

LEARNING NEUROSCIENCE THE HARD WAY: THE TERRI SCHIAVO CASE AND THE ETHICS OF EFFECTIVE REPRESENTATION

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*"It has been said innumerable times, and I have also repeated it, that 'facts remain and theories pass away . . . To observe without thinking is as dangerous as to think without observing.'"*¹

"These results confirm that, despite fulfilling the clinical criteria for a diagnosis of vegetative state, this patient retained the ability to understand spoken commands and to respond to

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¹ Alvaro Fernandez, Comment, *Santiago Ramon y Cajal: Recollections of My Life*, SHARP BRAINS, Aug. 31, 2008, <http://www.sharpbrains.com/blog/2008/08/31/santiago-ramon-y-cajal-recollections-of-my-life/> (quoting SANTIAGO RAMON Y CAJAL, *RECOLLECTIONS OF MY LIFE* 638 (E. Horne Craigie & Juan Cano trans., First MIT Press 3d ed. 1996)).

them through her brain activity, rather than through speech or movement."²

*In re Guardianship of Schiavo*³ is one of the most notable, complex, and cautionary controversies in American legal and political history. It began in the early 1990s when Terri Schiavo suffered a massive brain injury after a cardio-respiratory failure of indeterminate origin. It ended when she died from marked dehydration⁴ after a Florida court ordered her guardian to remove her feeding tubes and to withhold all further nutrition and hydration. The political power struggle it ignited between the Florida and federal courts and the elected branches of the Florida and federal governments held the nation and the world transfixed for weeks.

The recent case of Eluana Englaro, described by one commentator as "[t]he Complicated Case of [the] 'Italian Terri Schiavo,'"⁵ has had an equally unsettling effect on the Italian people and their government. Eluana's case began when she suffered a traumatic brain injury (TBI) in a 1992 automobile accident. It ended in March 2009, when an Italian court

² Adrian M. Owen et al., *Detecting Awareness in the Vegetative State*, 313 SCI. 1402 (Sept. 8, 2006).

³ *In Re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001), *aff'd without opinion*, 789 So. 2d 348 (Fla. 2001).

⁴ JON R. THOGMARTIN, M.D. ET AL., REPORT OF AUTOPSY: THERESA SCHIAVO, CASE NO. 5050439 (June 13, 2005), at 8, Question 7 ("By what mechanism did Theresa Schiavo die?"). Because the Medical Examiner could not determine the cause of the "severe anoxic brain injury . . . with reasonable medical certainty[, the] manner of death will therefore be certified as undetermined." *Id.* at 9, Question 8 ("What was the cause and manner of death?").

⁵ See, e.g., Peter Parisius, *The Complicated Case of "Italian Terri Schiavo,"* THE ITALY DISPATCH, Dec. 25, 2008, available at <http://italydispatch.splinder.com/post/19415896/The+complicated+case+of+%22Itali>. See also Gina Doggett, *Uproar in Italy Over Mercy Killing*, SUNDAY TELEGRAPH (Sydney, Australia), Feb. 8, 2009, available at 2009 WLNR 2450460; News International Ltd., *Coma Woman Dies 'According to Her Wish' Before Parliament Can Restore Life Support*, THE TIMES (U.K.), Feb. 10, 2009, available at 2009 WLNR 2595132. Cf. Benedetta Argentieri, *Eluana, più di diecimila in corteo Appello dalla Cattolica: ora rispetto* [Eluana: More than 10,000 March from the Catholic University of Milan], CORRIERE DELLA SERA (Milan, Italy), Feb. 8, 2009, at 9, available at 2009 WLNR 2471340 (reporting that Italian Undersecretary of Health, Eugenia Roccella, sought to assure the crowd that "The Englaro case is not this country's Terri Schiavo case.").

authorized her father to withhold nutrition and hydration. Based on the press accounts of the case to date, it is safe to assume that her case will shape the thinking of Italians on these issues for many years to come.

At last count, over 17,000 English-language articles discuss the legal, medical, political, medical ethics, and cultural dimensions of the *Schiavo* case.⁶ Only a few discuss the bewildering complexity of its facts, or seek to place them in the scientific, medical, or cultural context of the 1990s in which the *Schiavo* and *Englaro* cases arose. *None* of them discuss the ethical obligations of the lawyers and judges whose professional obligations serve as the protections-of-last-resort for the interests and human dignity of persons whose cognitive abilities have been impaired or destroyed by disease, stroke, or a traumatic brain injury (TBI).⁷

This article seeks to fill that void by looking at some of the lessons that can be learned from a critical examination of the *Schiavo* case through the lens of legal ethics. This is a subject on which I can claim some unique knowledge. In *Schiavo v. Bush*,⁸ I argued the case for the constitutionality of the executive review process established by the Florida legislature after Judge

⁶ A full-text search on the phrase "Terri Schiavo" in Academic Search Premier produced 17,738 English language references. Of this number, 9,043 appeared in academic journals, including some law reviews. A Westlaw search on the same phrase returned 525 references in law reviews and legal periodicals, and a LEXIS search of law reviews, legal periodicals, and CLE materials produced 369. This is understandable. The case fits comfortably within the intersecting boundaries of civil and criminal procedure; the law of homicide; family, guardianship, and disability law; the art and science of medicine; neuroscience; professional ethics; constitutional law; politics; and morals.

⁷ A full-text search on the phrase "Terri Schiavo" & "Rule 1.14" produced five references in LEXIS and eight in Westlaw. Most of these dealt with issues of disability and incompetence in the context of estate planning. See, e.g., Michael D. Toobin, *Considerations in Planning for Incapacity*, NATIONAL BUSINESS INSTITUTE: ESTATE PLANNING BASICS (2008), available at 42293 NBI-CLE 99. The only article that came close to addressing this topic was that of Professor Pamela Champine. See Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 26 (2006) (comparing the problem facing courts that must decide whether a testator lacks mental capacity to the situation in which the "fallibility of medical expertise requires individuals to exercise judgment about when to trust their own instincts and when to rely on professional medical advice").

⁸ *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), cert. denied, 543 U.S. 1121 (2005).

Greer's September 17, 2003, order that Terri Schiavo's feeding tube be withdrawn.⁹ "Terri's Law"¹⁰ authorized Governor Jeb Bush to issue a stay of execution of the probate court's order, and to seek the appointment of a court-appointed guardian *ad litem* who would to review the record in the proceedings before Judge Greer and report back to the Governor and the court.¹¹ That stay was embodied in an October 2003 Executive Order to sustain Terri Schiavo's life during the pendency of the review process.¹² I later served as co-counsel on the legal team representing the Schindler family, and wrote the initial justification for a proposed amendment to the federal habeas corpus statute¹³ that would have given Terri access to the great writ. Public Law 109-3 emerged from that process.¹⁴

⁹ See *infra text* accompanying note 131.

¹⁰ 2003 Fla. Laws 418, available at http://laws.flrules.org/files/Ch_2003-418.pdf.

¹¹ The Florida Supreme Court heard oral arguments in *Bush v. Schiavo* on August 31, 2004. The transcript of the oral argument is available at <http://www.wfsu.org/gavel2gavel/transcript/04-925.htm>. The video is available at <http://www.wfsu.org/gavel2gavel/archives/04-08.html>. My co-counsel in the case, Kenneth J. Connor, Esq., argued the proposition that neither the passage of Terri's Law, nor the Governor's assertion of protective custody, violated the terms of Judge Greer's September 17, 2003, order.

¹² Fla. Exec. Order No. 03-201 (Oct. 21, 2003), available at <http://news.findlaw.com/hdocs/docs/schiavo/flagovexord03201.html>. Given the interests at stake, the only way to accomplish that end was to insert a new nutrition and hydration tube.

¹³ 28 U.S.C. § 2254(a) (2007). The goal of that amendment would have been to make it clear that persons in Terri's situation were persons "in custody." See, e.g., Memorandum of March 6, 2005 from Robert A. Destro to Brian Darling, "Proposed Habeas Amendments regarding Terri Schiavo case" at 1 ¶3 (on file with author) ("In sum, if Terri Schiavo's case is not appropriate for habeas corpus, it is hard to figure out what cases might be. Ted Bundy got better process than she did.").

¹⁴ Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). The legislative saga is just as interesting as the history of the intra-family dispute that sparked this litigation, the history of the litigation itself, and the history of the tantalizing, but ultimately unsuccessful, last-ditch efforts to have Terri Schiavo's consciousness disorder evaluated by two of the world's leading experts in the field. Space limitations and relevancy concerns make it impossible to recount that story here, but it is a story worth telling, especially the part that deals with the extensive negotiations held between the House of Representatives and the Senate that led to the framing of Public Law Number 109-3 as a special bill for the relief of Terri Schiavo's family rather than a one-line amendment to the habeas corpus statute. Pub L. No. 109-3.

Based on those experiences and continuing concerns about the welfare and effective representation of those suffering disease or trauma-induced brain injury, I will argue here that the criminal justice process provides an excellent reference point by which to judge the adequacy of the *civil* justice process in cases where severely incapacitated persons are alleged to be in need of medical or rehabilitation services. Had Theresa Marie Schindler Schiavo (commonly known as “Terri”) been a criminal facing either the death penalty or a term of incarceration in any state or federal court in the United States, the ethical and legal norms built into the process by which criminal charges are proved, defended, and appealed would have required the federal appellate courts to order the State of Florida to conduct a new trial in strict conformity to the civil guardianship and medical neglect process mandated by Florida and federal law.

Part I looks at the three main “narratives” that are commonly employed to describe the *Schiavo* case, and it recounts the basic facts concerning Terri Schiavo’s brain injury and the early, but quickly-abandoned, attempt at rehabilitation. Part II is an examination of how the demise of one of the most profoundly harmful dogmas in the history of medicine—the theory that the brain is “hard-wired” and that no amount of rehabilitation can cause the brain to rewire itself—occurred too late in the litigation for the judges or advocates in either *Schiavo* or *Englaro* to understand that Terri and Eluana *might* actually have been able to communicate “cognitively” rather than physically. That too is a cautionary tale about the ways in which “iconoclastic researchers” were able to use state-of-the-art diagnostic imaging and aggressive, but (then) unorthodox, rehabilitation techniques to demonstrate that conventional wisdom in neurology in the 1990s was simply wrong. Part III develops a model of ethical and effective representation and judging brain injury cases, and Parts IV through VII draw lessons from that model based on the facts of the *Schiavo* case.

I. WHAT HAPPENED TO TERRI SCHIAVO? A TALE OF FOUR NARRATIVES

Exploring the legal and ethical reasons why the civil justice

system failed so badly in the *Schiavo* case is not easy. At the beginning of this article, I described the *Schiavo* case as “notable, complex, and cautionary.” Most commentators agree, but their understanding of the facts leads them to utilize three very different narratives in their telling of the story.¹⁵ In this section, I will discuss each of these narratives in detail, but will begin with a common point of reference: the facts that appear in the trial and appellate records of the *Schiavo* case. For present purposes, this is the fourth, or “Transcript Narrative.” The other three are the “Death with Dignity” narrative, the “Killing Terri Schiavo” narrative, and the “Judicial Independence” narrative.

A. The “Transcript” Narrative

1. The Medical Case and Initial Court Proceedings

The medical facts of the *Schiavo* case are fairly straightforward. Sometime before 5:00 a.m. on February 25, 1990, Theresa Marie (“Terri”) Schindler Schiavo, then twenty-six years old, suffered cardio-respiratory arrest.¹⁶ According to

¹⁵ The importance of characterization cannot be understated. One goal of this article is to explain why the *Schiavo* case is an excellent example of the dangers that arise for both law and medicine when policy disputes are resolved through a process of “characterization,” rather than a careful analysis of the facts and an equally careful balancing of the relevant interests involved. Kathleen Sullivan describes the difference between the two approaches as follows:

Categorization and balancing each employ quite different rhetoric. Categorization is the taxonomist’s style—a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government’s justification for the infringement. Balancing is more like grocer’s work (or Justice’s)—the judge’s job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors. These two styles have competed endlessly in contemporary constitutional law; neither has ever entirely eclipsed the other.

Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293-94 (1992).

¹⁶ JON R. THOGMARTIN, M.D. et al., REPORT OF AUTOPSY: THERESA SCHIAVO, CASE NO. 5050439 at 2 (June 13, 2005), available at

court and medical examiner documents, her husband, Michael Schiavo, found her lying face-down on the floor at 5:00 a.m. He placed a call to Terri's father, Robert Schindler, at around 5:40 a.m. Mr. Schindler told him to hang up and call for emergency medical assistance. According to logs kept by the St. Petersburg, Florida, police, the emergency call was received at 5:40 a.m. Emergency medical services personnel arrived approximately twelve minutes later (at 5:52 a.m.) and began resuscitation immediately. According to the Report of the Pinellas County Medical Examiner: "[a]lthough a pulse was documented at 06:32hrs, a measurable systolic blood pressure was not recorded until 0646hrs[,] almost one hour after resuscitation began."¹⁷ The result was a massive brain injury.¹⁸ Intensive rehabilitation efforts and the first set of legal proceedings—medical malpractice cases against her primary care physician and the gynecologist who had been treating her for infertility—began shortly thereafter.

2. The Guardianship Case

At the root of the legal case was an intra-familial dispute over the nature, quality, and extent of the rehabilitation and medical care provided to Terri Schiavo after she was released from the hospital. Because Terri had left no advance directive of any kind, her husband, Michael Schiavo, became her legal guardian by operation of Florida law.¹⁹ Her parents, Robert and Mary Schindler, believed Mr. Schiavo to be unfit to serve as guardian, and mounted several unsuccessful attempts to have the court remove him so that they could assert their right as parents under Florida law to undertake the guardianship role themselves.

www.sptimes.com/2005/06/15/schiavoreport.pdf, at 29.

¹⁷ The post-mortem examination of Mrs. Schiavo showed "marked, global anoxic, ischemic encephalopathy resulting in massive cerebral atrophy," but was unable to draw any conclusions concerning the condition and function of her brain at any point during her life post-trauma. *See id.* at 9; www.sptimes.com/2005/06/15/schiavoreport.pdf, at 35 (Questions 5-7).

¹⁸ *Id.* at 8.

¹⁹ FLA. STAT. §§ 765.401, 744.312 (2007).

