That investigation produced little new information and the prosecutors declined to pursue the matter.⁵⁹ Since Theresa's death, the conservative groups that intervened in the case and the politicians that vocally joined the cause have become silent.⁶⁰ As one observer commented, "Now the politicians are scattering like cockroaches when the light is turned on in the middle of the night."⁶¹

III. RELEVANT FLORIDA LAW REGARDING WITHDRAWAL OF LIFE-SUSTAINING TREATMENT

Florida law clearly and unambiguously protects the right of an individual to refuse life-sustaining medical treatment. In fact, Florida's constitution,⁶² statutes, and decisional law together appear more clearly protective of a right to refuse such treatment than the federal due process standard discussed in *Cruzan*.⁶³ This right of

⁵⁸ See *id.*

⁵⁹ See Memo to State Attorney Bernie McCabe from Prosecutors Doug Crow and Bob Lewis (June 27, 2005), available at http://www.miami.edu/ethics2/schiavo/terri_schiavo_time_line.html (last visited Mar. 24, 2006) (concluding that "[i]n the complete absence of any evidence that Terri's collapse was caused by anyone's criminal actions . . . [w]e strongly recommend that the inquiry be closed and no further action be taken.").

⁶⁰ See Lynda Hurst, *Sudden Silence on Schiavo*, TORONTO STAR, Mar. 30, 2005, at A10.

⁶¹ See *id.* (quoting Prof. Larry Sabato at the University of Virginia's Center for Politics); see also Sheryl Gay Stolberg, *The Dangers of Political Theater*, N.Y. TIMES, Mar. 27, 2005, at D3 (describing a CBS opinion poll which concluded that eighty-two percent of Americans disagreed with the Congressional intervention in the case and seventy-two percent thought that the decision to intervene was intended to further a conservative political agenda). Of course, these opinion polls, while interesting, tell us nothing about what Theresa herself would choose; in that regard, the courts reached a conclusion based on her limited prior statements about end-of-life matters and more general information about her values, preferences, and beliefs.

⁶² The Florida Constitution, unlike the U.S. Constitution, contains an explicit provision guaranteeing citizens a right of privacy. See FLA. CONST. Art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.").

⁶³ See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990). Justice Rehnquist's opinion in *Cruzan*, while noting the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from prior decisions," merely concludes that the U.S. Constitution does not forbid states like Missouri from requiring a "clear and convincing" standard of evidence that an incapacitated person would wish to forego life-sustaining procedures in proceedings in which a guardian seeks judicial permission to withdraw artificial nutrition and hydration from a person in PVS. See *id.* at 278-85.

refusal is grounded in the ethical principle of autonomy that allows patients to retain control over their bodies.⁶⁴ This right of bodily integrity does not disappear when patients become unable to express their wishes. Instead, the law in Florida, as in most other states, permits a proxy decision-maker to step in to articulate the desires of incapacitated patients.⁶⁵ In a landmark decision announced the same year that Theresa suffered her attack, the Florida Supreme Court ordered the removal of a feeding tube from a patient in a PVS based on her preferences as expressed in a living will.⁶⁶ The decision confirmed that an incompetent person's guardian, surrogate, or proxy decision-maker may exercise this privacy-based right of refusal on the patient's behalf, whether those wishes have been expressed orally or in writing.⁶⁷ The Florida statutes also explicitly recognize the validity of oral advance directives.⁶⁸

A statute enacted in the wake of the decision described above provides that if the patient has not designated a surrogate decision-maker in writing, then a proxy decision-maker can attempt to articulate her wishes based on prior relevant statements and the patient's values and beliefs.⁶⁹ In Florida, as in many states, the statutory hierarchy of proxies grants decisional authority to the in-

⁶⁴ See Noah, *supra* note 3, at 110; cf. Lawrence O. Gostin, *Ethics, the Constitution, and the Dying Process: The Case of Theresa Marie Schiavo*, 293 JAMA 2403, 2405 (2005) (observing that "erring on the side of life" in cases of scientific uncertainty, as suggested by President Bush, "would deny an equally important value—the autonomy of the person and her constitutional right to decline life-sustaining treatment" and concluding that once courts have "carefully and diligently adhered to prescribed civil processes and evidentiary guidelines. . . there is no other civilized way but to respect [the result]").

⁶⁵ See Noah, *supra* note 3, at 111.

⁶⁶ *Id.* at 110-11.

⁶⁷ *Id.*; see also *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (reviewing the case of a woman in a PVS and dependent on a feeding tube). It is all the more remarkable that, at the time, Florida's statute specifically excluded artificial nutrition and hydration from its definition of life-prolonging procedures. See *id.* at 8, 11 n.5. Thus, the Florida Supreme Court's decision to respect the patient's refusal as set out in her living will, despite the lack of explicit statutory authority on this point, constitutes a powerful endorsement of individual rights of autonomy at the end of life. Interestingly, the attorney for the plaintiff in the *Browning* case, George Felos, also represented Michael Schiavo in the litigation over withdrawal of life-sustaining care from Theresa Schiavo. See Didion, *supra* note 11.

⁶⁸ See FLA. STAT. § 765.101 (2001) (defining "advance directive" as "a witnessed written document or oral statement in which instructions are given by a principal . . . concerning any aspect of the principal's health care . . ."); FLA. STAT. § 765.104 (c) (permitting the oral amendment or revocation of an advance directive).

