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INTRODUCTION

INTRODUCTION AND COMMENTARY: REFLECTIONS ON AND IMPLICATIONS OF *SCHIAVO**

Rebecca C. Morgan**

Michael P. Allen***

Theresa Marie Schiavo died on March 31, 2005, at about 9:00 a.m.¹ It is unlikely that she ever could have imagined the truly bizarre events surrounding her passing from this world. Indeed, when we first conceived of a conference and symposium concerning the *Schiavo* case, we certainly did not have any conception of the twists and turns the matter would ultimately take. In the years leading up to her death, Terri Schiavo's situation was discussed and debated at *every level of the federal and Florida State*

* © 2005, Rebecca C. Morgan and Michael P. Allen. All rights reserved. Professors Morgan and Allen wish to thank Stetson University College of Law's Dean Darby Dickerson for her support of the Conference and Symposium concerning Terri's Law. We also thank the staff of the Stetson Continuing Legal Education office and the *Stetson Law Review* for their essential contributions to the Symposium. Finally, we extend our gratitude to all of the participants in the Conference and Symposium for making that day—and this Issue—so special.

** Professor of Law and Boston Asset Management Faculty Chair in Elder Law at Stetson University College of Law. B.S.B.A., Central Missouri State University, 1975; J.D., Stetson University College of Law, 1980.

*** Associate Professor of Law, Stetson University College of Law. B.A., University of Rochester, 1989; J.D., Columbia University School of Law, 1992.

1. See Manuel Roig-Franzia, *Long Legal Battle over as Schiavo Dies*, Wash. Post A1 (Apr. 1, 2005) (reporting the time of death as 9:05 a.m.).

*governments.*² The legal and political saga surrounding Terri Schiavo's death was simply extraordinary and beyond prediction.³

One wonders where to begin cataloging the issues raised by the fight about Terri Schiavo's life. A major contender for the most serious consequence of this case is the role of politics in law. We were all witnesses to stunning events over the past several years in which state and national politicians attempted to overturn valid, final court orders meant to effectuate Terri Schiavo's constitutional and statutory rights.⁴ This type of rank political interference with individual rights was, quite frankly, frightening to us as teachers of the law.⁵ While we hope that the negative

2. At the federal level, the withholding of nutrition and hydration from Terri Schiavo led to the passage of "An Act for the Relief of the Parents of Theresa Marie Schiavo," which was signed into law by President George W. Bush. Pub. L. No. 109-3, 119 Stat. 15 (2005). Under the authority of the Act, federal courts at all levels of the judiciary considered the matter. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1261 (11th Cir. 2005), *reh'g. en banc denied*, 403 F.3d 1261, *stay denied*, 125 S. Ct. 1692 (2005) (tracing *Schiavo's* path through the federal courts).

There is a similar pattern at the Florida State level. Of course, the Florida courts have dealt with matters concerning Terri Schiavo on numerous occasions. *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004); *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. 2d Dist. App. 2003); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. 2d Dist. App. 2001); *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. 2d Dist. App. 2001). The Legislature and Governor were involved as well by, among other things, enacting "Terri's Law." 2003 Fla. Laws ch. 418.

3. In addition to the articles in this Symposium Issue, there are a number of other treatments of the facts surrounding various aspects of the *Schiavo* case. See e.g. O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 Fla. L. Rev. 53, 55-69 (2005) (discussing the facts of *Schiavo* as a starting point to examine the separation-of-powers question regarding Terri's Law); Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 Am. U. L. Rev. 971, 976-978, 1009-1012 (2004) (using the facts of the *Schiavo* controversy to illustrate the relative insecurity of the individual's right to refuse medical treatment); Michael P. Allen, *Life, Death and Advocacy: Rules of Procedure in the Contested End-of-Life Case*, 34 Stetson L. Rev. 55, 66-80 (2004) (utilizing the saga of Terri Schiavo as a case study to illustrate the importance of procedure in the contested end-of-life case).

4. One such situation concerned Terri's Law, the subject of this Symposium, which we discuss in more detail below. The other event was Congressional action leading to Public Law No. 109-3, 119 Stat. 15. See *supra* n. 2 (looking at the laws and the judicial activity that followed enactment of Terri's Law).

5. Other commentators have also voiced their concern over the role of politics in end-of-life decisionmaking. See e.g. George J. Annas, "Culture of Life" Politics at the Bedside—*The Case of Terri Schiavo*, 352 New Eng. J. Med. 1710 (Apr. 21, 2005) (discussing the role of politics in the *Schiavo* case); Barbara A. Noah, *Politicizing the End of Life: Lessons from the Schiavo Controversy*, 59 U. Miami L. Rev. 107 (2004) (stating that the right to refuse medical treatment should not be "held hostage to the vicissitudes of political or moral change"). And it is worth remembering that the *Schiavo* saga was not the only end-of-life

public response to these actions will prevent their recurrence, only time will ultimately tell how secure our liberties remain.⁶