Review of the extensive, verbatim trial record developed over more than fifteen years discloses that there were significant, and unresolved, disputes between Terri's husband and her parents over brain function, including visual and auditory abilities, and the physical response of her brain to various forms of stimulation.²⁰ These disputes led to an ongoing battle over the value of rehabilitation, basic medical care, and routine forms of physical and mental stimulation such as listening to music and trips outdoors.²¹ They eventually led to complaints by Terri's parents that Michael had abandoned her, first by refusing to continue rehabilitation, and later, through his relationship with other women, including one with whom he had two children.²²

Money also played a role in this dispute. The medical malpractice case against the gynecologist resulted in a 1993

²⁰ See generally Transcript of Record at Vol. IV, *In re* Guardianship of Schiavo, No. 90-2908-GD-003 (Fla. Cir. Ct. Oct. 15-17, 20, 22, 2002).

²¹ See *infra* text accompanying note 29.

²² Second Amended Petition to Remove Guardian at 3-8, *In re* Guardianship of Schiavo, No. 90-2908-GD-003 (Fla. Cir. Ct. Jan. 10, 2005). Ironically, the Schindler family might have been more successful in their attempts to remove Michael Schiavo as guardian had they petitioned the guardianship court for a divorce. In 1994, the Fifth District Court of Appeals held that Florida's no-fault divorce law allows for dissolution proceedings to be filed against the competent spouse on behalf of the ward. *Vaughan v. Guardianship of Vaughan*, 648 So. 2d 193 (Fla. Dist. Ct. App. 1994). Although the majority view is that a guardian or conservator needs express statutory authority to commence a dissolution action on behalf of the ward, see *Murray v. Murray*, 426 S.E.2d 781 (S.C. 1993); *In re Marriage of Drews*, 503 N.E.2d 339 (Ill. 1986), *cert. denied*, *Drews v. Drews*, 483 U.S. 1001 (1987), courts in other states began to accept the proposition that the best interests of the ward may sometimes require the initiation of divorce proceedings. See, e.g., *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674, 683-84 (Ariz. Ct. App. 1993) (holding that a guardian may bring a dissolution action on behalf of the incapacitated ward pursuant to his general powers to act on the ward's behalf); *Smith v. Smith*, 335 N.W.2d 657 (Mich. Ct. App. 1983) (holding that guardian of incompetent person can file divorce action against competent spouse); *Nelson v. Nelson*, 878 P.2d 335, 341 (N.M. Ct. App. 1994) ("[A] guardian of an adult incompetent ward may initiate divorce proceedings on behalf of the ward."); *Broach v. Broach*, 895 N.E.2d 640 (Ohio Ct. App. 2008); *Kronberg v. Kronberg*, 623 A.2d 806, 810 (N.J. Super. Ct. Ch. Div. 1993) (holding a guardian *ad litem* has the authority to obtain a divorce on behalf of an incompetent person); *Stubbs v. Ortega*, 977 S.W.2d 718, 724 (Tex. Ct. App. 1998) ("Texas public policy does not prohibit authorizing a guardian to petition for divorce on behalf of her mentally incapacitated ward.").

award of \$750,000 in economic damages²³ to Terri Schiavo, and \$300,000 in damages for loss of consortium and non-economic damages to Michael,²⁴ who had testified in 1992 that his incapacitated wife was expected to live out her normal life span and that he would provide for her health care.²⁵ By early 1994, however, his position had changed. When Terri developed a urinary tract infection, he elected not to treat it and requested a “Do Not Resuscitate” order in the event she suffered another cardiac arrest.²⁶ When the nursing facility resisted the order, he cancelled it and transferred her to another facility.²⁷ In 2000, Michael transferred Terri (who was not terminally ill) to the hospice in which she spent the last five years of her life.²⁸ From that point forward, her parents alleged, he would not permit routine medical or dental care, or any form of physical stimulation, including physical therapy or rehabilitation, the

²³ Jay Wolfson, *Guardian Ad Litem for Theresa Marie Schiavo, A REPORT TO GOVERNOR JEB BUSH AND THE SIXTH JUDICIAL CIRCUIT IN THE MATTER OF THERESA MARIE SCHIAVO* 9 (Dec. 1, 2003), available at <http://abstractappeal.com/schiavo/WolfsonReport.pdf>.

²⁴ *Id.* at 9; see also *In re Guardianship of Schiavo*, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001) [hereinafter *Schiavo I*].

²⁵ Direct testimony of Michael Schiavo, Transcript of Record, Barnett Bank Trust Company as Guardian of the Property of Theresa Schiavo and Michael Schiavo, Individually v. G. Stephen Igel, M.D., No. 92-939-15 (November 5, 1992) at p. 26, line 25 through p. 28, line 4 [hereafter “Medical Malpractice Case”]. See also, Jurisdiction Brief of Petitioners, *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003) (No. SC03-1242), 2003 WL 22400860, at *1.

²⁶ Wolfson, *supra* note 23, at 10. Depending on its severity, an untreated urinary tract infection (UTI) can lead to acute renal failure. See U.S. National Library of Medicine & National Institutes of Health, *Kidney Infection*, MEDLINEPLUS MEDICAL ENCYCLOPEDIA, available at [http://www.nlm.nih.gov/medlineplus/ency/article/000522.htm#Expectations%20\(prognosis\)](http://www.nlm.nih.gov/medlineplus/ency/article/000522.htm#Expectations%20(prognosis)) (last accessed March 9, 2009); *id.* (“Acute Renal Failure – Prognosis.”) available at [http://www.nlm.nih.gov/medlineplus/ency/article/000501.htm#Expectations%20\(prognosis\)](http://www.nlm.nih.gov/medlineplus/ency/article/000501.htm#Expectations%20(prognosis)) (last accessed March 9, 2009).

²⁷ Wolfson, *supra* note 23, at 10.

²⁸ See Second Amended Petition to Remove Guardian at 15-16, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Jan. 10, 2005). Terri Schiavo did not have a “terminal condition.” Federal rules governing reimbursement for hospice care limit allowable reimbursement to periods for which the physician “must specify that the individual’s prognosis is for a life expectancy of 6 months or less if the terminal illness runs its normal course.” See 42 C.F.R. § 418.22(b)(1) (Certification of terminal illness); 42 C.F.R. § 418.21 (Duration of hospice care coverage—Election periods).

use of a wheelchair to take her outside, natural light from the window, or music in her room.²⁹ As we shall see in the next section, that lack of stimulation guaranteed a downward spiral in both the physical condition of her brain and a reduction in whatever amount of cognitive ability she had.³⁰

All of these factors led the Florida District Court of Appeal to recognize that “both Michael and the Schindlers [were] suspicious that the other party [was] assessing Theresa’s wishes based upon their own monetary self-interest,”³¹ but that it saw “no evidence in this record that either Michael or the Schindlers seek monetary gain from their actions. [They] simply cannot agree on what decision Theresa would make today if she were able to assess her own condition and make her own decision.”³² The district court did hold, however, that Michael could not be

²⁹ See Second Amended Petition to Remove Guardian at 17-21, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Jan. 10, 2005).

³⁰ It was known as early as 1994 that music has a discernable effect on the brain that can be measured by neuroimaging technologies such as positron emission tomography (PET scanning) and functional magnetic resonance imaging (fMRI). See K. Vlad Hachinski & Vladimir Hachinski, *Music and the Brain*, 151 CAN. MED. ASS’N J. 293, 295 (1994) (noting that “PET can now be used to ascertain areas of brain stimulation during auditory processing” and that “[p]atients subjected to musical stimuli displayed activity in the frontotemporal areas of the brain”). Accord Annirudh D. Patel, *Language, Music, Syntax, and the Brain*, 6 NATURE NEUROSCIENCE 674, 679 (July 2003) (proposing the “hypothesis that linguistic and musical syntax share certain syntactic processes (instantiated in overlapping frontal brain areas) that apply over different domain-specific syntactic representations in posterior brain regions”). The post-mortem examination of Terri Schiavo’s brain showed “relative preservation of the frontal and temporal lobes”—areas that could have been scanned in an attempt to ascertain some of her cognitive abilities. See Letter from Stephen J. Nelson, Chief Medical Examiner, 10th Judicial Circuit of Florida, to Jon R. Thogmartin, District 6 Medical Examiner 4 (June 8, 2005) (Neuropathology Report) in THOGMARTIN, *supra* note 4 at 15.

³¹ *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001). The court further explained as follows:

This lawsuit is affected by an earlier lawsuit. In the early 1990s, Michael Schiavo, as Theresa’s guardian, filed a medical malpractice lawsuit. That case resulted in a sizable award of money for Theresa. This fund remains sufficient to care for Theresa for many years. If she were to die today, her husband would inherit the money under the laws of intestacy. If Michael eventually divorced Theresa in order to have a more normal family life, the fund remaining at the end of Theresa’s life would presumably go to her parents.

Id.

³² *Id.*

permitted to make the decision to continue or refuse life-sustaining treatment by stating as follows:³³

Because Michael Schiavo and the Schindlers could not agree on the proper decision and the inheritance issue created the appearance of conflict, [the Court of Appeal permitted] Michael Schiavo, as the guardian of Theresa, to invoke[] the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.³⁴

As we shall see in the discussion below, it is my contention that this ruling was legally and ethically erroneous on several grounds,³⁵ and that it tainted the fact-finding process to the point where it became necessary to argue that Terri Schiavo was denied the rudiments of due process in the guardianship.

B. *The "Public Narratives"*

1. The "Death with Dignity" Narrative³⁶

The first of the "public narratives" is told from the perspective of Michael Schiavo, Terri Schiavo's husband. In Michael Schiavo's version of the story, Terri was "brain dead"³⁷ when the litigation began, and his efforts to seek an end to

³³ *Id.* In light of the finding that there was an appearance of conflict of interest, this holding was required by the conflict of interest provisions of Florida's guardianship statute. FLA. STAT. § 744.309(3) (2009).

³⁴ *In re* Guardianship of Schiavo, 780 So. 2d at 178.

³⁵ The Court of Appeal was correct in its view that Florida law does not automatically compel the appointment of a guardian *ad litem* when a surrogate decision-maker may ultimately inherit from the patient, because it recognized that "there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision." *Id.* Its mistake, discussed below in Part VI(D), was that Florida law expressly forbids the appointment of a guardian who has a potential conflict of interest.

³⁶ See, e.g., Leslie Pickering Francis, *(Mis)framing Schiavo as Discrimination Against Persons with Disabilities*, 61 U. MIAMI L. REV. 789 (2007).

³⁷ See, e.g., Richard Luscombe, *Bush Defied in Right-to-Die Case*, THE GUARDIAN (London, UK), Mar. 23, 2006, available at <http://www.guardian.co.uk/world/2005/mar/23/richardluscombe> ("The Schindlers say their daughter is responsive and could improve with treatment, but her husband, Michael Schiavo, claims she is brain dead . . .").

further nutrition and hydration was “not merely . . . [a fight] for what he thought was right, but also for what he claimed Terri wanted for herself.”³⁸

The medical testimony presented on Michael’s behalf supports the guardianship court’s finding that Terri Schiavo was in a persistent vegetative state³⁹ throughout the course of the guardianship. Three witnesses testified that Terri Schiavo had made four oral statements to the effect that she would not want to be kept alive by artificial means were she to become incapacitated. Her husband, Michael, testified that Terri had stated that she did not want to be a burden on her family or “live like that.”⁴⁰ Michael’s brother, Scott Schiavo, testified that Terri had told him that she did not “want to be kept alive on a machine,”⁴¹ and Michael’s sister-in-law, Joan Schiavo, testified

³⁸ Alan Meisel, *Suppose the Schindlers Had Won the Schiavo Case*, 61 U. MIAMI L. REV. 733, 733-34 (2007). The author went on to state as follows:

But Michael Schiavo claimed not merely to be fighting for what he thought was right, but also for what he claimed Terri wanted for herself. His position was that it was not a vindication of his interests that he sought, but hers. And he was fighting not only for Terri, but for a principle—that the wishes of patients who are unable (and never will be able) to speak for themselves be respected. This being the case, giving in to the Schindlers was not having his cake and eating it, too. It was not even a compromise. It was a sellout: a betrayal of Terri and a betrayal of a principle.

Id. at 734.

³⁹ See, e.g., Brad Smith, *Schiavo Videotapes Offer Powerful But Misleading Evidence*, TAMPA TRIBUNE, Mar. 20, 2005, at 12, available at <http://news.tbo.com/news/MGBQ67CTI6E.html> (“[Videotapes taken at the nursing home] more accurately show the Pinellas Park woman, argue some doctors and Michael Schiavo, who says his wife is brain-dead and should die in dignity after 15 years[,] in what doctors term a persistent vegetative state.”).

⁴⁰ *Money, Fear and Prejudice: Why the Courts Killed Terri Schiavo*, 30 WOMEN’S RTS. L. REP. 42, 84 (2008) (quoting Transcript of Trial at 31-31, 33, *In re* Guardianship of Schiavo, No. 90-2908GC-003 (Fla. Cir. Ct. Apr. 17, 2000)). Professor Patricia Norwood Harris provides the “alleged oral statements by Terri and their context . . . as follows”:

#1. If [she] “ever had to be a burden to anybody like [her uncle was to her grandmother], [she didn’t] want to live like that.” [Allegedly said to Michael Schiavo during a train ride.]

#2. Do not “keep [me] alive on anything artificial.” [Allegedly said to Michael Schiavo while watching a documentary.]

Id.

⁴¹ *Id.* (quoting Excerpts of Trial at 15, *In re* Guardianship of Schiavo, No. 90-2908GC-003 (Fla. Cir. Ct. Apr. 17, 2000)). Professor Harris provides the January 24,

that she and Terri had agreed, after watching a movie “about a guy who had an accident and he was in a comma [sic],” that “we would want it stated in our will we should want the tubes and everything taken out.”⁴² Based on this evidence, Judge Greer found that Terri Schiavo would have refused further artificial nutrition and hydration.