⁶⁹ See FLA. STAT. § 765.401(1) (2005).

capacitated patient's spouse ahead of his or her parents.⁷⁰ Because Theresa Schiavo did not designate a surrogate decision-maker in writing, her husband Michael presumptively served as the proxy decision-maker in accordance with Florida law.⁷¹ The statute further requires that, before a proxy decision-maker may exercise an incapacitated patient's right to refuse or request the withdrawal of life-prolonging measures, the decision must be supported by "clear and convincing evidence that the decision would have been the one the patient would have chosen if the patient had been competent."⁷² The Florida statutes also explicitly affirm that the right of refusal covers all life-prolonging procedures and treatments, including the provision of artificial nutrition and hydration.⁷³ The specific inclusion of these measures in the enumerated list of life-prolonging procedures coincides with the ethical position that there is no scientific or moral basis on which to distinguish such interventions from other types of life support such as mechanical ventilation.⁷⁴ After

⁷⁰ The Florida statutes created the following statutory hierarchy: (1) court-appointed guardian (if already appointed); (2) spouse; (3) majority of adult children; (4) parents; (5) majority of adult siblings; and (6) other relative or friend. *See id.* § 765.401.

⁷¹ The court also appointed Michael Schiavo as Theresa's formal guardian in 1990 and, although her parents have challenged the propriety of this designation and sought his removal, they have not succeeded. *See Key Events, supra* note 9. At various points during the litigation, the court also appointed different individuals to serve as guardian ad litem for Theresa. *See id.*

⁷² *See* FLA. STAT. § 765.401(3).

⁷³ *See* FLA. STAT. § 765.101(10) (defining "life-prolonging procedure" as "any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function"). Other states have taken different approaches to the issues surrounding artificial nutrition and hydration. Some statutes require specific statements about individual patient preferences regarding artificial nutrition and hydration rather than considering these measures as part of the general category of life-sustaining treatments. *See, e.g.,* OHIO REV. CODE ANN. § 2133.09 (2001). Other states take the opposite position, requiring the withdrawal of artificial nutrition and hydration from terminally ill patients absent an advance directive expressing a contrary preference. *See, e.g.,* NEV. REV. STAT. § 449.624 (1999).

⁷⁴ Numerous courts and commentators have affirmed this position. *See, e.g.,* Corbett v. D'Alessandro, 487 So. 2d 368, 371 (Fla. Ct. App. 1986) ("We see no reason to differentiate between the multitude of artificial devices that may be available to prolong the moment of death We are unable to distinguish on a legal, scientific or a moral basis between those artificial measures that sustain life—whether by means of 'forced' sustenance or 'forced' continuance of vital functions of the vegetative, comatose patient who would soon expire without the use of those artificial means."); *In re* Conroy, 486 A.2d 1209, 1235-37 (N.J. 1985) ("once one enters the realm of complex, high-technology medical care, it is hard to shed the 'emotional symbolism' of food . . . analytically, artificial feeding by means of a nasogastric tube . . . can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own."); Norman L. Cantor, *The Permanently Unconscious Patient, Non-Feeding and Euthanasia*, 15 AM. J.L. & MED. 381 (1989); J. Lynn and John F.

years of litigation, the appellate court affirmed the trial court's conclusion that the evidence presented through the testimony of Michael Schiavo and several of Theresa's friends satisfied this statutory standard of proof.⁷⁵

Finally, the Florida statute defines "persistent vegetative state" in a manner consistent with the definition endorsed in the reports of an expert task force on the subject.⁷⁶ Chapter 765 also contains a provision expressly describing the rights and interests of individuals in PVS that implicitly recognizes the dismal prognosis of patients with this condition. The statute provides that, even for persons in PVS who have no advance directive, for whom there is no evidence indicating their wishes under the circumstances, and for whom no one is available to serve as a health care proxy, physicians may withdraw life support whenever a court-appointed guardian concludes, with the concurrence of a physician and a hospital ethics committee, that there is no reasonable medical probability for recovery and that withdrawing life-prolonging procedures is in the patient's best interest.⁷⁷ Thus, the Florida legislature, through the enactment of this statutory provision, clearly contemplated the possibility that providing artificial support to a

Childress, *Must Patients Always Be Given Food and Water?*, 13 HASTINGS CTR. REP. 17 (1983). Nevertheless, some courts and commentators reject this contention, preferring to treat artificially provided nutrition and hydration differently from other life supportive measures. See, e.g., *Cruzan v. Harman*, 760 S.W.2d 408, 412, 423 (Mo. 1988) (opining that "common sense tells us that food and water do not treat an illness, they maintain a life" and that "[t]his is not a case in which we are asked to let someone die This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration."), *aff'd*, 497 U.S. 261 (1990); *In re Warren*, 858 S.W.2d 263, 266 (Mo. Ct. App. 1993) (discussing the Missouri Supreme Court opinion in *Cruzan* with approval).

⁷⁵ See *In re Guardianship of Schiavo*, 851 So. 2d 182, 186-87 (Fla. Ct. App. 2003) (affirming the trial court's conclusion that the standard of evidence has been met, and observing that, "in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo's right to make her own decision, independent of her parents and independent of her husband."). Florida's statute requires "clear and convincing" evidence that the substituted judgment decision is the one that patient would have chosen if competent. By contrast, more conservative jurisdictions such as Michigan and New York require clear and convincing evidence that the particular patient actually wanted particular measures taken or refused. See, e.g., *In re Eichner*, 420 N.E.2d 64, 72 (N.Y. 1981); *In re Westchester County Med. Ctr. (O'Connor)*, 531 N.E.2d 607, 613 (N.Y. 1988).

⁷⁶ See *PVS Report (Pt. I)*, *supra* note 5, at 1500-01. In Florida, a persistent vegetative state is "a permanent and irreversible condition of unconsciousness in which there is: (a) The absence of voluntary action or cognitive behavior of any kind, (b) An inability to communicate or interact purposefully with the environment." FLA. STAT. § 765.101(12) (2003).

