

Reflections on the Terri Schindler-Schiavo Controversy

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ABSTRACT: Despite the enormous attention it received, the Terri Schindler-Schiavo litigation is not legally significant. The litigation involved the application of a fairly well-settled legal framework. This framework permitted, however, an unjust result. The controversy over Terri's fate has, though, helped to focus attention on a consensus that is in need of re-examination. This paper explores the lessons that ought to be learned from the Terri Schindler-Schiavo litigation. After briefly discussing the basic facts and the complex litigation history, the paper considers the relevant federal constitutional and Florida law. The paper then critiques Florida law and explains the legal and moral considerations that ought to inform the re-examination that is so sorely needed. The most important effort needed is to restore the sanctity of life ethic.

DESPITE THE ENORMOUS attention it received, the Terri Schindler-Schiavo litigation¹ is not legally significant. In fact, a recent article on the case by John Robertson was entitled "Schiavo and its (In)significance."² Robertson describes the case as legally "routine" and concludes that the case "will have contributed little to end-of-life law, but will be remembered because of the bitter battle that erupted between her husband and her parents over whether her feeding tube should be removed, and the extraordinary efforts of Florida and then national politicians to overturn a judicial ruling in a pending case."³

As others have noted, *Schiavo* involved the application of a legal framework that has been developed in this country over a fifteen-year period from the mid-1970s through the early 1990s. This largely settled legal framework was described by Lawrence Gostin in an

article on the *Schiavo* case: “Federal and state courts have reached a broad consensus on matters of death and dying since the seminal cases of Karen Ann Quinlan in 1976 and Nancy Cruzan in 1990. So too there has been substantial consensus in the bioethics literature. Courts and scholars have affirmed a person’s right to refuse life-sustaining treatment and concluded that this right remains intact even if the person is no longer able to speak for herself. Near relatives and the courts should adopt the same course of action the person would have chosen if competent.”⁴

The *Schiavo* case involved the application of this fairly well-settled framework. The subsequent litigation over the Florida and federal laws that were designed to save Terri presented a number of interesting issues, but I do not think they are of much general applicability to these controversies. Both laws applied only to Terri and I think it was no surprise that the laws did not ultimately succeed in changing the outcome that had already been litigated in the Florida courts. After these efforts failed, Terri died on March 31, 2005.

This is not to say that I approve of what happened in the Terri Schindler-Schiavo litigation. The legal regime that has developed in this country since the mid-1970s is terribly flawed. This paper will explore some of the principal flaws in the current consensus. The major defect in the current situation is that there has been a collapse in the traditional sanctity of life ethic. Our task is to restore this ethic. This is a cultural battle of enormous proportion; the battle here is not just or even primarily a problem of activist judges. The *Schiavo* case, although legally not very significant, has helped to open peoples’ eyes to the injustice of the existing legal regime and has helped to focus public scrutiny to a consensus that is sorely in need of re-examination.

In this paper,⁵ I will attempt to explore the lessons that ought to be learned from this litigation. In section 1, I will set forth the basic facts. I will focus primarily on the litigation in the Florida courts that ended with the ordering of the withdrawal of Terri’s food and water. I will only refer briefly to the litigation in the Florida courts about the constitutionality of Terri’s Bill (the Florida law that authorized Governor Bush to restore Terri’s food and water) and to the litigation in the federal courts after Congress passed a law that permitted the federal courts to hear certain issues in the case. In section 2, I will discuss the federal constitutional law that bears on this controversy. In section 3, I will discuss the relevant Florida law. This discussion will

demonstrate that it is earlier Florida cases that are the real source of the problem. The *Schiavo* litigation is simply the working out of a flawed legal approach to the care of disabled patients. In section 4, I will critique these Florida precedents and argue that it is these precedents that need to be re-examined. In section 5, I will then discuss the legal and moral considerations that ought to inform this re-examination. Fortunately, this litigation has prompted some necessary rethinking of the errors of these earlier cases, and some contemporaneous moral reflection—most notably that offered by a statement of Pope John Paul II—has suggested how we ought to reshape our approach to the care of patients such as Terri.

1. THE BASIC FACTS

There is a lot of dispute about the underlying facts and here I will make an effort to set forth the key events as clearly as I can.⁶ In February 1990, Terri Schindler-Schiavo collapsed in her home and suffered massive brain injuries. In 1992, Terri and her husband Michael were awarded sizeable amounts of money in malpractice suits. As early as 1993, Michael and Terri's parents (Bob and Mary Schindler) disagreed about her treatment. In 1998, Michael petitioned a Florida court to withdraw the food and water that were being provided to Terri through a feeding tube. In February 2000, a Florida trial court judge granted Michael's petition.⁷ The trial court found that Terri was in a persistent vegetative state and that there was clear and convincing evidence that she would have chosen to discontinue food and water. This ruling was affirmed on appeal.⁸ The Florida Supreme Court⁹ and the United States Supreme Court¹⁰ refused to intervene. In April 2001, Terri's food and water were withdrawn. Terri's parents successfully sought to resume her feeding and also succeeded in reopening the case for the consideration of new evidence. In November 2002, the Florida trial court reaffirmed its earlier ruling and rescheduled the removal of Terri's feeding tube.¹¹ This order was again affirmed on appeal.¹² Terri's food and water were again withdrawn on October 15, 2003.¹³