It is that finding that leads most commentators to accept the “right to die” narrative, and to assert that the *Schiavo* case is legally significant because the Florida and federal judiciaries stood firm for the preservation of the privacy and personal autonomy of persons who, like Terri, had entered a persistent vegetative state without leaving an advance directive.⁴³ That finding is also politically significant. In some versions of the “death with dignity narrative,” the debates in Congress and the Florida Legislature pitted civil libertarians against “vitalists” whose “fundamentally primitive belief[s]” lead them to conclude that “despite the absence of cognition of any sort, a beating heart in a permanently unconscious human needs to be protected the same way as a beating heart in a human who has cognition and sentience.”⁴⁴

2000, testimony of Scott Schiavo as follows: “#3. ‘If I ever go like that, just let me go. Don’t leave me there. I don’t want to be kept alive on a machine.’ [Allegedly said to Scott Schiavo at a funeral luncheon for Scott’s grandmother in February of 1986.]” *Id.*

⁴² *Id.* (quoting Excerpts of Trial at 40, *In re Guardianship of Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. Feb. 11, 2000)). Professor Harris provides the January 24, 2000, testimony of Joan Schiavo as follows:

#4. We had watched a movie one time on television. It was about somebody. I don’t remember. I don’t remember the movie. It was about a guy who had an accident and he was in a comma [sic]. There was no help for him. We had stated that if that ever happened to one of us, in our lifetime, we would not want to go through that. That we would want it stated in our will we should want the tubes and everything taken out.” [Allegedly said to Joan Schiavo, who could not remember the date.]

Id.

⁴³ *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005). See also Joshua E. Perry, *Biblical Bio-Politics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553 (2006).

⁴⁴ Kenneth Goodman, *Ethics Schmethics: The Schiavo Case and the Culture Wars*, 61 U. MIAMI L. REV. 863, 868 (2007).

2. The “Killing Terri Schiavo” Narrative⁴⁵

This version of the public narrative is told from the perspective of Robert and Mary Schindler, Terri Schiavo’s parents. Based on exactly the same trial record, the Schindlers characterized the case as one involving medical and judicial neglect.

The Schindler family disputed the all-important finding⁴⁶ that Terri Schiavo was in a “persistent vegetative state” in a variety of ways, including an appearance on *The Oprah Winfrey Show* to present a videotape that, in their view, showed that Terri was at least minimally aware of her surroundings.⁴⁷ They countered Michael’s evidence with testimony from Terri’s mother, Mary Schindler, and Diane Meyer, one of Terri’s childhood close friends, that the two of them had discussed with Terri the dispute about termination of life-sustaining measures that had arisen in the highly-publicized case of Karen Ann Quinlan.⁴⁸ Based on those conversations, Mrs. Schindler and Ms. Meyer testified that Terri would not, under the circumstances, elect to forego artificial nutrition and hydration.⁴⁹ The other Schindler family witness, Jackie Rhodes,

⁴⁵ Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMMENT. 585 (2006) (“But it reduces to this: The State of Florida, acting through its judiciary, ordered a severely disabled woman to be slowly dehydrated and starved to death, by removing her feeding tube.”).

⁴⁶ See FLA. STAT. § 765.305 (2007) (“procedure in the absence of a living will”).

⁴⁷ Dave Reynolds, *Schindlers Appeal Judge’s Efforts To Block Them From Schiavo Suit; Family Takes Case To Oprah Show*, INCLUSION DAILY EXPRESS, Nov. 17, 2003, available at <http://www.mnddc.org/news/inclusion-daily/2003/11/111703fladvschivo.htm> (noting that “Terri’s parents believe that she is alert and responsive and that she might improve with rehabilitative therapies that Mr. Schiavo has denied her for at least the past 10 years.”).

⁴⁸ *In re Quinlan*, 355 A.2d 647 (1976), cert denied 429 US 922 (1976).

⁴⁹ O. Carter Snead, *The (Surprising) Truth About Schiavo: A Defeat for the Cause of Autonomy*, 22 CONST. COMMENT. 383, 397-98, 398 n.43 (2005) (quoting Transcript of Record at 372-73, 762, *In re Guardianship of Schiavo* No. 90-2908GD-003 (Fla. Cir. Ct. January 2000)). Direct examinations of Mary Schindler and Diane Meyer, respectively, provided as follows:

Mary Schindler (Ms. Schiavo’s mother) and Diane Meyer (Ms. Schiavo’s childhood friend) testified that, based on conversations with Ms. Schiavo about the widely publicized Quinlan case (involving a dispute about termination of life-sustaining measures), they believed that Ms. Schiavo would not, under the

“testified that in the many times she and Ms. Schiavo had visited her grandmother in a nursing home, Ms. Schiavo never expressed to her that she would wish to decline artificial nutrition and hydration were she ever to fall into a profoundly dependent condition.”⁵⁰ They argued on appeal that the evidence presented by Michael Schiavo and his relatives concerning the choice Terri would have made, had she been capable of doing so, was not “clear and convincing.”⁵¹ They also questioned the integrity of the fact-finding process by seeking to have the judge recuse himself⁵² and by filing several motions to have Michael Schiavo removed as Terri’s guardian.⁵³

From the perspective of the Schindler family and their supporters, the “death with dignity” narrative ignored advances in both diagnostic imaging and rehabilitation medicine, and it served as a political cover from what they saw as his desire for Terri “to die so that he can marry another woman with whom he has fathered two children, and so he can benefit from what’s left of an insurance settlement that now pays for her treatment.”⁵⁴ When their efforts to protect their daughter failed in the courts, they sought redress of their grievances from the political branches. To the Schindlers, the order to withhold further nutrition and hydration made the case into the functional equivalent of a death penalty case in which procedural and substantive errors at the trial level render the verdict inherently unreliable.⁵⁵

circumstances, elect to decline artificial nutrition and hydration.

Id. at 397-98.

⁵⁰ *Id.* at 398.

⁵¹ For a complete analysis of the evidence presented by the five witnesses who testified at the trial, see Snead, *supra* note 49, at 392-404.

⁵² The Motion to Recuse Judge Greer was filed on April 10, 2001, and it was denied. See Kathy Cerminara & Kenneth Goodman, *Key Events in the Case of Theresa Marie Schiavo*, UNIVERSITY OF MIAMI ETHICS PROGRAMS: SCHIAVO CASE RESOURCES, available at <http://www6.miami.edu/ethics/schiavo/timeline.htm> (last accessed March 5, 2009).

Id. at August 10, 2001. There were several attempts to remove Michael Schiavo as guardian. See William R. Levesque, Carrie Johnson & Anita Kumar, *Without a Ruling, the Wait Continues*, ST. PETERSBURG TIMES, Mar. 22, 2005, at 1A, available at 2005 WLNR 23899652.

⁵⁴ See Reynolds, *supra* note 47.

⁵⁵ Statement of Interest of the United States, *Schiavo ex. rel. Schindler v. Schiavo*,

3. The “Judicial Independence” Narrative

The “judicial independence” narrative pits the fact-finding powers of the courts against the clemency powers of the executive branch. Its focus is on the separation of powers violations that are alleged to have occurred when the Florida Legislature authorized the Governor to stay execution of Judge Greer’s order to remove the feeding tube pending a review of the evidence by an independent guardian *ad litem*, and the federalism and civil rights violations that allegedly occurred when Congress and the President approved a bill that permitted *de novo* review of the evidence considered by the Florida courts.

The “Judicial Independence” narrative arises because there is a “true conflict”⁵⁶ between the “Death with Dignity” narrative associated with Michael Schiavo, and the “Killing Terri Schiavo” narrative associated with Robert and Mary Schindler, her parents. If, as the Schindlers alleged, Terri Schiavo was a person with a severe cognitive disability who was *not* in “persistent vegetative state” and who would *not* have chosen to forego nutrition and hydration, then a judicial decree ordering that nutrition and hydration be withheld is the functional equivalent of condemning an innocent person to death. In this case, a petition for redress of grievances addressed to the political branches is the only feasible way to get a *de novo* review of the record. If, by contrast, Terri Schiavo *was* in a persistent vegetative state *and* she had stated clearly that she would not have wanted to continue any form of treatment, including nutrition and hydration, Florida law would have made those statements controlling. From this perspective, further litigation or intervention would have been a violation of her rights.

The “judicial independence” narrative thus rests on the two

358 F. Supp. 2d 1161 (M.D. Fla. 2005).

⁵⁶ The term “true conflict” is used to describe a problem in which the interests are irreconcilable. In such a situation, one will, of necessity, be subordinated to the other. When used in the field of choice of law, a finding that there is a “true conflict” requires that the court attempt “a more moderate and restrained interpretation of the policy or interest of one state or the other . . .” in an effort to avoid the conflict. See Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242 (1963).

findings of fact that support the guardianship court's ruling that nutrition and hydration should be withdrawn: 1) that Terri Schiavo was in a persistent vegetative state; and 2) that she would have chosen to refuse further nutrition and hydration rather than continue life in a persistent vegetative state. In this narrative, once those findings are in place, the courts have primary responsibility for ensuring that an incompetent person's "choices" regarding continued treatment are respected. From the judiciary's perspective, any attempt by the Governor or the Legislature to interfere with the execution of the incompetent person's choice to refuse further treatment is a violation of both separation of powers *and* individual rights.

Governor Jeb Bush, by contrast, had his own separation of powers argument. He argued that the executive branch, not the judiciary, is ultimately charged by the Florida and federal constitutions with the protection of the civil rights of individuals whose deaths are ordered, or facilitated, by judicial decree. On this point, he was most certainly correct. In capital cases, it is assumed that the executive branch provides a "check" on the powers of the judiciary. Post-conviction attacks on the integrity of the judicial fact-finding process are routine,⁵⁷ and capital defendants and their advocates nearly always seek final review through the Governor's clemency power. This process allows the Governor, or clemency panel, to review the evidence alleged to support the finding of guilt, as well as the integrity of the process in which those findings were made.

House Bill 35-E,⁵⁸ dubbed "Terri's Law" by the media, was

⁵⁷ Attacks on the integrity of the fact-finding process are so routine that Congress has taken steps to limit the ability of capital defendants to seek writs of *habeas corpus* from the federal courts. See 28 U.S.C. § 2262(c) (2007) (limiting the number of *habeas corpus* petitions that can be filed on behalf of a prisoner sentenced to death).

⁵⁸ H.B. 35-E, 105th Leg., Spec. Sess. (Fla. 2003) available at http://laws.flrules.org/2003/ch_2003-418.pdf. The substance of the statute provided 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

modeled on the executive clemency proceedings employed in Florida capital cases.⁵⁹ It gave the Governor post-judgment review powers in cases where the families dispute the findings or the fairness of the proceeding. The Bill's main features included:

- (1) Stay of execution⁶⁰ pending review of the facts of the case and the fairness of the judicial process by the Governor;⁶¹
- (2) Appointment by the chief judge of the circuit court of an independent guardian *ad litem* whose loyalties are to the ward alone;⁶² and
- (3) A report to the chief judge and the Governor of the guardian *ad litem's* findings and conclusions,⁶³ after which the Governor could either dissolve the stay or seek such further relief on behalf of the ward as might be warranted under the circumstances.

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 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 the 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.

Id.

⁵⁹ Compare FLA. CONST. art. IV, §8 (Clemency), with 2003 Fla. Laws 418.

⁶⁰ Compare FLA. STAT. § 922.06 (Stay of Execution of Death Sentence) with 2003 Fla. Laws 418, at §§ 1-2 (authorizing Governor to issue a temporary stay order ensuring continued nutrition and hydration).

⁶¹ Cf. FLA. STAT. § 940.03 (2007) (an application for executive clemency "may require the submission of a certified copy of the applicant's indictment or information, the judgment adjudicating the applicant to be guilty, and the sentence, if sentence has been imposed, and may also require the applicant to send a copy of the application to the judge and prosecuting attorney of the court in which the applicant was convicted, notifying them of the applicant's intent to apply for executive clemency.").

⁶² Compare FLA. R. CRIM. P. 3.851(b) ("Appointment of Post-Conviction Counsel") with FLA. STAT. § 27.703 (specific conflicts of interest).

⁶³ Compare FLA. CONST. art. IV, §8(a) (clemency requires approval of two members of the cabinet), with 2003 Fla. Laws 418 §3 (providing for a report to the Governor and the court by the guardian *ad litem*).

When the Governor entered the stay authorized by the statute,⁶⁴ the stage was set for the confrontation between the political branches and the courts that marked the final chapters of the *Schiavo* case. When the Florida Supreme Court held, in *Schiavo v. Bush*,⁶⁵ that Terri's Law was unconstitutional, the Schindler family's only recourse was to seek a writ of *habeas corpus* from the federal courts.

II. THE MEDICAL CONTEXT

Since most of the commentary characterizes the *Schiavo* case as one involving "the right to die," most articles dealing with the case actually engage the debate over the correctness of the Florida courts' decision that Terri should be "allowed to die" from the marked dehydration that occurs when a PEG (feeding) tube is withdrawn. This article does not address that topic directly. Nor, in my view, should it.

A lawyer who accepts the duty of representing a client understands that "representation . . . , including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."⁶⁶ The American Bar Association's ("ABA") Model Rules also assume that the lawyer can maintain enough distance from the facts to maintain "independent professional judgment."⁶⁷ In cases where one's *client* is a person who has suffered a severe brain injury, the obvious reference point is Rule 1.14 of the ABA Model Rules, which provides, in relevant part:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably

⁶⁴ See Fla. Exec. Order No. 03-201 (Oct. 21, 2003), available at: <http://news.findlaw.com/hdocs/docs/schiavo/flagovexord03201.html> (last accessed March 4, 2009).

⁶⁵ *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), cert. denied, 543 U.S. 1121 (2005).

⁶⁶ MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2006).

⁶⁷ MODEL RULES OF PROF'L CONDUCT R. 2.1.

necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.⁶⁸

In the *Schiavo* case, the family was at odds over whether to continue treatment *at all*. The litigation that ensued showed just how “aspirational” the client autonomy model embedded in Rule 1.14 can be.⁶⁹ Patients who have suffered serious brain injuries that cause significant impairment of their cognitive abilities are, by definition, “not autonomous.” Providing effective representation requires the diligent attorney to embark on a crash course of “on the job” training in neurology, cognitive and consciousness disorders, diagnostic imaging, and rehabilitation medicine. An attorney cannot possibly defend the rights of a client with a consciousness disorder or cognitive disability without at least a basic understanding of that disability.

Kendall Coffey’s recent article, “Litigating at Light Speed,”⁷⁰ is an excellent primer for lawyers who find themselves embroiled in litigation that pushes their legal, organizational, professional, and personal-relations skills (not to mention their physical stamina⁷¹) to the limit.