⁷⁷ See FLA. STAT. § 765.404.

person in a PVS who has not expressly requested such treatment may offer no genuine benefit to the patient.

* * * * *

This series of events, taken together with the court’s application of the rule of law as described above, raises some challenging questions. First, did the available evidence of Theresa’s wishes provide a sufficient basis on which the court could conclude that withdrawal of artificial nutrition and hydration would be her choice under the circumstances? Numerous appellate reviews of the original decision concluded that the trial court’s conclusion was consistent with the legal standard in Florida.⁷⁸ Moreover, as the following section explains, a decision to forego artificial nutrition and hydration is not inconsistent with Catholic principles. Second, even if the court reached the correct conclusion as a matter of law, is the standard being applied by the courts inherently flawed, at least for those whose moral or religious beliefs serve as the primary guidepost for their medical decision-making? When carefully applied, the existing legal standard is, in fact, sufficiently flexible to capture and reflect accurately the wishes of incapacitated patients whose preferences are guided by sincerely held religious beliefs.

IV. ROMAN CATHOLIC DOCTRINE AND THE DECISION TO FOREGO TREATMENT

Many prominent, adjudicated cases concerning end-of-life treatment have involved Roman Catholic patients.⁷⁹ The Roman Catholic Church, however, has made very few pronouncements dealing specifically with the withdrawal of life-supportive measures. Moreover, until very recently, the few extant statements failed to address directly the complexities of withdrawal of support from permanently incapacitated patients or patients who are not actively dying. In fact, the Church has long appeared curiously unwilling to confront directly the ethical and moral conundrums created by modern medical technology.⁸⁰ In a 1996 speech to the

⁷⁸ See, e.g., *Schiavo, ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292-93 (11th 2005).

⁷⁹ See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986); *In Re Quinlan*, 355 A.2d 647 (N.J. 1976); *In re Eichner*, 420 N.E.2d 64 (N.Y. 1981).

⁸⁰ In the 1860s, the *Syllabus of Errors Condemned by Pope Pius IX* renounced as error the statement that “The Roman Pontiff can, and ought to, reconcile himself, and come to terms with progress, liberalism, and modern civilization.” See Pope Pius IX, *Syllabus of Errors*, #80 (renouncing the Papal allocution “Jamdudum cernimus,” Mar. 18, 1861), available at <http://www.papalencyclicals.net/Pius09/p9syll.htm> (last visited Feb. 9, 2006). The

Pontifical Academy of Science, however, Pope John Paul II acknowledged that science and religious principles could co-exist and, in fact, that each could enhance the understanding of the other: "Science can purify religion from error and superstition; religion can purify science from idolatry and false absolutes. Each can draw the other into a wider world, a world in which both can flourish."⁸¹

The dispute over Theresa Schiavo's care provides a vivid example of the dangers of false absolutes. One of the key issues that arose during the latter stages of the litigation concerned the question of whether a Catholic patient may properly refuse artificial nutrition and hydration. The answer to this question is far more complex than the public discourse suggested. First, Catholics must understand the teaching authority of the Pope and his Bishops and the relative canonical significance of different types of teachings.⁸² The touchstone principle for this endeavor is found in Canon 752 of the 1983 Code of Canon Law, which states that "religious submission of the intellect and will must be given to a doctrine which the Supreme Pontiff or the college of bishops declares concerning faith or morals when they exercise the authentic magisterium."⁸³

Catholic theologians divide the magisterium into two categories: ordinary and solemn magisterium.⁸⁴ The ordinary magisterium includes the vast majority of teachings by the popes, and the teachings of the bishops when they are not gathered in an ecumenical council.⁸⁵ By contrast, the solemn magisterium "is that which is exercised only rarely by formal and authentic definitions of councils or popes. Its matter comprises dogmatic definitions of ecumenical

Church has never officially revoked this (or any other) declaration of error contained in the *Syllabus of Errors*.

⁸¹ See George P. Smith, II, *Law, Medicine, and Religion: Towards a Dialogue and a Partnership in Biomedical Technology and Decision Making*, 21 J. CONTEMP. HEALTH L. & POL'Y 169, 187-88 (2005) (quoting speech of Pope John Paul II).

⁸² For a detailed and insightful overview on these questions by a highly regarded canonist, see Francis G. Morrissey, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, 50 JURIST 102 (1990) (analyzing the juridical significance of various types of papal pronouncements).

⁸³ See NEW COMMENTARY ON THE CODE OF CANON LAW (John P. Beal et al. eds., 2000) (commentary supplied by James Coridan, S.J.) (hereinafter CANON LAW COMMENTARY); see also CATECHISM OF THE CATHOLIC CHURCH (2nd ed. 1997) ("The task of interpreting the Word of God authentically has been entrusted solely to the Magisterium of the Church, that is, to the Pope and to the bishops in communion with him.").

⁸⁴ See DONALD ATWATER, ED., A CATHOLIC DICTIONARY (The Catholic Encyclopedic Dictionary) (1962) [hereinafter A CATHOLIC DICTIONARY].