On October 21, 2003, the Florida legislature passed and Governor Bush signed a law, usually referred to as Terri's Bill.¹⁴ This law authorized the governor to restore food and water to a patient if the following conditions were satisfied as of October 15, 2003: that the patient has no written advance directive, that a court has found the patient to be in a persistent vegetative state, that the patient has had

food and water withheld, and that a member of the patient's family has challenged the withholding of food and water.¹⁵ On the same day the law was passed, Governor Bush issued an Executive Order that found that these conditions were satisfied.¹⁶ The Executive Order stayed the trial court's order and directed that Terri's food and water be restored. Michael subsequently filed a lawsuit in state court challenging the constitutionality of Terri's Bill. On May 6, 2004, a Florida trial court granted Michael's motion for summary judgment and declared Terri's Bill unconstitutional.¹⁷ This ruling was upheld by the Florida Supreme Court and the United States Supreme Court refused to hear the case.¹⁸

On March 18, 2005, Terri's food and water were withdrawn.¹⁹ On March 21, 2005, Congress passed a law that authorized the federal courts to review de novo arguments that Terri's federal constitutional rights had been violated.²⁰ This effort also failed to result in changing the outcome of the earlier Florida litigation,²¹ and Terri died on March 31, 2005.²²

There is a lot in this brief account that I have not addressed.²³ For example, there were allegations of domestic violence and even the suggestion that Michael may have been responsible for Terri's injuries. There have been allegations of conflict of interest given the financial stake that Michael had in Terri's death. Moreover, Michael had clearly moved on with his life. For years before Terri's death, Michael lived with another woman (Jodi Centonze); this woman is the mother of two of Michael's children. Despite the court findings, there is serious doubt as to whether Terri was in fact in a persistent vegetative state and serious doubt as to whether the withdrawal of food and water accorded with Terri's previously expressed wishes.

2. FEDERAL CONSTITUTIONAL LAW

Although it seems common for the United States Supreme Court to dominate the field on contentious social issues, the Court has not had played a major role in this area. Most of the significant developments have taken place in the state courts in cases primarily focusing on state law issues.

The United States Supreme Court has dealt with withdrawal of treatment and assisted suicide issues on just two occasions. And, although these decisions have sometimes been read as supporting the idea that patients have a right to refuse life-sustaining treatment, the Court's holdings did not give much encouragement to the right to die

movement.

In the first case it considered, *Cruzan v. Director, Missouri Department of Health*,²⁴ the Court rejected arguments that Nancy Cruzan's parents were constitutionally entitled to withdraw her food and water. Nancy Cruzan was in a persistent vegetative state and had virtually no prospect of recovering her cognitive abilities. She was supplied food and water through a feeding tube, and her parents eventually asked the hospital to discontinue this care. A Missouri trial court authorized termination on the grounds that she had a fundamental constitutional right to withdraw food and water. The Missouri Supreme Court reversed.²⁵ The Missouri Supreme Court found that state law required that the patient's wishes to withdraw food and water had to be shown by clear and convincing evidence and that such evidence was absent in this case.²⁶

The United States Supreme Court affirmed,²⁷ and held that Missouri's evidentiary requirement did not violate Nancy Cruzan's constitutional rights.²⁸ After reviewing state court decisions on the right to refuse treatment, the Court expressed a reluctance to intervene in the on-going debate on these issues. The Court refused to find that there was a fundamental right involved and instead stated that "[w]e believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."²⁹ That quote was followed by a citation to *Bowers v. Hardwick*,³⁰ a case in which the Court had used the most deferential form of review.

Even the Court's description of this liberty interest was quite careful. The Court stated: "Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."³¹

The Court also emphasized the strong state interest in the protection and preservation of life. The Court suggestively stated that "[w]e do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to

starve to death.”³² In addition, the Court emphasized its view that “a State may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.”³³ In the end, the Court concluded that Missouri’s heightened evidentiary standard did not violate the liberty interests it had assumed were implicated.³⁴ The Court further rejected the argument that Missouri was compelled to accept the substituted judgment of close family members in a case where there was doubt as to the wishes of the patient.³⁵

Justice Scalia’s concurring opinion was even clearer that the Constitution does not dictate the approach that states must follow in this area. He noted the states’ “power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one’s life....”³⁶ He further noted that even if it had been demonstrated that the “patient no longer wishes certain measures to be taken to preserve his or her life, [that] it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored.”³⁷