One of the most remarkable battlefields for light speed litigation was the tragic and multi-faceted case of Terri Schiavo. As the entire nation would learn, she was the center of a heartbreaking controversy between her husband and parents concerning the question of whether nutrition and

⁶⁸ MODEL RULES OF PROF’L CONDUCT R. 1.14(b).

⁶⁹ For a more in-depth discussion of Rule 1.14, see *infra* Part VI(B).

⁷⁰ Kendall Coffey, *Litigating at Light Speed*, 83 FLA. B. J. 20, 25-26 (Jan. 2009).

⁷¹ *Id.* at 26:

Among other truths about 24/7 lawyering that [George] Felos[, lead counsel for Michael Schiavo,] and [David] Gibbs[, lead counsel for the Schindler family,] emphasize repeatedly are the extraordinary human demands on health and stamina. Gibbs spoke of the “absolutely unbelievable physical, emotional, and mental pressures” confronted in the Schiavo litigation. Correspondingly, in his efforts to meet those challenges, Felos underscored the value of being in good condition before entering a no-sleep zone, where fatigue can be a constant companion even as adversities intensify and magnify.

hydration should be withdrawn due to the limited brain functions resulting from heart failure 15 years earlier. Following the state trial judge's decision to remove feeding tubes on March 18, 2005, trails were blazed through state and federal courts at trial and appellate levels, lasting until Terri Schiavo's death on March 31, 2005.

The case was litigated by both sides with great ability and a remarkable capacity to respond effectively to some of the most abbreviated and intense deadlines imaginable.⁷²

Those of us involved as attorneys in the *Schiavo* case certainly appreciate the compliment. But "the most abbreviated and intense deadlines imaginable"⁷³ were the least of our worries. The real problem for the attorneys on the Schindlers' team was the lack of a scientifically sound diagnosis based on state-of-the-art diagnostics. Getting one turned out to be an impossible task.

A. First Things First: Brain Injuries Causing Severe Cognitive Disabilities

Brain injuries are common. Traumatic Brain Injury (TBI) "occurs when a sudden trauma causes damage to the brain[, and] can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue."⁷⁴ Not surprisingly, it is the leading cause of injury and disability in Afghanistan and Iraq.⁷⁵ Acquired brain injuries (ABIs) are caused by tumors, blood clots, strokes, seizures, toxic exposures, infections, metabolic disorders, neurotoxic poisoning,

⁷² *Id.* at 25-26.

⁷³ *Id.* at 26.

⁷⁴ National Institute of Neurological Disorders and Stroke, NINDS Traumatic Brain Injury Information Page, available at <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last accessed May 3, 2009). See also Rehabilitation Institute of Chicago, Brain, available at <http://www.ric.org/conditions/brain/whatis/index.aspx> (last accessed Mar. 9, 2009).

⁷⁵ Edgar Jones et al., *Shell Shock and Mild Traumatic Brain Injury: A Historical Review*, 164 *AM. J. PSYCHIATRY* 1641, 1641 (2007); see also Charles W. Hoge et. al., *Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq*, 358 *NEW ENG. J. MED.* 453, 454 (May 15, 2008).

and anoxia (lack of oxygen).⁷⁶ Stroke occurs when blood or fluid invades the tissues of the brain.⁷⁷ Every year, some 750,000 Americans suffer a stroke,⁷⁸ thus making it a leading cause of serious, long-term adult disability in the United States. Terri Schiavo's injury was caused by cortical hypoxia, "a condition in which there is a decrease of oxygen supply to the brain even though there is adequate blood flow."⁷⁹ It can be caused by "[d]rowning, strangling, choking, suffocation, cardiac arrest, head trauma, carbon monoxide poisoning, and complications of general anesthesia"⁸⁰

Whatever the cause, the results of a brain injury can be devastating.

Approximately half of severely head-injured patients will need surgery to remove or repair hematomas (ruptured blood vessels) or contusions (bruised brain tissue). Disabilities resulting from a TBI depend upon the severity of the injury, the location of the injury, and the age and general health of the individual. Some common disabilities include problems with cognition (thinking, memory, and reasoning), sensory processing (sight, hearing, touch, taste, and smell), communication (expression and understanding), and behavior or mental health (depression, anxiety, personality changes, aggression, acting out, and social inappropriateness). More serious head injuries may result in stupor, an unresponsive state, but one in which an individual can be aroused briefly by a strong stimulus, such as sharp pain; *coma*, a state in which an individual is totally unconscious, unresponsive, unaware, and unarousable; *vegetative state*, in which an individual is

⁷⁶ Rehabilitation Institute of Chicago, *Brain*, available at <http://www.ric.org/conditions/brain/whatis/index.aspx> (last accessed Mar. 9, 2009).

⁷⁷ The National Institutes of Neurological Disorders & Stroke ("NINDS") reports that four million Americans are living with the effects of stroke. See NINDS Traumatic Brain Injury Information Page, <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last accessed Mar. 2, 2009).

⁷⁸ SHARON BEGLEY, *TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES* 120 (Ballantine Books 2007).

⁷⁹ NINDS Cerebral Hypoxia Information Page, *What is Hypoxia?*, available at <http://www.ninds.nih.gov/disorders/anoxia/anoxia.htm> (last accessed March 4, 2009).

⁸⁰ *Id.*

unconscious and unaware of his or her surroundings, but continues to have a sleep-wake cycle and periods of alertness; and a *persistent vegetative state* (PVS), in which an individual stays in a vegetative state for more than a month.⁸¹

A lawyer accepting the task of representing any party to a dispute over a brain injury thus has quite a bit of studying to do. In order to offer “effective representation,” the lawyer needs to learn as much as possible about the art, science, and politics of neuroscience.⁸²

B. The 1990s Conventional Wisdom: A “Hardwired Brain”

The view that the brain is “hardwired” is traceable to the influential, but erroneous, theories of one the founders of modern neurology, Spanish Nobel Laureate Santiago Ramón y Cajal. Writing in 1911, Cajal observed that “[i]n the adult centers [of the brain] the nerve paths are something fixed, ended and immutable.”⁸³

Conventional wisdom in neuroscience held that the adult mammalian brain is fixed in two respects: no new neurons are born in it, and the function of the structures that make it up are immutable, so that if genes and development dictate that *this* cluster of neurons will process signals from the eye, and *this* cluster will move the fingers of the right hand, then by god they’ll do that and nothing else come hell or high water. There was good reason why all those extravagantly illustrated brain books show the function, size, and location of the brain’s structures in permanent ink. As late as 1999, neurologists writing in the prestigious journal *Science* admitted, “We are still taught that the fully mature brain lacks the intrinsic mechanisms needed to replenish neurons and reestablish neuronal networks after acute injury or in response to the

⁸¹ NINDS Traumatic Brain Injury Page, *What is the Prognosis?*, available at <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last accessed Mar. 24, 2009).

⁸² MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) (2006).

⁸³ Begley, *supra* note 78 at 5 (quoting SANTIAGO RAMÓN Y CAJAL, *HISTOLOGY OF THE NERVOUS SYSTEM OF MAN AND VERTEBRATES* (Neely Swanson & Larry Swanson trans., Oxford University Press 1995)).

insidious loss of neurons seen in neurodegenerative diseases.”⁸⁴

In the pages that follow, I will make the case that the rejection of neuroplasticity had a profound impact on the litigation, on the autopsy report, and on media accounts of the case.

Today, it is common knowledge that science has yet to unlock even a fraction of the mysteries of the brain and nervous system. In the early 1990s, when Terri Schiavo and Eluana Englaro suffered their respective head injuries, the scientific mainstream was far more confident about what it knew about the adaptive abilities of neurons than it is today. It should not be at all surprising that the lawyers and judges who relied on the conventional scientific wisdom knew even less.

Until quite recently, it was simply assumed that the brain and central nervous system are largely unable to adapt to experience, including injury.⁸⁵ Today we know that the opposite is true. The brain and nervous system are enormously adaptive because neurons have the ability to adapt *physically* in response to stimuli and to shift the locus of brain function to compensate for injuries and disease.⁸⁶ In the early 1990s, however, advocates for persons with severe cognitive disabilities faced an uphill battle. Those who argued that the nervous system could adapt, rewire itself, and recover at least some of its impaired function if the injured person were enrolled in an aggressive rehabilitation were viewed as charlatans and quacks.⁸⁷ This

⁸⁴ *Id.* at 6 (quoting Daniel H. Lowenstein & Jack M. Parent, *Brain, Heal Thyself*, 283 SCIENCE 1126 (Feb. 19, 1999)).

⁸⁵ See *infra* text accompanying note 95 (“The doctrine of the unchanging human brain has had profound ramifications, none of them very optimistic. It led neurologists to assume that rehabilitation for adults who had suffered brain damage from a stroke was almost certainly a waste of time.”).

⁸⁶ See, e.g., Julien Doyon & Habib Benali, *Reorganization and Plasticity in the Adult Brain During Learning of Motor Skills*, 15 CURRENT OPINION IN NEUROBIOLOGY 161-67 (2005); Bogdan Draganski et al., *Changes in Grey Matter Induced by Training: Newly Honed Juggling Skills Show Up as a Transient Feature on a Brain-Imaging Scan*, 427 NATURE 311, 311-12 (Jan. 22, 2004).

⁸⁷ See National Public Radio, *Science Friday* (Feb. 2, 2007), available at http://www.sciencefriday.com/pages/2007/Feb/hour2_020207.html (last accessed, May 1, 2009).

explains much of the skepticism evident in Judge Greer's rulings in the guardianship proceeding. Experts had testified that there was no hope of improvement because she had lost too much of her brain, and that rehabilitation would have been a waste of time.⁸⁸

Even if there had been a book entitled *Neurology and Consciousness Disorders: A Primer for Lawyers and Other Dummies*, reading it during the closing phases of a high-profile case like *Schiavo* would not have been particularly helpful. The

⁸⁸ See Transcript of Record at 974, 976, *In re* Guardianship of Schiavo, No. 90-2908-GD-003 (Fla. Cir. Ct. Oct. 15-17, 20-21, 2002) (providing questioning on cross examination by Pamela Andersen, Esq., to Melvin Greer, M.D., a neurologist, who had been called as a witness by Michael Schiavo. Dr. Greer's direct testimony begins at p. 864, line 24.):

Q. And you're telling the Court that physical therapy would be of no benefit?

A. That's right. Physical therapy is not a benefit in this circumstance.

Q. Would it have been a benefit in the past?

A. No, the only thing that would have been helpful is if she had a different problem which led, unfortunately, to her being admitted in this terrible state. No, the die was cast when she was found in this anoxic ischemic state and the evolution of the problem was going to be coming. Her doctors did a great job in being able to maintain adequate nutrition and control infection and so forth, but there would be no difference in terms of the outcome.

Q. So you're saying that therapy would have had zero effect on her over the years?

A. That's right.

Q. But this is an inevitable progression?

A. Yes, this is an inevitable progression.

Q. Is she going to inevitably progress into a more contracted state?

A. Well, she's pretty well contracted right now.

Q. When do you think that would have occurred?

A. I'm sorry?

Q. When do you think that would have occurred?

A. Over the course of her first year or two.

Q. So she would have been in The [sic] state of contracture that she is in today by two years out from the injury?

A. No, the contracture continues to become more prominent, but she was in decerebrate positioning. I mean, the contractures were continuing to emerge as a consequence of the joints being maintained and the posturing. And regardless of what one does to try to extend the joint, the contracture will occur because of the [lack of] input from the brain.

record in the *Schiavo* case was developed over the course of a fifteen-year period, during which mainstream neuroscience remained largely in the grip of Santiago Ramón y Cajal's now-discredited theory that the basic structures of the brain are fixed and immutable. It remained so until nearly 2006, when Dr. Edward Taub, of the University of Alabama, Birmingham, and his colleagues "reported the results of the most rigorous trial ever conducted" of "constraint-induced movement therapy."⁸⁹ Dr. Taub's rehabilitation experiment entailed immobilizing the patient's *good* arm so that she would be forced to use the "useless" arm if she wanted to hold something or feed herself or get dressed or do the laborious rehabilitation exercises through which he put patients."⁹⁰ Dr. Taub's hypothesis was that "*learning* not to use an affected arm [or other body parts] accounted for much of a stroke patient's disability."⁹¹

The story of how Dr. Taub and "a few iconoclastic neuroscientists [who successfully] challenged the paradigm that the adult brain cannot change . . ."⁹² is told in *Wall Street Journal* science reporter Sharon Begley's book, *Train Your Mind, Change Your Brain*,⁹³ a slim and eminently readable book that should be required reading for any lawyer retained to handle a case involving a brain injury. It should also be required reading for all those commentators whose opinions about the state of Terri Schiavo's brain were based on facts developed with old technology, shaped by the conventional

⁸⁹ Begley, *supra* note 78, at 121. See generally, "Constraint-Induced Movement Therapy," available at <http://www.strokeassociation.org/presenter.jhtml?identifier=3029931#2006> (last accessed May 3, 2009):

Constraint-induced movement therapy (CI) forces the use of the affected side by restraining the unaffected side. With CI therapy, the therapist constrains the survivor's unaffected arm in a sling. The survivor then uses his or her affected arm repetitively and intensively for two weeks.

See also, UAB Taub Therapy Clinic, "Constraint Induced Movement Therapy: Why It Works," available at <http://www.uabhealth.org/13227/>.

⁹⁰ Begley, *supra* note 78, at 121.

⁹¹ See *id.* at 120. Compare this theory with the testimony of Melvin Greer, M.D., quoted *supra* note 88.

⁹² Begley, *supra* note 78, at 8.

⁹³ *Id.*

wisdom, and defended with a certainty reserved for “true believers” who cannot be bothered by the facts.⁹⁴ Begley observes:

The doctrine of the unchanging human brain has had profound ramifications, none of them very optimistic. It led neurologists to assume that rehabilitation for adults who had suffered brain damage from a stroke was almost certainly a waste of time. It suggested that trying to alter the pathological brain wiring that underlies psychiatric diseases, such as obsessive-compulsive disorder (OCD) and depression, was a fool’s errand. And it implied that other brain-based fixities, such as the happiness “set point” to which a person returns after the deepest tragedy or the greatest joy, are as unalterable as Earth’s orbit.