⁸⁵ See WIKIPEDIA, MAGISTERIUM, available at <http://en.wikipedia.org/wiki/Magisterium> (last visited Dec. 22, 2005).

councils or of the popes teaching *ex cathedra*, or of particular councils, if their decrees are universally accepted or approved in solemn form by the pope”⁸⁶ Under certain circumstances, teachings that constitute extraordinary magisterium are considered to be infallible.⁸⁷

Most of the teachings of the Pope and the Bishops represent ordinary magisterium.⁸⁸ Canon 752 describes the required response which faithful Catholics must accord to such teachings.⁸⁹ Commentary on this canon suggests that Catholics must give a “respectful religious deference of intellect and will” to such teachings but that “[t]he canon leaves room for dissent when [there is] honest disagreement”⁹⁰ Canon 212 requires obedience to the teachings of the Church, but acknowledges that the Christian faithful “are free to make known to the pastors of the Church their needs, especially spiritual ones, and their desires.”⁹¹ The accompanying commentary suggests that “the obedience to which the canon obliges the faithful is not a blind, unquestioning reality but rather an intelligent and reflective response.”⁹²

What guidance dealing with life-supportive medical technologies is available for “intelligent and reflective” consideration according to these canonical principles on the teaching authority of the Pope and Bishops? A few papal statements and other sources of Catholic teaching, none of them apparently binding according to principles of Canon Law,⁹³ address the withdrawal or withholding of life-supportive measures.⁹⁴ First, in 1980, the Sacred Congregation for the Doctrine of the Faith published the *Declaration on Eutha-*

⁸⁶ See A CATHOLIC DICTIONARY, *supra* note 84.

⁸⁷ See WIKIPEDIA, *supra* note 85.

⁸⁸ See Interview with Reverend John J. Bonzagni, M.Ed., J.C.L., J.D., Judicial Vicar for the Diocese of Springfield, Mass. (Nov. 21, 2005) [hereinafter Interview with Reverend Bonzagni].

⁸⁹ See CANON LAW COMMENTARY, *supra* note 83, at 916.

⁹⁰ See *id.* at 917; see also Interview with Reverend Bonzagni, *supra* note 88. The Canon leaves room for honest disagreement when a person firmly believes that a particular Church pronouncement does not apply to their situation and that person’s conscience is clear.

⁹¹ See CANON LAW COMMENTARY, *supra* note 83, at 263.

⁹² See *id.* at 264.

⁹³ See Interview with Reverend Bonzagni, *supra* note 88.

⁹⁴ Although most of the debate about the withdrawal of life support in the *Schiavo* case arose out of the Catholic or conservative Christian traditions, other religious traditions also address the issue of refusal of life-supportive measures. One variant of Orthodox Judaism, for example, allows adherents to refuse life-sustaining treatment only when they are within seventy-two hours of death. See ELLIOT N. DORFF, MATTERS OF LIFE AND DEATH: A JEWISH APPROACH TO MODERN MEDICAL ETHICS 199 (1998).

nasia, which was approved by Pope John Paul II, and which acknowledges that Amedicine has increased its capacity to cure and to prolong life in particular circumstances, which sometimes give[s] rise to moral problems.”⁹⁵ This document is considered solemn magisterium: though not infallible, the Declaration must receive serious and respectful consideration from the faithful.⁹⁶ The Declaration strongly condemns the practice of euthanasia, which it defines as “an act or omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated. Euthanasia’s terms of reference, therefore, are to be found in the intention of the will and in the methods used.”⁹⁷ Nevertheless, the Declaration also states that:

[O]ne cannot impose on anyone the obligation to have recourse to a technique which is already in use but which carries a risk or is burdensome. Such a refusal is not the equivalent of suicide; on the contrary, it should be considered as an acceptance of the human condition, or a wish to avoid the application of a medical procedure disproportionate to the results that can be expected, or a desire not to impose excessive expense on the family or the community.⁹⁸

Theresa Schiavo’s case appears to fit the circumstances contemplated here. The cardiac arrest and resulting anoxia left her body unable to function at a level consistent with survival absent additional technological measures.⁹⁹ The Florida courts confirmed that she would refuse such treatment under the circumstances, which implies a conclusion, based on the available evidence, that she would find such treatment burdensome both to herself and perhaps also to her family and the community.¹⁰⁰

It is important to note that the *Declaration on Euthanasia* defines euthanasia more broadly than the conventional use of that term in secular bioethics discourse. In the secular context, ethicists distinguish euthanasia (usually defined narrowly to mean a deliberate dose of lethal medication designed to terminate a patient’s life) from assisted suicide (usually used to refer to circumstances in which a

⁹⁵ See SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON EUTHANASIA, (1980), <http://www.usccb.org/prolife/tdocs/euthanasia.htm> (last visited Dec. 6, 2005) [hereinafter DECLARATION ON EUTHANASIA].

⁹⁶ See Memorandum from Rev. John J. Bonzagni to Barbara Noah (undated, received Dec. 2005) (on file with author) [hereinafter Memo from Rev. John J. Bonzagni].

⁹⁷ See DECLARATION ON EUTHANASIA, *supra* note 95, at Pt. II (explaining that the practice of euthanasia is a “violation of the divine law, an offense against the dignity of the human person, a crime against life, and an attack on humanity.”).

⁹⁸ See DECLARATION ON EUTHANASIA, *supra* note 95, at Pt. IV.

⁹⁹ See *Schindler v. Schiavo*, 780 So. 2d 176, 177 (Fla. 2d Dist. Ct. App. 2001).