The Court’s next occasion to address right to die issues came in 1997 when the Court decided *Washington v. Glucksberg*³⁸ and *Vacco v. Quill*.³⁹ In these cases, the Court rejected constitutional challenges to laws banning assisted suicide. In *Glucksberg*, the Court rejected the argument that there was a fundamental right to assisted suicide. The Court rejected the view that the right to assisted suicide was deeply rooted in our Nation’s history and tradition.⁴⁰ The Court mentioned that in *Cruzan* it had “assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.”⁴¹ But, in *Glucksberg*, the Court refused to extend this to a right to assisted suicide. The Court also emphasized the state’s “unqualified interest in the preservation of human life.”⁴² The Court also noted that the state had “rejected this sliding-scale approach [to assessing the weight of the state’s interest in protecting life], and, through its assisted suicide ban, insists that all persons’ lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law.”⁴³

In *Vacco v. Quill*, the Court also rejected an equal protection challenge.⁴⁴ The Court agreed that there is a difference between

letting a patient die (by refusing life-saving medical treatment) and killing a patient (by assisting in the patient's suicide). According to the Court, "[l]ogic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction."⁴⁵

The overwhelming message of the 1997 decisions is of judicial restraint.⁴⁶ The Court clearly wanted to stay out of this controversy as much as possible. The Court's narrow, careful opinions permitted the political debate to move forward. As the Court stated in *Glucksberg*, "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."⁴⁷

The 1990 and 1997 decisions provide little explicit support that there is a constitutional right to die. Although the Court assumed that there was a right to refuse medical treatment, the Court carefully avoided the language of "fundamental rights." And, even with the assumption that there was a liberty interest at stake, the Court upheld all the restrictions under review. The Court spoke strongly, although not in any definitive way, about the state's interest in preserving life. The Court even suggested in *Cruzan* that the state might be able to intervene to prevent death by starvation,⁴⁸ a point that Justice Scalia explicitly endorsed in his concurrence.⁴⁹

It is difficult, however, to speak with a great degree of confidence about how to read these opinions, and particularly the passages that might be read to allow a State to refuse to honor a patient's request to refuse treatment. Justice O'Connor's concurring opinion in *Cruzan* (and she was the pivotal vote in that case) was far more accepting of the constitutional basis for the refusal of treatment, including the refusal of artificially delivered food and water.⁵⁰ And although the Court was unanimous in the assisted suicide cases, the majority opinion and the separate opinions seem accepting of at least the right to withdraw treatment,⁵¹ which the Court emphasized was based on "well established, traditional rights to bodily integrity and freedom from unwanted touching[,...]"⁵² and perhaps a right to adequate palliative care.⁵³

3. STATE CONSTITUTIONAL LAW

One clear message of the United States Supreme Court cases is that the Court seems content to leave these issues to the political process and to state court judges interpreting their own constitutions. This is a task that the state court judges have undertaken,⁵⁴ with largely unfavorable results. Perhaps the only good news is that the state courts have resisted the argument that there is a right to assisted suicide.⁵⁵

The right to refuse treatment cases are, however, quite troublesome, and it is to those cases that I'll now turn. It is these cases that set the stage for the tragic events in the Terri Schindler-Schiavo litigation.

There are many state cases involving the right to refuse treatment. In this section of this paper, I will focus on the leading Florida case, which is, it should be noted, not atypical. The leading Florida case is *In re Guardianship of Browning*.⁵⁶ In *Browning*, the Supreme Court of Florida considered the following question: "Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube?"⁵⁷ The Court largely endorsed this view.

While competent, Estelle Browning had executed a declaration that stated that "If at any time I should have a terminal condition and if my attending physician has determined that there can be no recovery from such condition and that my death is imminent, I direct that life-prolonging procedures [and this was stipulated to include artificially provided food and water] be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying."⁵⁸ After suffering a stroke at age 86, Estelle was confined to a nursing home. She was severely disabled (although she was not in a persistent vegetative state) and required total care, including tube feeding. Two years later, her guardian (Doris Herbert—who was Estelle's second cousin and only living relative) filed a petition to have the tube removed. Estelle was not comatose but she had suffered severe brain damage and there was virtually no chance of recovery. The medical testimony indicated that she might survive as long as a year with the sustenance provided by the feeding tube. Without the tube, of course, she would die within approximately a week.

The Florida Supreme Court found that, under the Florida Constitution, Estelle's "fundamental right of self-determination, commonly expressed as the right of privacy, controls this case."⁵⁹ This right, the Court found, includes the right to make choices about medical treatment, and this includes all medical choices. The Court stated: "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. Courts overwhelmingly have held that a person may refuse or remove artificial life-support, whether supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube. We agree and find no significant legal distinctions between these artificial means of life-support."⁶⁰ The Court also found that this right is not "lost or diminished by virtue of physical or mental incapacity or incompetence."⁶¹ If a patient is not competent, her legally appointed guardian (or other proxy or surrogate) is authorized to exercise this right for her, but must do so in manner that reflects the choice that the patient, if competent, would have made. The surrogate is not to make her own choice or to make the choice that she believes is in the patient's best interest.