But the dogma is wrong. In the last years of the twentieth century, a few iconoclastic neuroscientists challenged the paradigm that the adult brain cannot change and made discovery after discovery that, to the contrary, it retains stunning powers of neuroplasticity. The brain can indeed be rewired. It can expand the area that is wired to move the fingers, forging new connections that underpin the dexterity of an accomplished violinist. It can activate long-dormant wires and run new cables like an electrician bringing a house up to

⁹⁴ Compare Kenneth Goodman, *Ethics Schmethics: The Schiavo Case and the Culture Wars*, 61 U. MIAMI L. REV. 863, 865 (2007) (“What you learned from Dr. Cranford, and especially from the slide he showed us, was that Terri Schiavo’s cerebral cortex was full of spinal fluid. Moreover, a flat EEG means that the part of your brain that’s supposed to do the thinking is not working. It means, as the autopsy showed afterward, that this woman for fifteen years could not see, feel, hear, or experience anything.”), with Vidya P. Kulkarni, Kaiwen Lin & Selim R. Benbadis, *EEG Findings in the Persistent Vegetative State*, 24 J. CLIN. NEUROPHYSIOLOGY 433-37 (December 2007), available at <http://www.ncbi.nlm.nih.gov/pubmed/18090523> (last accessed Mar. 25, 2009) (Abstract) (“EEG findings had no association with etiology and varied from one pattern to another in the same patients’ EEGs obtained at different times (see table). We conclude that EEG findings in PVS are heterogeneous and too variable to be of diagnostic value.”), and Adrian M. Owen et al., *Detecting Awareness in the Vegetative State*, 313 SCI. 1402 (Sept. 8, 2006) (noting that recent research “suggests a method by which some noncommunicative patients, including those diagnosed as vegetative, minimally conscious, or locked in, may be able to use their residual cognitive capabilities to communicate their thoughts to those around them by modulating their own neural activity.”).

code, so that regions that once saw can instead feel or hear [C]ontrary to Ramón y Cajal and most neuroscientists since [Cajal won the Nobel Prize in 1906], the brain can change its physical structure and its wiring long into adulthood.⁹⁵

C. The State of the Art, 2005 Through Early 2009: Detecting Conscious Awareness in Patients Who Are Assumed to Be Vegetative

Consider, if you will, the *possibility* that Terri Schiavo might have been responsive at some cognitive level to friends and family who visited. There was considerable testimony that she was.⁹⁶ Consider next the *possibility* that she could have been aware that the PEG tube had been withdrawn, and that she was entering a process of dehydration that would inevitably lead to her death.⁹⁷ These are not far-fetched suggestions. The authors of a September 2008 article entitled *Detecting Awareness in the Vegetative State*, have observed that “recent functional neuroimaging studies have suggested that islands of preserved brain function may exist in a small percentage of patients who have been diagnosed as vegetative.”⁹⁸

⁹⁵ Begley, *supra* note 78, at 7-8.

⁹⁶ See, e.g., *supra* note 88 (providing testimony of Marvin Greer, M.D.); Jay Wolfson, *Guardian Ad Litem* for Theresa Marie Schiavo, A REPORT TO GOVERNOR JEB BUSH AND THE SIXTH JUDICIAL CIRCUIT IN THE MATTER OF THERESA MARIE SCHIAVO (Dec. 1, 2003), available at <http://abstractappeal.com/schiavo/WolfsonReport.pdf>.

⁹⁷ See *Last Visit Narrative* from Attorney Barbara Weller, a member of the Schindlers' legal team (Mar. 19, 2005) (on file with author). Ms. Weller's narrative recounts her effort to elicit a reaction from Terri:

I stood up and leaned over Terri. I took her arms in both of my hands. I said to her, “Terri if you could only say ‘I want to live’ this whole thing could be over today.” I begged her to try very hard to say, “I want to live.” To my enormous shock and surprise, Terri's eyes opened wide, she looked me square in the face, and with a look of great concentration, she said, “Ahhhhhhh.” Then, seeming to summon up all the strength she had, she virtually screamed, “Waaaaaaaaa.” She yelled so loudly that Michael Vitadamo, Suzanne's husband, and the female police officer who were then standing together outside Terri's door, clearly heard her. At that point, Terri had a look of anguish on her face that I had never seen before and she seemed to be struggling hard, but was unable to complete the sentence. She became very frustrated and began to cry.

Id.

⁹⁸ Owen et al., *supra* note 2, at 1402.

I ask the reader to consider these possibilities, not because I am convinced that Terri Schiavo had any “islands of preserved brain function.” No one can know for certain whether she did or did not. Technology existed to measure brain function. It could have been used, but it was not. Nor do I suggest that the experts who stood ready to assist the Schindlers’ legal team in the planned *habeas corpus* proceeding would have agreed that the technology available in early 2005 would have “provide[d] a means for detecting conscious awareness in patients who are assumed to be vegetative yet retain cognitive abilities that have evaded detection using [the] standard clinical methods”⁹⁹ that were employed by the neurologists in the *Schiavo* case. We will never know the answer to that question either. The autopsy report specifically rejects any assertion that it is possible to make a post-mortem diagnosis concerning Terri Schiavo’s post-injury brain function.¹⁰⁰ Those who nevertheless point to the post-mortem size and weight of her brain, including the Chief Medical Examiner, conveniently ignore the fact that the cause of death was dehydration—a process that causes shrinkage in all body tissues.¹⁰¹ My proposal goes to the ethics of effective representation in cases involving persons with brain injuries and consciousness disorders.

Rule 1.14(b) of the ABA Model Rules of Professional Conduct requires the lawyers for such patients—or those who are seeking to protect their interests—to “take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.”¹⁰² This would include, among other things, a demand that the patient be represented by her own counsel, and

⁹⁹ *Id.* (reporting on the case of a twenty-three-year-old woman who sustained a severe traumatic brain injury in an automobile accident, and their successful attempt to test their hypothesis that she could respond “through her brain activity, rather than through speech or movement.”).

¹⁰⁰ See *supra* note 17 (discussing autopsy report); see also *infra* note 141 (discussing autopsy report).

¹⁰¹ See Mayo Clinic.com, *Dehydration*, available at <http://www.mayoclinic.com/print/dehydration/DS00561/DSECTION=all&METHOD=print> (last accessed March 9, 2009).

¹⁰² MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2006).

that testimony be adduced that develops facts about the patient's condition that rest on the state-of-the-art diagnostic tools available *at the time of the trial*.

The Schindlers' trial team attempted to convince the guardianship court, Florida's Governor and Legislature, the Florida Supreme Court, the Supreme Court of the United States, the President and Congress, the United States District Court for the Middle District of Florida, and the Eleventh Circuit Court of Appeals that Terri Schiavo was entitled to a fair trial. At a minimum, such a trial would have explored:

- (1) Terri's physical and cognitive condition and responses;
- (2) The efficacy of state-of-the-art rehabilitation techniques for patients assumed to be in a persistent vegetative state;
- (3) The physical, psychological, and emotional responses of patients who are dying from lack of nutrition or hydration; and
- (4) Testimony from leading experts in the field of consciousness disorders.

But it was not to be. On March 9, 2005, the guardianship court denied a "Motion for Relief from Judgment Pending Contemporary Medical-Psychiatric-Rehabilitative Evaluation of Theresa Marie Schiavo."¹⁰³ Judge Greer's opinion expressed confidence in "guardian ad litem Wolfson's report in which he found the evidence of PVS to be compelling."¹⁰⁴ It was a revealing observation, for it captures perfectly the profound practical wisdom of Sharon Begley's observation that "[s]cience doesn't work the way newspapers might have you believe."¹⁰⁵

Though he has an impressive résumé,¹⁰⁶ I will never

¹⁰³ See Order of March 9, 2005, *In re* Guardianship of Schiavo, No. 90-2908-GD-003 (Fla. Cir. Ct. 2005) (denying Motion for Relief from Judgment Pending Contemporary Medical-Psychiatric-Rehabilitative Evaluation of Theresa Marie Schiavo).

¹⁰⁴ *Id.* at 5.

¹⁰⁵ Begley, *supra* note 78, at 122.

¹⁰⁶ See University of South Florida, *Jay Wolfson, Dr.P.H., J.D.* <http://health.usf.edu/publichealth/eoh/jwolfson/index.htm> (last accessed Mar. 12, 2009).

understand why the circuit court appointed Dr. Jay Wolfson as Terri Schiavo's guardian *ad litem* during the stay ordered by Governor Bush. Dr. Wolfson is neither a medical doctor, nor a neuroscientist, nor an expert in consciousness disorders. Even if it had been possible for him to review the entire, fifteen-year medical record in the short time he had to evaluate the case, there is nothing in his report or *curriculum vitae* from which one could infer *any* expertise, education, or training that would qualify him as an expert qualified to give a professional opinion regarding the state of Terri Schiavo's consciousness.¹⁰⁷ A close reading of his report discloses exactly what one might expect from an expert who has a doctorate in public health and a law degree:¹⁰⁸ a restatement of the conclusions of the medical experts who testified before Judge Greer. What we needed was an unbiased, and searching, consultative process that involved experts on the cutting edge of research on disorders of consciousness.

Unfortunately, it is not "news" to report that the law is slow to accept advances in science that could cast doubt on the *res judicata* effect of a judgment. In the early years of DNA testing, the Florida courts routinely rejected requests for DNA tests by defense counsel in death penalty cases because of doubts involving their reliability.¹⁰⁹ In *Schiavo*, the accepted wisdom

¹⁰⁷ See, e.g., Wolfson, *supra* note 23, at 30, where Dr. Wolfson reports that:

In the month during which the GAL conducted research, interviews and compiled information, he sought to visit with Theresa as often as possible, sometimes daily, and sometimes, more than once each day. During that time, the GAL was not able to independently determine that there were consistent, repetitive, intentional, reproducible interactive and aware activities. When Theresa's mother and father were asked to join the GAL, there was no success in eliciting specific responses. Hours of observed video tape recordings of Theresa offer little objective insight about her awareness and interactive behaviors. There are instances where she appears to respond specifically to her mother. But these are not repetitive or consistent. There were instances during the GAL's visits, when responses seemed possible, but they were not consistent in any way.

This having been said, Theresa has a distinct presence about her . . . This is the confusing thing for the lay person about persistent vegetative states.

¹⁰⁸ *Id.*

¹⁰⁹ See Benedict P. Kuehne, *Criminal Law and Procedure: 1993 Survey of Florida Law*, 18 NOVA L. REV. 235, 259 (1993). Noting the discrepancy between the "general acceptance" test for the admission of scientific evidence applied in *Robinson v. Florida*,

from the beginning of the trial *through the coroner's final report* was that Terri's *physical* condition was a good proxy for her cognitive abilities. Her physical condition was known at the time of the trial and subsequent hearings, and all of the experts assumed that nothing could have been done to change it.

One of the great tragedies of the *Schiavo* case is that the art and science of neurology were being revolutionized by advances in diagnostic imaging during the final years of the *Schiavo* case. Advanced techniques in rehabilitation medicine were finally focusing on rebuilding the neural pathways that had atrophied from nonuse. The "advocacy gap" created by the lack of a guardian *ad litem* represented by counsel for Terri alone thus created a "knowledge gap" that allowed the court to rely on a parade of well-known experts who were, themselves, mired in the "conventional wisdom," and a "high quality CT scan" of the physical structure of Terri Schiavo's brain that told the court absolutely nothing about the possibility that there might be "islands of cognition" discoverable by more advanced imaging techniques.¹¹⁰ As Begley observes:

610 So. 2d 1288 (Fla. 1992) (admissibility of DNA testing in capital case), and the approach taken by the Supreme Court of the United States under Rule 702 of the Federal Rules of Evidence, the author provided the following:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993)).

¹¹⁰ Functional magnetic resonance imaging (fMRI) is only one such technique. See Nicholas D. Schiff, *Multimodal Neuroimaging Approaches to Disorders Of Consciousness*, 21 J. HEAD TRAUMA REHAB. 388, abstract (Sept.-Oct. 2006), available at <http://www.ncbi.nlm.nih.gov/pubmed/16983224> (last accessed Mar. 10, 2009):

Multimodal neuroimaging studies using positron emission tomography techniques, functional magnetic resonance imaging, and quantitative electroencephalography and magnetoencephalography quantify variations of residual cerebral activity across these patient populations. The results suggest models to distinguish the pathophysiologic basis of VS and MCS. Less clear are potential brain mechanisms underlying late recovery of communication in rare MCS patients. Diffusion tensor magnetic resonance imaging studies and recent experimental findings suggest that structural remodeling of the brain following severe injury may play a role in late functional recoveries . . .

If you are attacking the dogma [of neuroscience], you don't make a lot of friends [The rejection of neuroplasticity is] yet another dogma that is now in the dustbin of history This was yet another case where science has deemed something impossible without really ruling it out empirically.¹¹¹

The “conventional wisdom” regarding brain structure, cognitive function, and neural plasticity died hard.¹¹² As late as 2006, “[t]he rehab community was united in opposition to the idea that therapy after a stroke could reverse the neurological effects of the infarct,” and “[t]he official position of the American Stroke Association was that rehab for patients with chronic stroke only increases a patient’s muscular strength and confidence,’ but does nothing to address the brain damage.”¹¹³ When advocacy organizations of the stature of the American Stroke Association were willing to assert—in the face of convincing evidence to the contrary—that rehabilitation of stroke victims was a fool’s errand, we can begin to understand the reasons why “[t]he vegetative state is one of the least understood and most ethically troublesome conditions in modern medicine.”¹¹⁴

Because neuroplasticity and the power of mind and mental training effect changes in the very structure and function of our brain, free will and moral responsibility become meaningful in a way that they have not been for some time in the scientific West The conscious act of thinking about one’s thoughts in a different way changes the very brain circuits that do that thinking As the discoveries of neuroplasticity, and this self-directed neuroplasticity, trickle

¹¹¹ Interview by Ira Flatow with Sharon Begley, science reporter for *The Wall Street Journal* and author of *TRAIN YOUR MIND, CHANGE YOUR BRAIN*, in National Public Radio, *Science Friday* (Feb. 2, 2007), available at http://www.sciencefriday.com/pages/2007/Feb/hour2_020207.html (follow link for mp3 file of brain interview) (last accessed Feb. 3, 2007).