¹⁰⁰ See *Bush v. Schiavo*, 885 So. 2d. 321, 325 (Fla. 2004).

physician provides a patient with a lethal dose of medication which the patient then ingests)¹⁰¹ and withdrawal or withholding of life supportive measures (such as turning off a ventilator, ceasing dialysis, or withdrawing a feeding tube in order to allow the patient to die of the underlying disease process that necessitated the life support in the first place).¹⁰² By contrast, the Church's definition of euthanasia draws the lines differently because it includes withdrawal of life supportive measures with the intention to cause death.¹⁰³ Nevertheless, the Catholic and secular standards appear somewhat more consistent when one focuses on the intention behind the act and the concept of burden on the patient.¹⁰⁴

A few other Church statements provide additional context. In the *Evangelium Vitae*, John Paul II reiterates the definition of euthanasia and adds that

when death is clearly imminent and inevitable, one can in conscience refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted. Certainly there is a moral obligation to care for oneself and to allow oneself to be cared for, but this duty must take account of concrete circumstances. It needs to be determined whether the means of treatment available are *objectively proportionate to the prospects for improvement*.¹⁰⁵

In the case of patients in a permanent vegetative state, confirmation of the prognosis would appear to remove any prospect for improvement, permitting the patient (or his or her surrogate decision-

¹⁰¹ See, e.g., Oregon Death with Dignity Act, Or. Rev. Stat. § 127.800-.897 (2003) (permitting a physician to supply a lethal dose of medication to "an adult who is capable, is a resident of Oregon, and has been determined by the attending physician . . . to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, [to] make a written request for medication for the purpose of ending his or her life in a humane and dignified manner").

¹⁰² See DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH* 24, 24-31 (2001) (discussing distinctions between suicide, assisted suicide, euthanasia, and withdrawal of life-sustaining treatment).

¹⁰³ Cf. BENEDICT M. ASHLEY & KEVIN D. O'ROURKE, *HEALTH CARE ETHICS: A THEOLOGICAL ANALYSIS* 416, 416-19 (4th ed. 1997) (discussing Catholic doctrine dealing with medical care at the end of life and explaining that the Catholic framework also distinguishes among physician-assisted suicide, euthanasia, and withholding or withdrawing treatment). In the strictest sense, Theresa's death resulted from the withdrawal of life-supportive measures. In a broader sense, she died from complications from anoxic brain injury because the damage to her brain left her unable to ingest adequate nutrition without technological assistance.

¹⁰⁴ Cf. Orentlicher, *supra* note 102, at 24-31 (rejecting an ethical distinction between assisted suicide and withdrawal of life-sustaining treatment).

¹⁰⁵ See Pope John Paul II, *EVANGELIUM VITAE*, Ch. III, Para. 65 (internal quotation marks omitted, emphasis added).

maker) to forego any additional life-supportive measures. The fact that the patient could continue to survive indefinitely with the artificial nutrition and hydration appears irrelevant if there is no prospect for medical improvement.

Separately, the United States Conference of Catholic Bishops published an updated version of the Ethical and Religious Directives for Catholic Health Care Services (“the Catholic Health Directives”), which address these questions in part.¹⁰⁶ Three of the directives appear particularly relevant:

56. A person has a moral obligation to use ordinary and proportionate means of preserving his or her life. Proportionate means are those that in the judgment of the patient offer a reasonable hope of benefit and do not entail an excessive burden or impose excessive expense on the family or the community.

57. A person may forgo extraordinary or disproportionate means of preserving life. Disproportionate means are those that in the patient’s judgment do not offer a reasonable hope of benefit or entail an excessive burden, or impose excessive expense on the family or the community.

58. There should be a presumption in favor of providing nutrition and hydration to all patients, including patients who require medically assisted nutrition and hydration, as long as this is of sufficient benefit to outweigh the burdens involved to the patient.¹⁰⁷

These three principles suggest that, when a conscious and capacitated patient believes that a particular treatment or supportive measure would pose more of a burden than a benefit, that patient may refuse that medical care.¹⁰⁸ The directives do not address the question of whether someone else may speak for an incapacitated patient on the benefits/burdens question as a surrogate decision-maker.¹⁰⁹

¹⁰⁶ See U.S. CONF. OF CATHOLIC BISHOPS, *Ethical and Religious Directives for Catholic Health Care Services* (4th ed. 2001), available at <http://www.usccb.org/bishops/directives/shtml> (last visited Nov. 21, 2005); see also Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers’ Beliefs and Patients’ Rights*, 51 STAN. L. REV. 1703, 1720–22 (1998) (discussing the directives in the context of Catholic health facilities). This directive constitutes a legislative document and is binding on health care providers and Catholic hospitals within the conference.

¹⁰⁷ *Id.* Statements 49 and 50 derive from the papal *Declaration on Euthanasia*. See DECLARATION ON EUTHANASIA, *supra* note 95.

¹⁰⁸ Of course, the concept of “ordinary and proportionate” care will evolve over time as technology advances. Two hundred years ago, prior to the advent of safe and sterile surgical techniques, a patient may have considered surgery for appendicitis “extraordinary” care. Today, most patients would view an appendectomy as ordinary and proportionate, and refusal would appear to contravene Directive 56.

¹⁰⁹ Directives 56 and 57 contemplate a vision of an intact person making a clear and reasoned decision based on his or her conscience and consistent with church teachings. For many patients who are *in extremis*, and certainly for patients who are permanently unconscious, nothing could be further from the truth. Health care providers, in cases of dispute, must

Nevertheless, it seems reasonable and consistent with these principles to envision a scenario in which a surrogate decision-maker could attempt to articulate what treatments, in the patient's view, would rise to the level of disproportionate care. Similarly, a surrogate who is very familiar with the patient's values and beliefs might appropriately articulate the position that continued care would, in the patient's view, impose an excessive expense on the family or the community.