The Florida Supreme Court rejected the state interests that might outweigh the individual's right to forego treatment.⁶² The Court spent most of its time dismissing the state's interest in the preservation of life.⁶³ This interest was insufficient, particularly because the patient's affliction was not curable and the state's only interest was in briefly maintaining her life. The state's interest in preventing suicide was not implicated, the Court stated, because "the discontinuation of life support 'in fact will merely result in [her] death, if at all, from natural causes.'"⁶⁴

The Florida Supreme Court went on to set forth the procedural steps that must be satisfied for the choice to refuse or withdraw treatment to be honored. The Court noted that it was "loath to impose a cumbersome legal proceeding at such a delicate time in those many cases where the patient neither needs nor desires additional protection."⁶⁵ This is particularly true when the choice to terminate treatment "is being made when the only alternative to a natural death is to artificially maintain a bare existence."⁶⁶ The Court insisted that, although prior judicial approval is not necessary, the "surrogate must take great care in exercising the patient's right of privacy, and must be able to support that decision with clear and convincing

evidence.”⁶⁷ This choice can be implemented through a living will, through oral declarations, or by the written designation of a proxy to make health care decisions. Although judicial approval is not necessary, the Court noted that the decision might be presented to the courts by the surrogate or might be challenged by interested parties.⁶⁸ Challenges would generally be limited, however, to the determination of the patient’s wishes.⁶⁹

In *Browning*, the Court went on to conclude that the relevant conditions had been satisfied. The Court thought that Estelle Browning’s death was indeed “imminent,”⁷⁰ since she would die within a short period of time without food and water. The Court also thought that she was in a “terminal condition,”⁷¹ since she had suffered permanent brain damage and there was no hope for recovery.⁷²

4. ANALYSIS

There are many problems with the approach set forth in *Browning*.

First, the *Browning* Court candidly adopts the extreme autonomy approach to the right of privacy. This approach is the same as that used by the United States Supreme Court in the joint opinion in *Planned Parenthood v. Casey*,⁷³ and most recently in *Lawrence v. Texas*.⁷⁴ This approach is fraught with difficulties, both legal and moral.

The *Browning* Court enthusiastically supports subjectivism, and seems to adopt the view that moral relativism is a constitutional command.⁷⁵ Although this rejection of objective moral norms seems liberating, it is ultimately threatening to the very ideal of freedom to which it appeals.⁷⁶ As Pope John Paul II has stated, “when freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority.”⁷⁷

Second, the *Browning* Court is just one example of how courts have rejected the sanctity of life ethic and candidly adopted a quality of life ethic. This is quite troublesome, although sometimes this feature of these withdrawal-of-treatment cases is not adequately understood.

The *Browning* Court spoke of the lives involved in these cases as involving “bare existence.”⁷⁸ The Court, more ominously, endorsed

the reasoning of the California Court of Appeals in the *Bouvia* case.⁷⁹ There, the California court permitted Elizabeth Bouvia, a competent 28 year old quadriplegic with severe disabilities, to withdraw the food and water that were sustaining her life. The *Bouvia* court faulted the lower court for failing to give appropriate weight to the quality of her life. The court endorsed the idea that it had to respect her view that “the quality of her life has been diminished to the point of hopelessness, uselessness, unenjoyability and frustration. She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She cannot be faulted [said the court] for so concluding.”⁸⁰ The court further noted that it had to respect her choice to consider that her “life has been physically destroyed and its quality, dignity and purpose gone....”⁸¹

Other courts in similar cases have voiced the same view. In the *Brophy* case,⁸² for example, the life of certain patients are described as having “mere corporeal existence.”⁸³ In fact, the “burden of maintaining the corporeal existence degrades the very humanity it was meant to serve.”⁸⁴ The patient may well consider such an existence “to be degrading and without human dignity.”⁸⁵ In his dissent in *Brophy*, Justice O’Connor rightly commented: “Even in cases involving severe and enduring illness, disability and ‘helplessness,’ society’s focus must be on life, not death, with dignity. By its very nature, every human life, without reference to its condition, has a value that no one can rightfully deny or measure. Recognition of that truth is the cornerstone on which American law is built. Society’s acceptance of that fundamental principle explains why, from time immemorial, society through law has extended its protection to all, including, especially, its weakest and most vulnerable members. The court’s implicit, if not explicit, declaration that not every human life has sufficient value to be worthy of the State’s protection denies the dignity of all human life, and undermines the very principle on which American law is constructed.”⁸⁶

The *Brophy* dissents recognized that something momentous is going on in these cases. Peter Singer, in commenting on a similar English case (*Bland*),⁸⁷ noted that the real import of these cases is the collapse of the traditional Western ethic—the principle of the sanctity of life.⁸⁸ The logic of these cases is that there are some lives that are not worth living. Or put another way, the logic is that some persons would be better off dead.⁸⁹