Yet another issue about which much could—and undoubtedly will—be written is the appropriate role of religion at the end of life. Many of those speaking out in favor of Terri Schiavo's parents and their quest to reinsert their daughter's feeding tube did so as a result (at least in part) of religious beliefs.⁷ How should the legal system deal with religion in the context of life-and-death decisions?⁸ Should it banish religion from the stage, assuming such a thing were possible? Should it allow the law to be dictated by religion, something that seems antithetical to our constitutional form of government? Neither extreme is tenable, but find-

case to have been touched by raw politics. See e.g. *Blouin v. Spitzer*, 356 F.3d 348, 353 (2d Cir. 2004) (state attorney general interceding to force continued treatment for terminally ill incompetent adult); *In re Guardianship of Barry*, 445 So. 2d 365, 368 (Fla. 2d Dist. App. 1984) (state attorney general contesting parents' decision to terminate life-sustaining measures for their critically ill child); *In re Rosebush*, 491 N.W.2d 633, 635 (Mich. App. 1992) (local prosecutors sought to block removal of life-sustaining measures from minor child); *In re Quinlan*, 355 A.2d 647, 650–651 (N.J. 1976) (state attorney general contesting parents' request to remove life-sustaining measures from incapacitated adult child); *Gilmore v. Finn*, 527 S.E.2d 426, 428, 430–432 (Va. 2000) (Virginia Governor seeking to prevent the removal of life-sustaining measures from adult). The difference in the *Schiavo* case seems to have been the sheer magnitude of the political pressure combined with a coordinated effort by groups on certain parts of the political spectrum.

6. National polls were overwhelmingly against either state or federal intervention in the *Schiavo* case. A website maintained by George Washington University contains a number of polls on this issue conducted by a variety of organizations. See *Terri Schiavo*, <http://pollingreport.com/news.htm> (accessed May 19, 2005) (showing that in one poll, seventy-four percent of the respondents thought the United States Congress "should have stayed out" of the Schiavo dispute).

7. See e.g. Rummana Hussain, *Rev. Jackson Joins Schiavo Fight: "We Cannot Be That Callous about Human Life,"* Chi. Sun-Times 6 (Mar. 30, 2005) (discussing involvement of the Reverend Jessie Jackson); Matt McKinney, *The Schiavo Case: Religious Order Stands by Parents; St. Paul Franciscans Help Schiavo Parents*, Star Trib. (Minneapolis) A1 (Mar. 24, 2005) (discussing Catholic religious group's support of the Schindler family); *Religious Overtones in Schiavo?* Conn. Post (Mar. 27, 2005) (discussing various religious aspects of the case); Jamie Thompson, *Juggler Says: "God Told Me to Come,"* St. Petersburg Times A14 (Mar. 31, 2005) (discussing motivations of some of the protestors at Terri Schiavo's hospice); *Terri Schiavo—The Roe v. Wade of Euthanasia, Says Operation Save America*, <http://usnewswire.com/> (Mar. 31, 2005) (discussing use of *Schiavo* case by certain Christian groups).

8. Numerous courts have considered the religious beliefs of patients when considering whether to authorize the removal of life-sustaining treatment. See e.g. Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decisionmaking* 2–33 (3d ed., Aspen L. & Bus. 2004 & Supp. 2005) (discussing the role of religion in various end-of-life cases).

ing the proper balance is difficult; Terri Schiavo's situation provides much fodder for this debate.

And the list could go on. To name but a few: What is the ethical role of the media in what became by all accounts the ultimate media circus? What is the scope of federal power under our Constitution to affect personal issues at the end of life? What, if anything, does Terri Schiavo's situation tell us about developments at the beginning of life? And what should be the attitude of society at large with respect to those vulnerable populations that could be harmed by a more laissez-faire attitude about death and dying?

No single volume could do justice to the myriad of issues presented by *Schiavo*. Our modest hope was to put together a conference and this Symposium Issue of the *Stetson Law Review* to address issues concerning a single, critical event in the life of the *Schiavo* case: the events surrounding the Florida Legislature's passage of Terri's Law in October 2003. As the entire country learned, Terri's Law came about after Terri Schiavo's feeding tube was removed by court order on October 15, 2003.⁹ After intense political pressure, the Florida Legislature passed Terri's Law, which provided in relevant part as follows:

Section 1.

- (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.