Because patients with a diagnosis of PVS cannot experience pain, it is difficult to articulate what would constitute the physical "burden" of continued treatment, including the provision of artificial nutrition and hydration. Nevertheless, the concept of burden might be understood to include an existential burden on the patient. If, for example, Theresa Schiavo were able to speak for herself, she may have concluded that continued artificial nutrition and hydration with no accompanying prospect for improvement would constitute a burden on her dignity which she would reject in favor of allowing the natural dying process to take its course. Such a position appears consistent with the recognition of costs and burdens on the patient's family and the community—clearly the concept of "burden" includes more than simply physical pain or suffering. If continued tube feeding impinges on Theresa's dignity, it seems reasonable, within the bounds of the Catholic health care directives, to view such a situation as burdensome. To reject this interpretation of burden would leave Theresa and other patients whose conditions prevent them from experiencing pain from exercising the option of refusing continued care.

In April of 2004, in the midst of the legal battle over Theresa Schiavo's medical care, Pope John Paul II made a speech concerning the withdrawal of artificial nutrition and hydration, announcing that tube feeding constitutes "basic health care" like cleanliness and warmth and that "the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act" and that its use is "ordinary and proportionate, and as such morally obligatory."¹¹⁰ The pope went on to state that:

rely on a family member or other surrogate decision-maker to interpret these directives on behalf of the incapacitated or unconscious patient.

¹¹⁰ See Address of John Paul II to the Participants in the International Congress on Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas (Mar. 20, 2004), available at <http://www.vatican.org> (last visited July 17, 2006). The underlying conclusion that artificial nutrition and hydration constitute "ordinary and proportionate

The evaluation of probabilities, founded on waning hopes for recovery when the vegetative state is prolonged beyond a year, cannot ethically justify the cessation or interruption of *minimal care* for the patient, including nutrition and hydration. Death by starvation or dehydration is, in fact, the only possible outcome as a result of their withdrawal. In this sense it ends up becoming, if done knowingly and willingly, true and proper euthanasia by omission.¹¹¹

John Paul II's pronouncement unequivocally states that the provision of artificial nutrition and hydration via a tube placed surgically into a patient's stomach constitutes "ordinary" care that is morally required for patients in Theresa's condition. This position contradicts the view of most bioethicists and medical ethics organizations, and it contradicts much of the Church's prior teachings on matters of end-of-life care.

After this papal allocution, is there any room for individual dissent on the question of whether an incapacitated patient in a vegetative state may refuse artificial nutrition and hydration? The papal allocution is just that—an expression of the Pope's opinion rather than solemn magisterium.¹¹² Catholic theologians disagree. In light of the pope's explicit statement, some theologians conclude that removal of artificial nutrition and hydration from a person such as Theresa who is in a permanent vegetative state would clearly contravene Catholic doctrine.¹¹³ The Pontifical Academy for Life explicitly addressed the issue of dignity of the patient in a vegetative state and rejected the idea that individual autonomy could justify refusal of life supportive measures in such medical circumstances.¹¹⁴

care" is reiterated in a contemporaneous statement from the Pontifical Academy for Life. See Pontifical Academy for Life, *International Congress on Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas, Joint Statement on the Vegetative State*, Mar. 10-17, 2004, available at <http://www.lifeissues.net/writers/doc/doc34vegetativestatejoint.html> (explaining that, "[i]n general, [vegetative state] patients do not require any technological support in order to maintain their vital functions" and that these "patients cannot in any way be considered terminal patients, since their condition can be stable and enduring").

¹¹¹ See Pope John Paul II, *supra* note 110; see also Pontifical Academy for Life, *supra* note 110.

¹¹² Cf. Morrisey, *supra* note 82, at 110 (explaining that papal allocutions are not binding or legislative in nature).

¹¹³ See Manual Roig-Franzia, *Catholic Stance on Tube-Feeding Is Evolving*, WASH. POST, Mar. 27, 2005, at A7; see also Fr. Robert Barry, *The Papal Allocution on Caring for Persons in a "Vegetative State,"* 20 ISSUES L. & MED. 155 (2004) (describing the context in which the Pope made the statement and vigorously defending its consistency with prior Catholic doctrine).

¹¹⁴ See Pontifical Academy for Life, *supra* note 110 (explaining that "[w]e acknowledge that every human being has the dignity of a human person" and that "[s]uch a dignity . . . cannot depend on specific circumstances of life and cannot be subordinated to anyone's judgment" but adding that "personal autonomy can never justify decisions or actions against one's own life or that of others").

Other commentators take the opposite position, noting that this allocution constitutes a radical departure from prior Church teachings and even from Pope John Paul II's own prior writings and statements, and that this statement was not an *ex cathedra* pronouncement. For these reasons, Catholics need not consider it infallible or absolutely binding.¹¹⁵ In fact, the allocution, if it were binding, would represent a sea change change in Catholic doctrine. Prior to this papal pronouncement, even conservative theologians agreed that Catholics could refuse artificial nutrition and hydration without sin as long as they had "prayerfully considered" the situation.¹¹⁶ Taking a broader view of canon law and its interpretation and prior statements of the Pope and bishops on this issue, it appears that Catholics remain free to refuse such medical treatment if the refusal comports with their faithful and conscientious understanding of the Church's teachings. In keeping with this position, Catholic hospitals still generally appear willing to honor patients' advance directives requesting the withdrawal of feeding tubes, despite the papal allocution.¹¹⁷

Pope John Paul II apparently made his 2004 pronouncement specifically in response to Theresa Schiavo's case, because of the fact that Theresa was in a vegetative state and there was continuing ethical controversy about the legally permitted withdrawal of artificial nutrition and hydration. The Schindlers argued that, because Theresa was a practicing Catholic, she would choose to adhere to the position described in the papal allocution.¹¹⁸ The federal courts rejected this argument.¹¹⁹ It is worth addressing, however, because it relies on a kind of highly speculative logic: But for Theresa's vegetative state and the surrounding dispute, the Pope might not have

¹¹⁵ See Interview with Rev. John Bonzagni, *supra* note 88 (explaining that the allocution was simply that—a speech expressing the Pope's opinion on a matter of public dispute).