Third, the *Browning* Court obscures that it is really accepting the legitimacy of a lethal choice. The Court does not admit that death is by starvation. In fact, the Court says that death is due to natural causes. The California court in *Bouvia* made the same point. After first noting, in a seemingly celebratory tone, “the fact that a desire to terminate one’s life is probably the ultimate exercise of one’s right to privacy,...”⁹⁰ the court stated that Elizabeth’s decision to withdraw food and water is a “decision to allow nature to take its course [and] is not equivalent to an election to commit suicide....”⁹¹ The United States Supreme Court seemed to endorse this view in *Vacco v. Quill* when it stated: “when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”⁹²

But, in the main, the food and water cases are in reality instances of killing by omission.⁹³ Some of the court opinions have recognized this. For example, in *Brophy*, Justice Nolan stated: “Paul Brophy will die as a direct result of the cessation of feeding. The ethical principle of double effect is totally inapplicable here. This death by dehydration and starvation has been approved by the court. He will not die from the aneurysm which precipitated the loss of consciousness, the surgery which was performed, the brain damage that followed or the insertion of the G-tube. He will die as a direct result of the refusal to feed him. He will starve to death, and the court approves this death.”⁹⁴ As William May has noted, patients in a persistent vegetative state are “not in fact dying of any fatal pathology. They are simply persons seriously impaired.”⁹⁵

As the quote from the majority in *Brophy* indicates, the courts hide their acceptance of a lethal choice behind the act-omission distinction. Yet, this distinction has never been regarded as controlling by the criminal law.⁹⁶ As Justice Scalia noted in his *Cruzan* concurrence, “[i]n the prosecution of a parent for the starvation death of her infant, it was no defense that the infant’s death was ‘caused’ by no action of the parent but by the natural process of starvation, or by the infant’s natural inability to provide for itself.”⁹⁷ Similarly, the act-omission distinction has not been regarded as controlling by Catholic moral teaching. *The Catechism of the Catholic Church*, for example, states that “an act or omission which, of itself or by intention, causes death in order to eliminate suffering constitutes a murder gravely contrary to the dignity of the human

person and to the respect due to the living God, his Creator.”⁹⁸ Pope John Paul II’s statement to the conference on patients in a persistent vegetative state also noted: “Death by starvation or dehydration is, in fact, the only possible outcome as a result of the withdrawal [of food and water]. In this sense it ends up becoming, if done knowingly and willingly, true and proper euthanasia by omission.”⁹⁹

Fourth, the procedural/evidentiary regime set forth by the *Browning* Court is flawed. Although the Court makes the right to refuse treatment sound quite limited, it is clear that the right is not confined to a narrow set of circumstances. In the *Browning* case itself, Estelle Browning’s declaration required that her death be imminent and that she be in a terminal condition. The court essentially ignored these requirements, because the court noted she would quickly die if her food and water were withdrawn. The “problem” in most of these cases is that the patients are “biologically tenacious.” That is, they won’t die soon enough.

This right to die is usually first articulated in narrow terms. In Oregon, where assisted suicide is legal, there is a six-month time limit.¹⁰⁰ There have been concerns that this is not being honored.¹⁰¹ But the real problem is with patients—such as Nancy Cruzan and Elizabeth Bouvia— who may live for a long time if their food and water are maintained. In *Browning*, the only reason the court needed to discuss and evade the “terminal condition” and “imminence” conditions was that these conditions had been set forth in Estelle’s advance declaration. The whole structure of the opinion makes it clear, however, that these purported limits are not requirements of Florida’s constitutional law. The whole idea is to respect the subjective wishes of the patient, and this clearly does not turn on the patient suffering terminal illness or being in a persistent vegetative state or the prospect of imminent death. As one of the dissents in *Brophy* stated, on the principle that the court must defer to the subjective judgment of the patient “it necessarily follows that the young as well as the old, the healthy as well as the sick, and the firm as well as the infirm, without exception, have the right to commit suicide,”¹⁰² which is how the dissent viewed the choice approved by the majority.

Moreover, the evidentiary regime is not well calculated to ensure accurate decisions. As Justice Overton’s partial dissent in *Browning* noted, the majority required fewer procedures to end a life than are required for a guardian to sell the property of a ward.¹⁰³ Another

concern is that the judges who may be, but are not required to be, involved in these decisions are likely to be influenced by the growing “culture of death,” and may be all too eager to approve decisions that result in the death of disabled patients. This process seemed to be at work in Terri’s case.¹⁰⁴

5. SOLUTIONS

There is no way to craft a good legal regime from the premises set forth in *Browning*. Neither Terri’s Bill nor the federal law provided a general solution, and in fact these laws did not purport to be since they only applied to her.

A legislative proposal that was prompted by the Terri Schiavo situation is seriously flawed. This proposal, which passed the Florida House¹⁰⁵ but died in a Committee of the Florida Senate,¹⁰⁶ was an effort to limit the worst abuses by creating a presumption for food and water for those who are incompetent. The proposal also tightened up the evidentiary standards to try to avoid the prospect of courts accepting the argument that casual oral statements constitute express and informed consent to the withdrawal of treatment. It is clear that this proposal would represent an improvement over the existing regime because Terri’s case indicates, among other things, that there are inadequate procedural protections under current Florida law.