¹¹² See Letter from Stephen J. Nelson, Chief Medical Examiner, 10th Judicial Circuit of Florida, to Jon R. Thogmartin, District 6 Medical Examiner 9 (June 8, 2005) (Neuropathology Report) in THOGMARTIN, *supra* note 4, at 20.

¹¹³ Begley, *supra* note 78, at 121.

¹¹⁴ Owen et al., *supra* note 2.

down to clinics and schools and plain old living rooms, the ability to willfully change the brain will become a central part of our lives—and of our understanding of what it means to be human.¹¹⁵

III. TOWARDS A MODEL OF ETHICAL PROFESSIONALISM

Doctors, nurses, allied health-care professionals, and researchers from every profession have weighty professional responsibilities. These duties do not exist in the abstract. They arise from and govern the relationships formed with those who need, and rely upon their knowledge, expertise, good judgment, and artistry.¹¹⁶

It is impossible to understand the claims made on Terri Schiavo's behalf by her parents in the final stages of the case, or the lengths to which the political branches of the State of Florida and the United States government went in their attempts to vindicate this young woman's right to a fair trial, without also understanding that none of these efforts would have been necessary had the courts and the media been open to the possibility that the conventional wisdom was—as it almost always is—wrong. James L. Bernat put it this way:

The findings of Eric Racine and colleagues in this issue of *Neurology* are important to understand how the media accounts of her case shaped public opinion. They found that articles published by print media outlets frequently contained scientific inaccuracies, inconsistent diagnostic and descriptive terminology, mismatches between the descriptions of her state and the medical terms used to characterize it, inaccurate prognoses, an inability to distinguish expert opinion from diatribe, and emotionally or politically charged language misleadingly describing end-of-life care. Sadly, media attempts to define and explain disorders of consciousness were

¹¹⁵ Begley, *supra* note 68, at 253-54.

¹¹⁶ See, e.g., Michael D. Bayless, *PROFESSIONAL ETHICS* (2nd ed., Wadsworth 1989); *CONFLICT OF INTEREST IN THE PROFESSIONS* (Michael Davis & Andrew Stark eds., Oxford University Press 2001); *THE CRISIS OF CARE: Affirming and Restoring Caring Practices in the Helping Professions* (Susan S. Phillips & Patricia Benner eds., Georgetown University Press 1994).

infrequent.

... But the most serious media shortcoming was squandering the opportunity to educate the public about disorders of consciousness and end-of-life care. The power of the media to mold public opinion imparts a duty for them to conduct public education.¹¹⁷

The same holds true for lawyers and judges. At the center of all of our respective professional endeavors is a human person—a patient, a client, a research subject, or a party who has an interest in the outcome of our efforts. We must be free, we argue, to perform our respective duties as professionals because both “skill” and “judgment” are a uniquely personal combination of art and science:

Every science touches art at some points—every art has its scientific side; the worst man of science is he who is never an artist, and the worst artist is he who is never a man of science. In early times, medicine was an art, which took its place at the side of poetry and painting; today they try to make a science of it, placing it beside mathematics, astronomy, and physics.¹¹⁸

A similar combination of art and science explains the profoundly important role that lawyers and judges play in the

¹¹⁷ James L. Bernat, Editorial, *Theresa Schiavo's Tragedy, and Ours Too*, 71 *NEUROLOGY* 964, 964-65 (Sept. 23, 2008); see also Timothy Johnson, *Shattuck Lecture; Medicine and the Media*, 339 *NEW ENGLAND J MED.* 87 (July 9, 1998). The article referenced by the Bernat editorial, Eric Racine et al., 71 *NEUROLOGY* 1027, 1030 (2008) expands on the point made in the text:

Given the centrality of the PVS diagnosis in the Schiavo case, our results highlight areas critical for the public understanding of the CDCs (chronic disorders of consciousness). The results confirm concerns expressed in the peer-review literature that media coverage of the case of Terri Schiavo included both inaccurate statements about her diagnosis and charged language about EOL (end-of-life) decision-making (references: Perry, J.E., Churchill, L.R., Kirshner, H.S., *The Terri Schiavo case: legal, ethical, and medical perspectives.* *Ann Intern Med* 2005; 143: 744-748 and Quill, T.E., *Terri Schiavo: a tragedy compounded.* *N Engl J Med* 2005; 352:1630-1633).

Id. (referencing James L. Bernat, *Chronic Disorders of Consciousness*, 367 *THE LANCET* 1181 (2006)).

¹¹⁸ A.L. Wynman, *Endpiece—Medicine: Art or Science*, 320 *British Med. J.* 1322 (2000) (quoting ARMAND TROUSSEAU, *LECTURES ON CLINICAL MEDICINE* (Vol. 2, The New Syndeham Society 1869)).

regulation of health care. By law and the ethics of their profession, lawyers are the gatekeepers and administrators of the justice system. We serve as the civil and criminal investigators, evaluators, and “judges” of first instance. It is our responsibility to ensure that no case under our control proceeds to a judge, or to a grand or petit jury, unless the evidence supporting the alleged grievance, crime, or defense is both admissible in court and strong enough to withstand the rigors of cross-examination.¹¹⁹ As the “arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law,”¹²⁰ the judge is legally and ethically obligated to “administer justice without respect to persons, and do equal right to the poor and to the rich”¹²¹

Read together, the ethics of both law and medicine thus lead inexorably to the conclusion that the boundary between law and medicine is defined by the consistent application of a rule of reason to the facts and circumstances of each case.¹²² Because duty is our common calling, a “professional responsibility” (or “duty”) model provides a powerful and precision-crafted lens through which to examine *any* decision, act, or omission by a legal or medical professional.

Viewed through this lens rather than the “real-time” glare of the twenty-four hour news cycle, the *Schiavo* case is a textbook example of questionable behavior *across the board*.

IV. THE ETHICS OF DUE PROCESS AND EQUAL PROTECTION IN

¹¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006).

¹²⁰ MODEL CODE OF JUDICIAL CONDUCT Preamble (2007).

¹²¹ 28 U.S.C. § 453 (2007). The material quoted in the text is drawn from chapter 28, section 453 of the United States Code, which prescribes the Oath of Office for each judge or justice of the United States. See also MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2006).

¹²² *Bolitho v. City and Hackney Health Auth.*, [1998] A.C. 232 (H.L.) (holding that “there are cases where, despite a body of professional opinion sanctioning the defendants' conduct, the defendant can properly be held liable for negligence . . . [when] it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible.”). Justice Farquharson made much the same point in the jury instructions delivered in *R. v. Arthur*, [1981] 12 B.M.L.R. 1 (“There is no special law in this country that places doctors in a separate category and gives them extra protection over the rest of us.”).

DISPUTED PROCEEDINGS TO WITHDRAW NUTRITION AND
HYDRATION FROM BRAIN-INJURED PATIENTS

A. The Role of the Courts in a Disputed Guardianship Case

Properly understood, the law provides a framework within which those who are empowered to decide difficult medical questions can do so without fear of criminal or civil liability. In the Anglo-American common law tradition that prevails in the United Kingdom, the Commonwealth countries, and the United States, the courts provide a forum for the formal *and final* resolution of public and private disputes, including those involving medical care.

In an ideal world, disputes among family members, between physicians and their patients, or among partisans in the field of medical or biological research would be rare. Unfortunately, they are all too common, and when one of the parties to such a dispute invokes the power of the court to resolve it, the “justice” of the outcome will depend not only on the strength of their respective medical and legal positions, but also on the quality of the legal process itself.

This point cannot be over-emphasized. The role of the judge is to preside over an adversarial hearing in which the parties and their counsel, not the court, must shoulder the burden of presenting enough facts to permit either the judge or a jury to resolve the factual issues in dispute. Where cases involve difficult questions relating to diagnosis or treatment, the law will often defer to medical experts, but judicial deference cannot be assumed. The parties must prove, to the satisfaction of the judge, that the law provides a remedy (including deference) under the circumstances.¹²³ As a result, the duty of a legal guardian, guardian *ad litem*, prosecutor, or counsel for one of the parties is to get as many of the relevant facts on the table as possible. If there is a default by any one of the parties to a case, the quality of justice will suffer.

¹²³ Compare FLA. STAT. § 764.361 (2007) (discussing powers of guardian); with § 765.401 (discussing powers of proxy in the absence of an advance directive); § 765.404 (discussing persons in a persistent vegetative state).

This article proposes that inquiries of this type are best conducted in the language of professional ethics. The professional norms common to criminal and civil cases provide not only a set of readily accessible and commonly accepted definitions of the rights and obligations of those having an interest in the outcome, but they also provide a powerful lens through which we can analyze the often-erroneous factual assumptions that drive the “conventional wisdom.”

B. The Relevance of the Law of Homicide

“Homicide” is defined by the common law as “the killing of one person by another.”¹²⁴ It has two purposes: 1) to protect the living from homicidal acts or omissions; and 2) to protect those who become parties to a post-mortem inquiry into the reasons why a specific death occurred. Florida law does not expressly define the term homicide,¹²⁵ but it does impose criminal liability for specific acts or omissions.¹²⁶ In most cases, the physician’s role is limited to making the initial determination that the patient has died and filing the appropriate death certificate.¹²⁷ If the cause of death is extraordinary in any way, such as by violence or under unusual circumstances, the medical examiner or coroner has the authority “to perform, or have performed, whatever autopsies or laboratory examinations he or she deems necessary and in the public interest to determine the identification of or cause or manner of death of the deceased or to obtain evidence necessary for forensic examination[,]” and, thereafter, to make it available to the appropriate legal authorities.¹²⁸

¹²⁴ See BLACK’S LAW DICTIONARY 751 (8th ed. 2004).

¹²⁵ Florida Statutes section 775.01 provides that “[t]he common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.”

¹²⁶ See, e.g., FLA. STAT. § 782.03 (excusable homicide); § 782.04 (murder); § 782.07 (manslaughter); § 782.071 (vehicular homicide); § 782.08 (assisting in self-murder, defined in § 781.081(1)(b) as “the voluntary and intentional taking of one’s own life. As used in this section, the term includes attempted self-murder.”).

¹²⁷ See, e.g., FLA. STAT. § 382.008 (2007).

¹²⁸ See, e.g., FLA. STAT. § 406.11 (2007).

There are only two situations in American law in which the execution of a judicial decree authorizes acts taken with the *express* intention of *causing* death. The first is the death penalty,¹²⁹ the other is a judicial decree authorizing families, physicians, or medical facilities to withhold or terminate life-sustaining care from an incompetent person.¹³⁰

Laws authorizing the execution of a death sentence make it clear that capital punishment is an exception to the general rule prohibiting acts or omissions “perpetrated from a premeditated design to effect the death of the person killed or any human being”¹³¹ Because death is a sentencing option in these cases, the law requires effective representation of counsel¹³² and other procedural safeguards that are supposed to ensure that the trial, appeals, and sentencing are conducted fairly.¹³³ If the sentence is actually carried out, the law also requires that the method of execution be neither cruel nor unusual.¹³⁴

¹²⁹ See, e.g., FLA. STAT. § 922.105(1) (2007) (“A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution. The sentence shall be executed under the direction of the Secretary of Corrections or the secretary’s designee.”).

¹³⁰ Laws expressly authorizing euthanasia at the request of a competent patient are distinguishable from the execution of a judicial decree ordering an act or omission intended to cause death. Assisted suicide statutes immunize, under certain conditions, actions that might otherwise make them accessories to homicide. See O.R.S. §161.155 (2009). Section 127.805 of Oregon’s assisted suicide statute, O.R.S. §§127.000-127.897 (2009), authorizes an adult who is certified by a physician to be terminally ill “to make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.” Fully informed consent, verified in writing by the physician, is required. O.R.S. §§ 127.820, 127.825, 125.830 (2009).

¹³¹ FLA. STAT. § 782.04 (2007) (defining “murder”). Compare § 922.105(5)-(8) (creating an exception to the general rule defining “murder” to exclude the acts or omissions necessary to execute a death sentence).

¹³² Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic’s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827 (2003).

¹³³ See generally Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381 (2005).

¹³⁴ Compare FLA. STAT. § 922.105(8) (2007) (“In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.”); with § 782.03 (“Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, . . . and not done in a cruel or unusual manner.”). See generally Philip R. Nugent, *Pulling*

A judicial decree authorizing acts or omissions that will inevitably result in the death of an incompetent person presents equally difficult legal and judicial ethics issues.¹³⁵ Death is not only the inevitable consequence of such decrees; it is, in many cases, the *intended* result. Even though the law and many commentators draw a distinction in such cases between acts or omissions, or between direct and indirect effects, the fact remains that:

[I]n many termination of treatment cases, it is specious to say that death is unintended. That explanation makes sense in administration of pain medication that is foreseeably lethal. It is also true where the decision to terminate life support is genuinely directed to the treatment, independent of its role in keeping the patient alive But this reasoning does not apply to many decisions to cease a life-sustaining procedure. Often what the patients or the families want to end are lives so impoverished and hopeless that they are judged not worth living. Despite repeated rejection of suicide and euthanasia, judicial decisions approving the right to such terminations make clear the judges' own sympathies with this judgment. The miserable existence suffered by the patient (apart from the procedure to be ended) is often described in heart-breaking detail.¹³⁶

the Plug on the Electric Chair: The Unconstitutionality of Electrocution, 2 WM. & MARY BILL RTS. J. 185 (1993).

¹³⁵ MODEL RULES OF PROF'L CONDUCT (2006); MODEL CODE OF JUDICIAL CONDUCT (2007).

¹³⁶ Richard S. Kay, *Causing Death for Compassionate Reasons in American Law*, 54 AM. J. COMP. L. (SUPP.) 693, 714 (2006) (internal citations omitted). The Florida courts provided just such detail in *Schiavo*:

The evidence is overwhelming that Theresa is in a permanent or persistent vegetative state. It is important to understand that a persistent vegetative state is not simply a coma. She is not asleep. She has cycles of apparent wakefulness and apparent sleep without any cognition or awareness. As she breathes, she often makes moaning sounds. Theresa has severe contractures of her hands, elbows, knees, and feet. Over the span of this last decade, Theresa's brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid 1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition. Unless an act of God, a true miracle, were to recreate her brain, Theresa will always remain in an unconscious, reflexive state, totally

It is clear from an examination of the record and published opinions in the *Schiavo* case that the stated justification for the orders entered by the Probate Court was that Terri had told her husband's relatives that she would not want to be maintained in a severely incapacitated condition.¹³⁷ It is also clear that this alleged desire was the one that the Probate Court of Pinellas County Florida sought to effectuate in Terri Schiavo's case.¹³⁸ Consider the sequence of the orders entered by the court:¹³⁹

- *The decree of February 11, 2000*, authorized the guardian, Michael Schiavo, to "proceed with the discontinuance of said *artificial life support* for Theresa Marie Schiavo."¹⁴⁰ Such a decree is not, by its terms, an order authorizing acts or omissions that will inevitably result in the death of the incompetent ward. Although death may well result from the discontinuance of artificial life support, it is

dependent upon others to feed her and care for her most private needs. She could remain in this state for many years.