¹¹⁶ See Manual Roig-Franzia, *supra* note 113 (quoting Richard M. Doerflinger, vice-president of the Pro-Life Secretariat of the U.S. Conference of Catholic Bishops and a vocal opponent of removal of Theresa's feeding tube).

¹¹⁷ See Matt Leingang, *Hospitals Stand Pat on Living Wills*, CINCINNATI ENQUIRER, Apr. 3, 2004, at A1 (noting that the Catholic Health Association considers artificial nutrition and hydration to be "medical treatment" that can be discontinued).

¹¹⁸ See *In re Guardianship of Theresa Marie Schiavo*, Motion for Relief from Judgment, Motion to Reconsider, No. 90-2908GD-003 (July 19, 2004), available at Key Events, *supra* note 9. The motion alleges that "Terri has now changed her mind about dying. As a practicing Catholic at the time of her collapse who was raised in the Church . . . Terri does not want to commit a sin of the gravest proportions by foregoing treatment to effect her own death in defiance of her religious faith's express and recent instruction to the contrary." See *id.* at 2-3.

¹¹⁹ See Order denying motion, Oct. 22, 2004, available at Key Events, *supra* note 9.

made the statement suggesting more clearly that artificial nutrition and hydration must continue in such circumstances. Courts attempt to make a substituted judgment inquiry based on what the patient would have chosen, using information about the patient's values and beliefs at the time she lost decisional capacity. It is odd to argue that Theresa would "change her mind" in response to a papal pronouncement about her situation years after she entered into a vegetative state simply because she had been a practicing Catholic at age twenty-six. Such a claim ignores Theresa's individual autonomy and assumes far too much about how her spiritual values might have evolved over the years.

The argument that Theresa would "change her mind" in response to the papal allocution years after she entered a vegetative state constitutes a kind of "sound-bite" Catholicism. It fails to reflect the genuine moral autonomy available to faithful Catholics who attempt in good conscience to make decisions consistent with the broader teachings and mission of the Church. The Catholic Church's teachings only minimally address the most complex end-of-life issues, leaving certain decisions to the conscience of the individual patient. As suggested by the complexities of the debate in the Catholic Church over euthanasia and refusal of medical care described above, courts cannot rely on a "sound-bite" approach to a patient's faith. Simply labeling a patient as "Catholic" cannot alone serve as conclusive evidence that a person would refuse artificial nutrition and hydration.

So, what role should Catholic principles play in medical decision-making for a Catholic patient who is unable to speak for herself? It depends on how relevant those principles are and how they are understood by the individual patient. Courts must conduct a factual inquiry within the context of that individual's specific faith and attempt to determine how that individual would exercise her conscience within her personal understanding of Catholic principles. Even the fact that Theresa was raised in a staunch Catholic family and educated in Catholic schools cannot conclusively resolve the question of how she would exercise her conscience in making medical decisions as an adult. To assume that Theresa (or any incapacitated patient who was a practicing Catholic) would adhere absolutely and completely to Catholic principles would be to ignore both the individual variation in religious practice and the real ambiguities in Catholic doctrine on end-of-life issues. Despite the urging of Catholic and other conservative Christian organizations that intervened in the Schiavo dispute, courts must resist the temptation to

leap to over-simplified conclusions based on an individual's affiliation with a particular religious tradition.

Although courts do in fact consider patients' religious principles in making determinations about end-of-life care, judicial inquiry into religious principles sometimes lacks nuance. In Theresa's case, for example, the court acknowledged that it did not have the benefit of testimony from a religious or spiritual advisor who knew Theresa and that it, therefore, could infer little about her particular religious convictions in reaching its decision.¹²⁰ Nevertheless, the expertise of courts as fact-finding bodies suggests that the requisite mechanism for such inquiries already exists. Courts have the capacity to conduct more meaningful judicial inquiry into the individual beliefs of incapacitated patients when such an inquiry appears relevant. Despite the vocal fears of the certain conservative religious organizations, there is nothing in the decision with respect to the individual case of Theresa Schiavo that would prevent a court from reaching the opposite conclusion in a future, similar case if continued treatment were consistent with that future patient's values, preferences, and beliefs.

V. CONCLUSION

The ongoing legal conflict over the withdrawal of life-supportive measures in the Theresa Schiavo case attracted the attention of a wide range of Catholic, evangelical Christian, anti-abortion, and related conservative groups.¹²¹ The controversy over Theresa's care presented conservative religious groups with an opportunity to broaden their "appeal" by moving beyond the abortion and stem cell research debate into medical decision-making at the end of life. Their intervention in the case created a situation laden with hypocrisy. First, social and religious conservatives repeatedly affirm the sanctity of marriage, yet they questioned Michael Schiavo's good

¹²⁰ See *id.* (concluding that "there is nothing new presented regarding Terri Schiavo's religious attitude and there still is no religious advisor to assist this or any other court in weighing her desire to comply with this or any other papal pronouncement.").