9. William R. Levesque, *Judge Sets Day for Feeding Tube Removal*, St. Petersburg Times B1 (Sept. 18, 2003).

- (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 the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.
- (3) Upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.¹⁰

As provided by the law, Governor Bush immediately "stayed" the court's order directing the withdrawal of nutrition and hydration.¹¹ Terri Schiavo's feeding tube was then reinserted.¹² The Florida Supreme Court ultimately struck this statute down as a violation of the separation of powers principles embodied in the Florida Constitution, but not until nearly a year had passed since the Governor had acted to reinsert the feeding tube.¹³

Our vision was to explore the issues surrounding Terri's Law from a number of perspectives. That diversity is reflected in the Symposium contributions. First, we were thrilled to have several of the participants in the actual events surrounding Terri's Law agree to speak at the Conference. All of these participants have contributed material for this Symposium discussing their roles in the legal battles surrounding Terri Schiavo as well as the potential longer-term implication of the case. Specifically, we have articles from George Felos, counsel for Michael Schiavo, Terri's husband;¹⁴ David Gibbs, counsel for Terri's parents, Bob and Mary Schindler;¹⁵ Ken Connor, counsel to Governor Bush in the litigation dealing with Terri's Law;¹⁶ and Jay Wolfson, the guardian ad

10. 2003 Fla. Laws ch. 418.

11. See Fla. Exec. Or. 03-201 (Oct. 21, 2003) (on file with the *Stetson Law Review*).

12. William R. Levesque et al., *Gov. Bush's Order Puts Schiavo Back on Fluids*, St. Petersburg Times A1 (Oct. 22, 2003).

13. *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004).

14. George Felos, *Felos on Schiavo*, 35 *Stetson L. Rev.* 9 (2005).

15. David C. Gibbs III, *Gibbs on Schiavo*, 35 *Stetson L. Rev.* 17 (2005).

16. Kenneth Connor, *Connor on Schiavo*, 35 *Stetson L. Rev.* 31 (2005).

litem appointed under Terri's Law.¹⁷ These contributions provide a unique and fascinating insight into an epic end-of-life case from those actually involved.

We also solicited contributions from members of the academic community and practicing bar about some of the broader issues implicated by the fight over Terri's Law. Our call for comments in this regard generated a range of responses. First, some papers deal with the Florida Supreme Court opinion on its merits. In this respect, our colleague Professor Tom Marks provides us with his version of a dissenting opinion in *Bush v. Schiavo* in which he lays out a series of grounds upon which the Florida Supreme Court *could* have upheld Terri's Law.¹⁸ Similarly, Professor Michael Allen discusses the *Bush v. Schiavo* decision in the context of democratic theory, suggesting not only that the decision was correct as a matter of law, but also imperative for our system of government.¹⁹

We were also honored to have some of the leading voices in end-of-life and bioethical matters discuss the potential implications of *Schiavo*. First, Professor William Allen provides a broad review of the rhetoric present in the *Schiavo* case concerning "erring on the side of life." He ultimately suggests that even though the substantive issue in the *Schiavo* case was unremarkable, the rhetoric of the case may be quite dangerous to the preservation of end-of-life rights.²⁰ Professor George Annas's contribution focuses on the harm to medicine as well as law as a result of the political manipulations both in Florida and Washington, D.C.²¹ In reality, his piece serves as a broad indictment of politics in bioethics generally. Third, Professor Norman Cantor writes about what he sees as the "false dichotomy" between talk of the sanctity of life and quality of life.²² He discusses what *Schiavo* might add to the de-

17. Jay Wolfson, *The Rule in Terri's Case: An Essay on the Public Death of Theresa Marie Schiavo*, 35 Stetson L. Rev. 39 (2005).

18. Thomas C. Marks, Jr., *A Dissenting Opinion*, *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), 35 Stetson L. Rev. 195 (2005).

19. Michael P. Allen, *Terri's Law and Democracy*, 35 Stetson L. Rev. 179 (2005).

20. William Allen, *Erring Too Far on the Side of Life: Déjà Vu All Over Again in the Schiavo Saga*, 35 Stetson L. Rev. 123 (2005).

21. George J. Annas, *"I Want to Live": Medicine Betrayed by Ideology in the Political Debate over Terri Schiavo*, 35 Stetson L. Rev. 49 (2005).

22. Norman L. Cantor, *Déjà Vu All Over Again: The False Dichotomy between Sanctity of Life and Quality of Life*, 35 Stetson L. Rev. 81 (2005).

bate that has raged over the past thirty years as to how best to preserve *both* the sanctity and quality of one's life. Professor John Robertson focuses his comments on two issues: first, what does *Schiavo* teach us concerning the substantive standards in place for proxy decisionmaking, and second, what dangers exist if that process becomes politicized, as it most certainly did with respect to Terri Schiavo?²³ And last, but certainly not least, Professor Kathy Cerminara canvases a wide range of potential legislative actions that could be prompted by the multifaceted Schiavo saga.²⁴

* * *

Anyone who followed the *Schiavo* case knows that predictions are fraught with peril. Yet, despite this caveat, we are confident that the *Schiavo* case will be talked about for years to come. Law, medicine, politics, and religion are just a few of the areas in which the case will resonate—how, we do not yet know. What we do know is that it is our sincere hope that this Symposium will add a measure of information and clarity to the discussions that will come to pass.

23. John A. Robertson, *Schiavo and Its (In)Significance*, 35 Stetson L. Rev. 101 (2005).

24. Kathy L. Cerminara, *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the Schiavo Cases*, 35 Stetson L. Rev. 147 (2005).