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

¹³⁷ See Transcript of Trial at 372, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Apr. 17, 2000) (testimony of Mary Schindler on January 25, 2000); Excerpts of Trial at 53-90, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Feb. 11, 2000) (testimony of Diane Myer on January 26, 2000, and testimony of Michael Schiavo, Scott Schiavo, and Joan Schiavo). The trial court also heard the testimony from a priest who had never met Terri, apparently in order to establish that the views attributed to Terri were consistent with Terri's personal faith and the stated position of the Catholic Church on withholding nutrition and hydration. Transcript of Trial at 178-223, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. 2000), available at http://www6.miami.edu/ethics/schiavo/doc_files/Testimony_of_Father_Gerard_Murphy.doc, at 28, 36-37 (testimony of Father Gerard Murphy: "Have you had the opportunity to meet Mr. and Mrs. Schindler? A: No. I regret that. I wish I were their pastor. Q: Have you had the opportunity to meet Theresa Schiavo in this case? A: No Q: So in this case, have you had the benefit of any of the other family's . . . A. No Q: -- thoughts on this? A: No").

¹³⁸ *Schiavo I*, 780 So. 2d at 180 ("Her statements to her friends and family about the dying process were few and they were oral. Nevertheless, those statements, along with other evidence about Theresa, gave the trial court a sufficient basis to make this decision for her.").

¹³⁹ All references to court orders are to the guardianship case: *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. 2000).

¹⁴⁰ Order of February 11, 2000, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. 2000) (emphasis added).

always *possible* that a person sustained by artificial nutrition and hydration can survive by ingesting food and water by mouth. Whether, and at what point, oral ingestion would have been possible for Terri Schiavo in late 2003 and in 2005 is a matter of some dispute.¹⁴¹

- *The decree dated September 17, 2003*, by contrast, directed that the guardian, Michael Schiavo, “shall cause the *removal of the nutrition and hydration tube* from the Ward, Theresa Marie Schiavo.”¹⁴² That particular tube was removed pursuant to the court’s order.¹⁴³ In accordance with the Executive Order authorized by “Terri’s Law,” another tube was inserted later. The Governor’s action precipitated the litigation in *Schiavo v. Bush*.
- *The final decree issued by Judge Greer on February 25, 2005*, directed “that the guardian, Michael Schiavo, shall cause the *removal of nutrition and hydration* from the

¹⁴¹ The autopsy takes the position that oral nutrition and hydration would have been impossible given the condition of Terri’s throat musculature at the time of her death from dehydration. THOGMARTIN, *supra* note 4, at 7, Question #3. The family, by contrast, argues that, with proper rehabilitation and training, Terri could have been taught to swallow, and there were indications in the medical records that she had, in the early 1990s, both taken liquids and responded on one occasion to a question.

In this regard, the Medical Examiner and the family are talking past each other. The Medical Examiner’s Report describes only the condition of the body after death and draws a careful distinction between a medical diagnosis and a *post-mortem* examination. The family’s position, by contrast, focuses on their longstanding argument that the failure to provide rehabilitation services after the diagnosis of PVS was medical neglect. This argument may well be supported by advances in rehabilitation medicine and the scientific community’s increasing awareness that the neuroplasticity of the brain makes it possible to regain physical and mental functions that were once thought to be irreversibly lost due to trauma or disease. See, e.g., SHARON BEGLEY, TRAIN YOUR MIND, CHANGE YOUR BRAIN: HOW A NEW SCIENCE REVEALS OUR EXTRAORDINARY POTENTIAL TO TRANSFORM OURSELVES (Ballantine Books, 2006); and JEFFREY M. SCHWARTZ & SHARON BEGLEY, THE MIND AND THE BRAIN: NEUROPLASTICITY AND THE POWER OF MENTAL FORCE (Harper Collins 2002).

¹⁴² Order of September 17, 2003, *In re* Guardianship of Schiavo, No. 90-2908-GD-003 (Fla. Cir. Ct. Sept. 17, 2003) (emphasis added).

¹⁴³ See Fla. Exec. Order No. 03-201 (Oct. 21, 2003) (noting that “the action of withholding or withdrawing nutrition or hydration from a patient in a permanent vegetative state has already occurred.”), available at <http://news.findlaw.com/hdocs/docs/schiavo/flagovexord03201.html>.

ward, Theresa Schiavo.”¹⁴⁴ This order was unquestionably designed to ensure that Terri Schiavo’s life would end—a point underscored by Judge Greer’s ruling on the “Emergency Expedited Motion to Provide Theresa Schiavo with Food and Water by Natural Means” filed on February 28, 2005, by Terri’s parents, Robert and Mary Schindler.¹⁴⁵ In that motion, Terri’s parents asked that they be permitted to provide food and water to their daughter by mouth.¹⁴⁶ Judge Greer denied the motion on March 8, 2005, because, in his view, their request was the medical equivalent of “asking for an experimental procedure.”¹⁴⁷ A police guard was then posted outside Terri’s room in order to ensure that no fluids were provided.¹⁴⁸

Because section 782.03 of the Florida Statutes excuses only acts taken “by lawful means with usual ordinary caution, and without any unlawful intent, . . . and not done in a cruel or unusual manner[.]” the timing and manner of death is relevant. In Terri Schiavo’s case, “[p]ostmortem findings, including the state of the body and laboratory testing, show that she died of marked dehydration (a direct complication of the electrolyte disturbances brought about by the lack of hydration).”¹⁴⁹ Were the patient capable of experiencing the pain and mental anguish that would attend such a horrible demise, there would be no

¹⁴⁴ Order of February 25, 2005, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Feb. 25, 2005) (emphasis added). *But see infra* text accompanying note 149.

¹⁴⁵ Order of March 8, 2005, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Mar. 8, 2005).

¹⁴⁶ Emergency Expedited Motion to Provide Theresa Schiavo with Food and Water by Natural Means, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Feb. 28, 2005).

¹⁴⁷ Order of March 8, 2005, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. March 8, 2005).

¹⁴⁸ See Anne Lindenberg, *In Schiavo Case, Police Rely on Professionalism*, ST. PETERSBURG TIMES, Apr. 11, 2005, at Largo Times 3.

¹⁴⁹ THOGMARTIN, *supra* note 4, at 39, p. 8, Question 7 (“By what mechanism did Theresa Schiavo die?”). Because the Medical Examiner could not determine the cause of the “severe anoxic brain injury . . . with reasonable medical certainty[, the] manner of death will therefore be certified as undetermined.”); *id.* at 39, p. 9, Question 8 (“What was the cause and manner of death?”).

doubt that utilizing such a method for ending the person's life would be "cruel and unusual"—if not barbaric. Theresa Schiavo's *actual* cognitive abilities at the time of her death were thus a critically important—but unknown—fact.¹⁵⁰

C. Comparing the Substantive and Procedural Requirements in Capital Punishment and Disputed Withdrawal of Treatment Cases

In *Florida v. Davis*,¹⁵¹ the Florida Supreme Court made the following statement concerning the unique nature of cases in which a judicial decree will result in death:

As the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind from any other punishment imposed under our system of criminal justice."¹⁵² We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen."¹⁵³

Terri Schiavo was not dead when these orders were entered. She was incapacitated and uniquely vulnerable, but also entitled as a matter of Florida constitutional law to have a surrogate exercise her right to decide whether to continue further nutrition and hydration.¹⁵⁴ Florida lawmakers responded to the problems created by the concept of "substituted judgment" by creating a conditional immunity for those involved in the inquiry. As long as health care facilities, providers, surrogates, and proxies follow the procedures prescribed in Chapter 765 of the Florida Statutes, and there is a finding, based on clear and convincing evidence, that the incapacitated person had given some indication that he or she would have refused life-sustaining treatment under the circumstances, the

¹⁵⁰ *Id.* at 39, p. 8, Questions 5 ("Was Mrs. Schiavo in a persistent vegetative state?") and 6 ("What diagnoses can be made in regards to the brain of Mrs. Schiavo?").

¹⁵¹ *Florida v. Davis*, 872 So. 2d 250, 254 (Fla. 2004).

¹⁵² *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)). Also in support of this proposition, the court cited *Florida v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (stating that because "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation . . . , the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.").

¹⁵³ *Davis*, 872 So. 2d at 255 (quoting *Sheppard & White, P.A. v. Jacksonville*, 827 So. 2d 925, 932 (Fla. 2002)).

¹⁵⁴ *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

surrogate may act.¹⁵⁵ That immunity, however, is expressly conditioned on two factors. The first is compliance with specific due process requirements. The second is the development of factual findings concerning the incapacitated person's physical, mental, or and cognitive condition.

Careful examination of the procedural requirements in capital cases and disputed withdrawal of treatment cases leaves little doubt that Florida law treats all cases in which judges are asked to authorize actions or omissions that would otherwise be subject to prosecution under the laws governing homicide as "death cases."¹⁵⁶ There are, however, important differences.

In a capital punishment case, the defendant is usually competent to stand trial and can participate in the defense of his or her case. There is an extensive body of constitutional and statutory law that mandates "effective assistance of counsel," and a vocal—and growing—group of individuals and organizations who are willing and able to delay execution of a death sentence for years in order to ensure that the trial was conducted fairly and that the court's findings of fact are *objectively* verifiable (*i.e.*, that the defendant is actually guilty).¹⁵⁷

¹⁵⁵ FLA. STAT. § 765.109 (2007) (discussing immunity from liability).

¹⁵⁶ Section 765.401(3) of the Florida Statutes requires that substituted judgment proceedings comply with section 765.205, which defines the powers of the surrogate decision-maker, and section 765.305, which deals with procedure where there is no advance directive. Both statutes contemplate compliance with Chapter 744 (governing guardians and their powers), as well as the possibility that life-sustaining treatment can be withdrawn, even in the absence of evidence concerning the patient's wishes, in cases where the patient is in a persistent vegetative state. See FLA. STAT. § 765.404 (2007).

¹⁵⁷ The Innocence Project is an excellent and inspirational example of an organization that seeks to ensure that individuals are not wrongly convicted. It was founded in 1992, by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University, to assist prisoners who could be proven innocent through DNA testing. This path-breaking, nonprofit legal clinic's efforts have now been duplicated at law schools throughout the country. Its website accurately observes that the facts and procedural issues of each case are unique, but that examination of the cases in which mistakes have been found show that there are a number of common issues: "[1] Unreliable or Limited Science[; 2] False Confessions[; 3] Forensic Science Fraud or Misconduct[; 4] Government Misconduct[; 5] Informants or Snitches[; and 6] Bad Lawyering." See The Innocence Project, *The Causes of Wrongful Conviction*, <http://www.innocenceproject.org/understand> (last accessed, Mar. 5, 2009).

The *Schiavo* case proves that precisely the opposite can be true in a disputed “substituted judgment” case. The client is under a severe “disability” as that term is understood in both civil rights law and legal ethics. The disability that gives rise to the claim that treatment should not continue makes it impossible for the incapacitated person to participate in a trial or to indicate his or her present preferences in any way. Although Florida prescribed almost exactly the same procedural safeguards for such cases as it does in capital punishment cases,¹⁵⁸ the courts were willing either to dispense with them, or to view them as impediments standing in the way of effectuating the court’s decision that the incapacitated wards would have chosen to refuse life-sustaining care under the circumstances.¹⁵⁹

¹⁵⁸ In section 744.1012 of the Florida Statutes, the Florida Legislature expressed its intent as follows:

Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of [the Guardianship Statute] to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.

Florida Statutes section 765.102(1) states the legislative intent of Florida’s Advance Directive Statutes:

(1) The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

The Florida Declaration of Rights provides explicit protection for the “Rights of Accused and Victims.” FLA. CONST. art. I, § 16. Section 17 provides detailed guidance concerning the legality of the death penalty and the manner in which it is to be executed. FLA. CONST. art. I, § 17 (“Excessive Punishments”).

¹⁵⁹ Among other omissions, Terri Schiavo was never represented by counsel whose independent professional judgment was not compromised by either real or apparent conflicts with the interests of her husband and guardian, Michael Schiavo, or those of the Schindler family, who sought to have Mr. Schiavo removed as guardian. *See, e.g., In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Sept. 3, 1999) (order authorizing payment of interim cost advance to attorney); *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Mar. 11, 1998) (order authorizing payment of cost retainer to attorney instituting action regarding withdrawal of life support systems); *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. May 14, 1997) (order

When Terri's parents and pro-life activists stepped forward to question the procedural fairness of the trial, they were described not as zealous guardians of the right to a fair trial and the rights of the accused, but as "those who wanted to keep [Terri] alive indefinitely—including her elderly parents" and "politicized religious forces [who] were responsible for the international attention garnered by Mrs. Schiavo's plight and the escalation of her cause to a culture war flashpoint."¹⁶⁰ And when Terri's family asked that state-of-the-art diagnostics, such as functional magnetic resonance imaging (fMRI), be used to test her actual, as opposed to assumed, cognitive state, the court refused the request.¹⁶¹

V. DISTINGUISHING BETWEEN THE FACTS OF A CASE AND THE "RECORD OF ITS PROCEEDINGS"

I joined the Terri Schiavo case as appellate co-counsel in the Florida Supreme Court¹⁶² for Florida Governor Jeb Bush in early August, 2004. Later that month, after having immersed myself in the trial record and all of the briefs filed to that point, I argued the case for the constitutionality of "Terri's Law"¹⁶³ and the Governor's October 2003 Executive Order restoring the nutrition and hydration tube sustaining Terri Schiavo's life¹⁶⁴

authorizing guardian to employ and pay an attorney).

¹⁶⁰ Joshua E. Perry, *Biblical Bio-Politics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553 (2006).