¹²¹ See Terri D. Keville & Jon B. Eisenberg, *Bush v. Schiavo and the Separation of Powers: Why A State Legislature Cannot Empower a Governor to Order Medical Treatment When There Is a Final Court Judgment That the Patient Would Not Want It*, 7 J. L. & SOC. CHALLENGES 81, 105 (2005) (naming various organizations and describing their roles in the controversy and explaining that the "public relations campaign bore fruit in the Schiavo case. Governor Bush and the Florida legislators acted to compel the reinsertion of Terri Schiavo's feeding tube only after their offices were flooded with thousands of email messages and telephone calls in a campaign orchestrated by religious conservatives.").

intentions in representing Theresa's wishes. Although the respect accorded to the bonds of marriage certainly has limits, there was nothing in this particular case to justify speculation about the purity of Michael Schiavo's intentions. Second, political and social conservatives hastily abandoned their usual preference for avoiding governmental intrusion into the lives of individuals, instead threatening political retaliation against lawmakers who failed to support various efforts to intervene in the dispute.¹²² Finally, the intervention by religious and political conservative groups in the Schiavo dispute unfortunately transformed Theresa's life and death into a political cause and thereby diminished the value of her life as an individual, making her a means to an end.

Some of these organizations helped to publicize the dispute nationally and to fund the cause by contributing to the Schindlers' legal costs and to the costs of Theresa's continued care.¹²³ At the same time, conservative religious leaders urged state and federal legislators to intervene in the fight to keep Theresa alive and threatened dire political consequences against those who failed to toe the line.¹²⁴ In fact, Judge George Greer, the Florida county judge assigned to hear the many motions and hearings in the case, received numerous death threats and ultimately resigned his membership from Calvary Baptist Church under pressure from its pastor and congregation.¹²⁵ Some individual members of organizations that intervened in the dispute also attempted to use their involvement to improve their chances in the political arena.¹²⁶ Not long after Theresa's death, Randall Terry, founder of Operation Rescue, announced his candidacy for the Florida Senate.¹²⁷

¹²² See Robert Solomon, *Schiavo Case Mocks Libertarian Posturing*, CONN. LAW TRIBUNE, Mar. 28, 2005, at 22 (describing the "unprecedented Congressional attempt to usurp the rule of law through the Terri Schiavo case" as an exhibition of "extraordinary . . . hypocrisy, demagoguery, and cowardice").

¹²³ See Campo-Flores, *supra* note 11, at 9 (explaining that four years ago the anti-abortion group Life Legal Defense Foundation began helping to pay the Schindlers' legal fees and that the group's total contribution amounted to at least \$300,000).

¹²⁴ See *id.* (noting that powerful religious groups such as the Southern Baptist Convention intervened and that Ken Connor, a former advisor to Jeb Bush, and U.S. Representative David Weldon, a Florida Republican, mobilized a strategy team that included individuals from national conservative organizations such as the Family Research Council and the National Right to Life).

¹²⁵ See Julia Duin, *Judge in Schiavo Case Faces Death Threats*, WASH. TIMES, Mar. 30, 2005, at A1.

¹²⁶ See Statement of Randall Terry, *Announcing Run for Florida State Senate*, June 22, 2005, available at <http://www.earnedmedia.org/sftj0622.htm> (last visited Dec. 12, 2005).

¹²⁷ *Id.*

Public reaction to the intervention of Florida's legislature and executive branch, the United States Congress, and various religious organizations into the Schiavo case was mixed, but a majority of observers expressed discomfort or disagreement with the political interference in the case.¹²⁸ Much of this unease probably arose from the perception that external forces ought not to be permitted to influence decision-making in individual cases as long as the individual decision conforms with relevant law and with the individual's preferences. In other words, the goal of the substituted judgment inquiry for an incapacitated patient such as Theresa should focus on what she would choose based on her own conscience within her Catholic faith, not on what others say she should choose. Even, as in this case, where those who knew Theresa well disagreed about how she would exercise her preferences in the context of her faith, the intervention of organizations that did not know her as an individual suggested a desire to achieve broader goals, using her case as an exemplar.

The cardiac arrest that left Theresa—a young and vibrant woman—in a permanent vegetative state fifteen years ago was the primary tragedy, although this point appears to have been lost in the years of litigation over her ultimate fate. As others have observed, her medical situation was not unusual; many individuals in the United States are in a permanent vegetative state and receive nutrition and hydration through a feeding tube. Many families have faced difficult decisions about whether and when to discontinue life supportive measures in these cases. Some of these families have disagreed and have turned to the courts to resolve the dispute.

What distinguishes Theresa Schiavo's case is the manner in which politicians and pro-life interest groups appropriated her very private struggle (and the dispute between Michael Schiavo and the Schindlers) for their own ends. This type of controversy is likely to repeat itself in the future.¹²⁹ If courts in these sorts of cases lose sight of their legally-mandated focus on inquiry into the individual patient's values and beliefs, they risk allowing outsiders (through

¹²⁸ See Didion, *supra* note 11 (noting that "a majority of Americans . . . saw a gross example of legislative opportunism, a clear demonstration of the power of the religious right to influence legislation, a threat most specifically to pro-choice protections in the matter of abortion and more generally to the privacy rights embodied in the Constitution itself.").

¹²⁹ See Robert J. Blendon, et al., *The American Public and the Terri Schiavo Case*, 165 ARCHIVES INTERNAL MED. 2580, 2580-83 (2005) (describing national opinion surveys that associated opposition to removal of Theresa's feeding tube with opposition to abortion and concluding that "issues involved in cases like Schiavo's are not likely to disappear from the political agenda").

influence on family members or through amicus briefs) to impose their version of Catholicism or Christianity on an individual patient. Unfortunately, the public discourse about the appropriate role of religious and moral values in end-of-life decision-making lacks subtlety. Instead of attempting to understand how the rich complexity that Catholic and Christian doctrine might enhance the quality and accuracy of a decision to withdraw life-supportive measures, many of the religious organizations that intervened in the Schiavo dispute delivered their message in overly simple sound bites. Such artificial clarity missed an opportunity to acknowledge the fundamental role that individual conscience plays in the difficult decisions faced by Catholics and all people of faith.