But the more fundamental problem is that the proposal is based on flawed premises. The proposal accepts the legitimacy of the current law—including *Browning*—and tries to make the best of a bad situation.¹⁰⁷ There is a certain merit in this, but it seems clear that this does not go far enough. *Browning* and the approach it reflects must be challenged.

There is a pressing need to rethink this whole issue. The intense public attention on Terri’s case is itself unusual since similar withdrawals of food and water have been taking place with some frequency for years throughout the country. Perhaps this focus will prompt the rethinking that is so sorely needed.¹⁰⁸

First, there is the need to expose the deficiencies of the extreme choice/autonomy regime.¹⁰⁹ Second, and perhaps more pivotally, there is the need to restore the sanctity of life norm.¹¹⁰ Pope John Paul II’s statement is quite effective in this regard. There, the Pope, after critiquing the dehumanizing “vegetative state” terminology, stated: “I feel the duty to reaffirm strongly that the intrinsic value and personal dignity of every human being do not change, no matter what

the concrete circumstances of his or her life. A man, even if seriously ill or disabled in the exercise of his highest functions, is and always will be a man, and he will never become a 'vegetable' or an 'animal.' Even our brothers and sisters who find themselves in the clinical condition of a 'vegetative state' retain their human dignity in all its fullness. The loving gaze of God the Father continues to fall upon them, acknowledging them as his sons and daughters, especially in need of help."¹¹¹ The Pope went on to note that generally it is morally obligatory to provide food and water to such patients. It is perhaps a sign of our distressing cultural situation that this statement has encountered much resistance, even from within the Catholic community.¹¹²

This effort to restore the sanctity of life ethic is where our focus ought to be. We need to challenge the increasing acceptance of the quality of life ethic and try to restore the traditional, sanctity of life norm. Tinkering with the flawed premises reflected in cases such as *Browning* and *Bouvia* and *Brophy* does not offer much hope for the long-term cultural renewal that is so necessary.

There is a need to restore the traditional view that it is wrong to intentionally take the life of an innocent human being.¹¹³ The withdrawal-of-treatment cases largely depart from this norm, although that is not adequately appreciated. Restoring this norm will be difficult work because it will require changes in much existing law, but these changes are sorely needed. The place that this should begin is in hospitals (such as Catholic hospitals) and with medical personnel who ought not be a party to this intentional killing. This conscientious objection would itself raise a host of complex issues (and discussing those issues would require a separate paper),¹¹⁴ but this sort of witness might further prompt the rethinking that the Terri Schindler-Schiavo litigation has begun.

NOTES

1. This litigation had a very long and complex history. For a full chronology (including links to the key court decisions), see http://www.miami.edu/ethics2/schiavo_project.htm. Because this resource is so easily available, I will frequently cite this website. The website of the International Task Force on Euthanasia and Assisted Suicide also has helpful information about the litigation. See <http://www.internationaltaskforce.org/ff.htm>.

2. John A. Robertson, “*Schiavo and Its (In)Significance*” (March 2005) *Univ. of Texas Public Law Research*, paper no. 72. <http://ssrn.com/abstract=692901>.

3. *Ibid.*

4. Lawrence O. Gostin, “Ethics, the Constitution, and the Dying Process: The Case of Theresa Marie Schiavo,” 293 *JAMA* 2403, 2403 (May 18, 2005).

5. An earlier version of this paper was delivered at the University Faculty for Life annual meeting on June 5, 2004. There was a tremendous amount of litigation after that time, but most of this litigation dealt with the Florida and federal laws that were designed to save Terri’s life. My June 2004 paper focused on the earlier litigation and the comments offered in that paper have been largely unaffected by the subsequent developments. Most of the paper presented here remains intact from the June 2004 version. Where relevant, I have updated the text and footnotes.

6. For a good discussion of the relevant facts, see Rita L. Marker, “Terri Schiavo and the Catholic Connection,” *National Catholic Bioethics Quarterly* 4 (2004): 555; see also Joan Didion, “The Case of Theresa Schiavo,” *New York Review of Books*, June 9, 2005, available at <http://www.nybooks.com/articles/18050>; O. Carter Snead, “Dynamic Complementarity: Terri’s Law and Separation of Powers Principles in the End-of-Life Context,” *Florida Law Review* 57 (2005): 53. Father Robert J. Johansen has written several insightful articles about the *Schiavo* litigation. His articles explore the facts in elaborate detail. The most recent article, Robert J. Johansen, “The Death of Terri Schiavo,” *Catholic World Report* (May 2005): 22-31; this article contains references to his other articles on the litigation.

7. *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct., Pinellas County, 2000), available at <http://www.miami.edu/ethics2/schiavo/021100-Trial%20Ct%20Order%20200.pdf>.

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8. In re Guardianship of Schiavo, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001).
 9. 780 So. 2d 176, review denied, 789 So. 2d 348 (Fla. 2001).
 10. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (entry for April 23, 2001).
 11. <http://www.miami.edu/ethics2/schiavo/Nov22%202002%20TC%20%20trialcourtorder11-02.txt>.
 12. In re Guardianship of Schiavo, 851 So. 2d 182 (Fla. Dist. Ct. App.), review denied, 855 So. 2d 621 (Fla. 2003).
 13. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (entry for October 15, 2003).
 14. 2003 Fla. Laws ch. 418., available at <http://www.miami.edu/ethics2/schiavo/102003_HB35-E.pdf>.
 15. Ibid.
 16. Exec. Order No. 03-201 (Oct. 21, 2003), available at <http://www.miami.edu/ethics2/schiavo/Schiavo%20Controversy%20Fla.%20Gov.%20Exec.%20Order%20No.%202003-201.htm>.
 17. Schiavo v. Bush, No. 03-008212-CI-20 (Fla. Cir. Ct., Pinellas County, 2004), available at http://www.miami.edu/ethics2/schiavo/Filed_05-06-04_Baird-rules-TerrisLaw-unconstitutional.pdf.
 18. Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004), cert.denied, 125 S. Ct. 1086 (2005).
 19. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (entry for March 18, 2005).
 20. Relief for the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005), available at <http://news.findlaw.com/hdocs/docs/schiavo/bill31905.html>.
 21. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (the entries for March 21, 2005-March30, 2005 detail the federal litigation and provide links to the relevant decisions).
 22. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (entry for March 31, 2005).
 23. For detailed treatments of the facts, see the articles cited supra note 6.

24. 497 U. S. 261 (1990).
25. *Cruzan v. Harmon*, 760 S. W. 2d 408 (Mo. 1988), *aff'd*, *Cruzan v. Director, Missouri Department of Health*, 497 U. S. 261 (1990).
26. *Cruzan v. Harmon*, 760 S. W. 2d at 425.
27. 497 U. S. 261 (1990).
28. *Ibid.* at 285.
29. 497 U. S. at 279.
30. 478 U. S. 186 (1986). *Bowers* was, of course, later overruled by *Lawrence v. Texas*, 539 U. S. 558 (2003).
31. 497 U. S. at 261.
32. 497 U. S. at 280.
33. *Ibid.* at 282.
34. *Ibid.* at 284-285.
35. *Ibid.* at 285-287.
36. *Ibid.* at 293 (Scalia, J., concurring).
37. *Ibid.* at 293 (Scalia, J., concurring).
38. 521 U. S. 702 (1997).
39. 521 U. S. 793 (1997).
40. *Glucksberg*, 521 U. S. at 723.
41. 521 U. S. at 720.
42. 521 U. S. at 728.
43. *Ibid.* at 729.
44. 521 U. S. 793 (1997).
45. 521 U. S. at 808.
46. Richard S. Myers, "Physician-Assisted Suicide: A Current Legal Perspective," *National Catholic Bioethics Quarterly* 1 (2001) 345, 349. See also Michael W. McConnell, "The Right to Die and the Jurisprudence of Tradition," 1997 *Utah Law Review* 665.
47. 521 U. S. at 735.

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48. 497 U. S. at 280.
 49. 497 U. S. at 293 (Scalia, J., concurring).
 50. 497 U. S. at 289 (O'Connor, J., concurring).
 51. See Myers, *supra* note 46, at 351-52.
 52. *Vacco v. Quill*, 521 U. S. at 807.
 53. See Myers, *supra* note 46, at 351-52.
 54. See Alan Meisel & Kathy L. Cerminara, "The Right to Die: The Law of End-of-Life Decisionmaking," chapter 1A (Aspen 3d ed. 2005).
 55. See Richard S. Myers, "Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective" in *Life and Learning XI: The Proceedings of the Eleventh University Faculty for Life Conference*, ed. J. Koterski (Washington, D.C.: UFL, 2002), pp. 3, 10.
 56. 568 So. 2d 4 (Fla. 1990).
 57. *Ibid.* at 8.
 58. *Ibid.*
 59. *Ibid.* at 9.
 60. *Ibid.* at 11-12.
 61. *Ibid.* at 12.
 62. *Ibid.* at 13-14.
 63. *Ibid.* at 14.
 64. *Ibid.* at 14.
 65. *Ibid.* at 15.
 66. *Ibid.* at 15.
 67. *Ibid.*
 68. *Ibid.* at 16.
 69. *Ibid.* at 16-17.
 70. *Ibid.* at 17.
 71. *Ibid.* at 17.
 72. I have focused here on the Florida constitutional law that bears on this

controversy. It should be noted that Florida statutory law builds on this framework and sets forth in detail the procedural mechanisms through which the decisions discussed in *Browning* are to be implemented. For a discussion of the Florida statutory framework, see Snead, *supra* note 6, at 71-76.

73. 505 U. S. 833 (1992).

74. 539 U. S. 558 (2003).

75. See Myers, *supra* note 46, at 346 (discussing this argument).

76. Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching," 72 *Univ. of Detroit-Mercy Law Review* 771, 780-782 (1995). See also Charles E. Rice, "Rights and the Need for Objective Moral Limits," 3 *Ave Maria Law Review* 259 (2005).

77. Pope John Paul II, *Evangelium Vitae* §96, footnote omitted, available at <http://www.vatican.va/edocs/ENG0141/INDEX.HTM>.

78. *Browning*, 568 So. 2d at 15.

79. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (Cal. Ct. App. 1986).

80. *Ibid.* at 1142.

81. *Ibid.* at 1143.

82. *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417 (Mass. 1986).

83. *Ibid.* at 434.

84. *Ibid.*

85. *Ibid.*

86. *Ibid.* at 453 (O'Connor, J., dissenting).

87. *Airedale N.H.S. Trust v. Bland*, [1993] A. C. 789.

88. Peter Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (New York: St. Martin's Press, 1995), p. 1.

89. See generally Myers, *supra* note 46 (discussing this issue). For an excellent commentary on the *Bland* case, see John Finnis, "Bland: Crossing the Rubicon?" 109 *L. Q. Rev.* 329 (1993); Anthony Fisher, "On Not Starving the Unconscious," *New Blackfriars* 74 (March 1993): 130.

90. *Bouvia*, 179 Cal. App. 3d at 1144.

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91. Id.
92. 521 U. S. at 801.
93. See Myers, supra note 46, at 359-61.
94. *Brophy*, 398 Mass. at 442 (Nolan, J., dissenting).
95. William E. May, *Catholic Bioethics and the Gift of Human Life* 268 (Huntington IN: Our Sunday Visitor, 2000), p. 268.
96. Myers, supra note 46, at 359-61.
97. 497 U. S. at 297 (Scalia, J., concurring).
98. *Catechism of the Catholic Church* § 2277 (2d ed. 1997).
99. Pope John Paul II, “Address to the Participants in the International Congress on Life-Sustaining Treatments and the Vegetative State: Scientific Advances and Ethical Dilemmas” (Mar. 20, 2004), available at *National Catholic Bioethics Quarterly* 4 (2004): 573, 575. [hereinafter Pope’s Address].
100. For information about the Oregon law, see <http://oregon.gov/DHS/ph/pas/index.shtml>.
101. See the report (Seven Years of Assisted Suicide in Oregon) available at <http://www.internationaltaskforce.org/orrpt7.htm>.
102. *Brophy*, 398 Mass. at 452 (O’Connor, J., dissenting).
103. *Browning*, 568 So. 2d at 17-18 (Overton, J., concurring in part and dissenting in part).
104. See Wesley J. Smith, “The Rule of Terri’s Case Strikes Again,” *Weekly Standard* (Jan. 30, 2004), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/669hvjvj.asp>.
105. H.B. 701, available at <<http://www.miami.ed/ethics2/schiavo/Fla%20h0701%20Engrossed.pdf>>.
106. See <http://www.miami.edu/ethics2/schiavo/timeline.htm> (entries for March 17 and March 23, 2005).
107. A model bill proposed by the National Right to Life Committee (NRLC) is available on that organization’s website. <http://www.nrlc.org/euthanasia/ModelBillAnnouncement.html>. The NRLC website makes it clear that this proposal is an effort to work within the confines of existing law.

108. See Wesley J. Smith, "Dehydration Nation," *Human Life Review* (Fall 2003), at 79: "The remarkable public outpouring in support of Terri Schiavo's life proves that at least among the general public, the sanctity-of-life ethic retains much of its vitality."

109. See *supra* note 76.

110. See Myers, *supra* note 46, at 361.

111. Pope's Address, *supra* note 99 at p. 574. For a good discussion of Pope John Paul II's statement, see Peter J. Cataldo, "Pope John Paul II on Nutrition and Hydration: A Change in Catholic Teaching?" in *National Catholic Bioethics Quarterly* 4 (2004): 513.

112. See Marker, *supra* note 6. See also Germain Kopaczynski, "Initial Reactions to the Pope's March 20, 2004 Allocution," *National Catholic Bioethics Quarterly* 4 (2004): 473, 478-80; Patrick J. Reilly, "Teaching Euthanasia," *Crisis* (June 2005): 29-35; Thomas A. Szyszkiewicz, "Hard to Understand?" *Catholic World Report* (June 2004): 50-55. Father Kevin O'Rourke, O.P. was one of the prominent critics of Pope John Paul II's statement. For a sound critique of Father O'Rourke's position, see Mark S. Latkovic's paper in the 2005 UFL volume. Mark S. Latkovic, "Kevin O'Rourke, O.P. on the Morality of Tube Feeding PVS Patients: A Critique," forthcoming in *Life and Learning XV: The Proceedings of the Fifteenth University Faculty for Life Conference (2005)*, ed. J. Koterski (Washington, D.C.: UFL, 2005).

113. Myers, *supra* note 46, at 361.

114. Richard S. Myers, "United States Law and Conscientious Objection in Healthcare" in *Cooperation, Complicity, and Conscience: Moral Problems in Healthcare, Science, Law, and Public Policy*, ed. Helen Watt (forthcoming).