¹⁶¹ See Order Denying FLA. R. CIV. P. 1.540(b)(5) Motion for Relief from Judgment Pending Contemporary Medical-Psychiatric-Rehabilitative Evaluation of Theresa Marie Schiavo of March 9, 2005, *In re Guardianship of Schiavo*, No. 90-2908-GD-003 (Fla. Cir. Ct. Mar. 9, 2005) (order authorizing guardian to employ and pay an attorney). As used in the text, the term "state of the art diagnostics" should not be equated with functional magnetic resonance imaging (fMRI). In November, 1990, approximately nine months after she collapsed, surgeons implanted a nine-centimeter-long neurological thalamic stimulator wire in Terri Schiavo's head. It extended from the right parietal bone and terminated in the right thalamus.

¹⁶² The case was argued in the Florida Supreme Court on August 31, 2004. The transcript of the oral argument is available at <http://www.wfsu.org/gavel2gavel/transcript/04-925.htm>. The video is available at <http://www.wfsu.org/gavel2gavel/archives/04-08.html>.

¹⁶³ 2003 Fla. Laws 418, available at http://election.dos.state.fl.us/laws/03laws/ch_2003-418.pdf.

¹⁶⁴ Fla. Exec. Order No. 03-201 (Oct. 21, 2003), available at

after Judge Greer's September 17, 2003, order that it be withdrawn.¹⁶⁵ From that review of the record, it became clear to me that the *Schiavo* case had all of the characteristics of a problematic death penalty case: serious procedural errors, ineffective assistance from her guardian, no assistance of counsel, and a judge who had overstepped the proper boundaries of his judicial role. Whatever the actual facts were in the *Schiavo* case, neither I nor an appellate court, whose review would be limited to the trial court's record, could ever know them from that source. It is my contention that the record in the case was developed in a seriously flawed judicial proceeding.

Throughout the later proceedings, including the federal *habeas corpus* and civil rights litigation that occurred in early 2005 and the flurry of legislative activity in Congress on legislation for the "[r]elief of the parents of Theresa Marie Schiavo[,]"¹⁶⁶ it was clear that the Schindler family was litigating against a "conventional wisdom" rooted in attitudes about the "right to die." In *Schiavo*, it took the form of a series of presumptions about disputed facts, including:

- (i) *Terri's condition*. Michael Schiavo, Terri's husband, took inconsistent positions concerning Terri's condition. During the medical malpractice case filed against her primary care physician and gynecologist,¹⁶⁷ Mr. Schiavo testified that "she does feel pain"¹⁶⁸ and would, on

<http://news.findlaw.com/hdocs/docs/schiavo/flagovexord03201.html>.

¹⁶⁵ See *supra* text accompanying note 142 and accompanying text.

¹⁶⁶ Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). The original draft of the legislation was an amendment to the federal *habeas corpus* statute, 28 U.S.C. §2241 (2007). That amendment would have made it clear that persons enmeshed in disputed guardianship proceedings can be considered a "person in custody." As finally adopted, Public Law 109-3 granted specific subject matter jurisdiction to the United States District Court for the Middle District of Florida:

to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Pub. L. No. 109-3, § 1, 119 Stat. 15 (2005) (emphasis added).

¹⁶⁷ See text at notes 24-25.

¹⁶⁸ Direct testimony of Michael Schiavo, Medical Malpractice Case, *supra*, note 25, at p. 17, lines 15-19:

occasion, swallow.¹⁶⁹ By the time he had filed the petition to withhold nutrition and hydration, Michael Schiavo had changed his view. “Terri was beyond any meaningful rescue” after suffering a massive brain injury in 1990, and “she never had any hope of recovery.”¹⁷⁰ The medical record, however, contained some evidence of cognitive function, including a reference to a situation in which Terri had responded verbally to a question posed by a physical therapist.¹⁷¹

- (ii) *The rejection of neuroplasticity.* We will never know for certain whether the cessation of rehabilitation harmed Terri Schiavo’s chances of recovery, but recent advances in neuroscience support her parents’ claim that aggressive rehabilitation would have been helpful. These advances also support the contention that the condition of Terri’s brain at death was attributable, at least in part, to lack of stimulation, rather than the initial injury.¹⁷²

A. [A]nd I usually do a little bit of range of motion with her

Q. And while you're doing that, do you talk to her?

A. Yes, I am talking to her right now telling her it's okay

Q. She doesn't like it very much?

A. No, she doesn't. She does feel pain.

Id. at 23, lines 8-12:

Q. Does she express discomfort [during physical therapy]?

A. Yes. Yes, she does.

Q. How does she do that?

A. She'll moan and groan.

¹⁶⁹ *Id.* at 20, lines 14-19.

¹⁷⁰ Michael Shelden, *Her Soul Had Gone, Her Body Was Ready*, THE TELEGRAPH ONLINE, Oct. 30, 2006 (discussing an interview with Michael Schiavo).

¹⁷¹ E-mail message from Patricia Campbell Andersen, counsel for the Schindler family during the hearings, to Robert A. Destro, Aug. 25, 2004 (on file with the author): “MediPlex Rehab Center in Bradenton, FL in January, 1991. Discharged in July, 1991. While there, Terri said “no” and “stop” during vigorous physical therapy”

¹⁷² See Letter from Stephen J. Nelson, Chief Medical Examiner, 10th Judicial Circuit of Florida, to Jon R. Thogmartin, District 6 Medical Examiner 9 (June 8, 2005) (Neuropathology Report) in THOGMARTIN, *supra* note 4 at 20 (“Neuropathologic examination alone of the decedent’s brain – or any brain, for that matter – cannot prove or disprove a diagnosis of persistent vegetative state or minimally conscious state.”).

- Both human and animal studies have shown that “the primary motor cortex (M1) can reorganise after a focal vascular lesion if there is motor skill retraining. In animals not trained after a stroke, there is a further reduction in the size of the hand representation in M1.”¹⁷³
- (iii) *Lack of medical and neuroscientific understanding of the minimally conscious state.* At the time the *Schiavo* case was tried in the guardianship court, it was widely assumed that the brain, once injured, could not recover. Today, there is a far more extensive literature on this subject, and a far greater understanding of the organization and functioning of the brain. At the time of the *habeas corpus* proceeding in February 2005, this literature was available, and neuroplasticity was “generally accepted” in the scientific community. It is unclear why the courts rejected the family’s pleas that experts be permitted to utilize appropriate, state-of-the-art, diagnostic imaging to get an accurate picture of Terri’s brain functions, but it is safe to assume from the “heart-breaking detail” and empathy expressed by the judges in the various proceedings in early 2005 that, like Michael, they had concluded that Terri’s life was “so impoverished and hopeless that [it was] judged not worth living.”¹⁷⁴

¹⁷³ R.M. Bracewell, Editorial Commentary, *Neuroplasticity and Rehabilitation, Stroke: Neuroplasticity and Recent Approaches to Rehabilitation*, 74 JOURNAL OF NEUROLOGY NEUROSURGERY & PSYCHIATRY 1465 (2003).

¹⁷⁴ Richard S. Kay, *Causing Death for Compassionate Reasons in American Law*, 54 AM. J. COMP. L. (SUPP.) 693, 714 (2006) (internal citations omitted). The Florida courts provided just such detail in *Schiavo I*, stating as follows:

The evidence is overwhelming that Theresa is in a permanent or persistent vegetative state. It is important to understand that a persistent vegetative state is not simply a coma. She is not asleep. She has cycles of apparent wakefulness and apparent sleep without any cognition or awareness. As she breathes, she often makes moaning sounds. Theresa has severe contractures of her hands, elbows, knees, and feet.

Over the span of this last decade, Theresa’s brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid 1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition. Unless an act of God, a true

- (iv) *The unfairness of her trial.* Both the federal courts and many post-mortem commentaries on the *Schiavo* case focused on the “proceedings” in the guardianship case. One writer even went so far as to state that:

A thorough examination of the Terri Schiavo guardianship proceedings reveals that the judicial process, both substantively and procedurally, achieved a decision that was consistent with the specific facts of Mrs. Schiavo’s case and Florida’s established legal framework . . . This conclusion is important because it challenges those claims of the Religious Right that attempted to undermine the credibility and legitimacy of the Florida judiciary.¹⁷⁵

Each of these points assumes a) that the “specific facts of Mrs. Schiavo’s case” were fully litigated; b) that the *conduct* of the trial was consistent with “Florida’s established legal framework,” and c) that a *habeas corpus* attack on the proceedings of a guardianship court was little more than an “attempt[] . . . to undermine the credibility and legitimacy of the Florida judiciary.”¹⁷⁶ The goal of the Schindler family, by contrast, was to raise enough doubts about the fairness of the proceeding to make a plausible case for a new trial.¹⁷⁷ This would have been the outcome had a federal court granted the family’s petition for a writ of *habeas corpus*¹⁷⁸ or, in the alternative, granted the new trial authorized by Congress in Public Law 109-3.¹⁷⁹

miracle, were to recreate her brain, Theresa will always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs. She could remain in this state for many years.

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

¹⁷⁵ Perry, *supra* note 160, at 555.

¹⁷⁶ Perry, *supra* note 160, at 555 (assuming that *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005), was correctly decided).

¹⁷⁷ See Petition for *Certiorari*, *Bush v. Schiavo*, 543 U.S. 1121 (2005) (No. 04-757), 2004 WL 2790640.

¹⁷⁸ *Schiavo v. Greer*, No. 8:05-CV-522-T-30TGW, 2005 WL 754121 (M.D. Fla. Mar 18, 2005), *vacated by Schiavo ex rel Schiavo v. Greer*, No. 8:05-CV-522-T-30TGW, 2005 WL 2240351 (M.D. Fla. Mar. 21, 2005).

¹⁷⁹ Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15

VI. "THINKING LIKE A (GOOD) LAWYER": THE RULES OF PROFESSIONAL CONDUCT AND THE LAWYER'S OBLIGATION TO INVESTIGATE THE FACTUAL AND LEGAL PREDICATES ON WHICH THE "CONVENTIONAL WISDOM" IS BASED

A number of commentators have argued, in the words of Joshua Perry, for example, that criticism of the Florida courts was "imprecise and irresponsible because it fail[ed] to distinguish between the quality of the judicial process and the outcome of the judicial process."¹⁸⁰

This is a rather strange criticism. The professional responsibility (or lack thereof) of any lawyer who serves as advocate or advisor (or both) in any civil or criminal case, including one as high-profile as *Schiavo*, is—and, ethically, must be—the starting point for an analysis of the lawyer's behavior.

A. *The Duty to Make Only Good-Faith Claims*

The first duty of the lawyer is to make an *independent, professional* judgment¹⁸¹ concerning the merits of the case. This is so because Rule 3.1 of the American Bar Association's Model Rules of Professional Conduct provides that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good

(2005). This Congressional Act granted specific subject matter jurisdiction to the United States District Court for the Middle District of Florida:

to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

Id. at § 1, 119 Stat. 15.

¹⁸⁰ See, e.g., Perry, *supra* note 160, at 620; see also *id.* at 589-90 nn.160 & 163 (recounting allegedly inflammatory comments by counsel for the Schindler family and Governor Bush).

¹⁸¹ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2006) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.¹⁸²

For many readers, and indeed for many of the judges assigned to hear Terri's case, the claim that Terri did not get a fair trial is somewhat counter-intuitive. The case did, after all, take nearly fifteen years to work its way through the courts. Nevertheless, the fact remains that *none* of the courts that actually considered the case were willing to consider the fair trial issue. Consider the following extract from the transcript of the oral argument in *Bush v. Schiavo*:

CHIEF JUSTICE: Good morning, ladies and gentlemen, and welcome to the Florida Supreme Court. The first case this morning is Bush versus Schiavo. Are the parties ready? . . .

[MR DESTRO:] Yes, Your Honor

[CHIEF JUSTICE:] Before you get into your argument, the court would appreciate it if . . . you would address the separation of powers, first, with the privacy argument, and with whatever free time you have, you can argue the other issues.

[MR DESTRO:] Thank you, Your Honor. May it please the Court. Terri Schiavo did not have [a fair trial or the benefit of] an independent [guardian *ad litem* represented by counsel].

JUSTICE WELLS: Let's try to get into the argument on separation of powers¹⁸³

¹⁸² MODEL RULES OF PROF'L CONDUCT R. 3.1. The two states in which I am admitted to the Bar, California and Ohio, have similar rules, as does the Florida State Bar, whose rules govern in all legal proceedings before the courts of the State of Florida.

¹⁸³ Transcript of Oral Argument, *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005). The transcript is available at <http://www.wfsu.org/gavel2gavel/transcript/04-925.htm>. The bracketed material was omitted from the transcript. Obvious misspellings of names have been corrected without

From my perspective as appellate counsel, this was an extraordinary (albeit expected) exchange. Lack of procedural due process during the trial was one of the only plausible legal theories on which a claim for relief could have been granted. Once the guardianship court had made its initial finding that Terri was in a “persistent vegetative state” and that she would not want to be maintained in that condition, the only way to attack those findings of fact was to attack the process by which they were found. Viewed from that perspective, “Terri’s Law” and the Governor’s Executive Order are similar to the non-judicial clemency proceedings that serve as the last hope of condemned criminals seeking to avoid the death penalty.

B. The Lawyer’s Duty to a Client with Diminished Capacity

Representing an incompetent person is, even in the “best” of times, a difficult proposition. Rule 1.14(a) of the American Bar Association’s Model Rules of Professional Conduct recognizes this problem when it advises that “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client[,]” even in cases where “a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason.”

In the case of an incompetent, laws governing guardianship, such as Florida Statutes Chapter 744, are the foundation of the lawyer’s duty to seek the appointment of a guardian. Rule 1.14(b) provides:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.

making note of the change.

Once that step is taken, the ethical terrain becomes treacherous indeed.

C. Who Is the Client? The Incompetent Ward or the Guardian?

Perhaps the most basic question in all of legal ethics is: *Who is the client?* In the case of an incompetent ward, the answer is clear: the client is the *ward*, not the guardian.¹⁸⁴ Because the guardian is competent and usually a close relation of the ward, the attorney must take great care to distinguish their respective interests.¹⁸⁵

D. May an Attorney Represent a Guardian Who Has a Concurrent Conflict of Interest with the Interests of His or Her Ward?

The answer to this question is an unequivocal “no.”¹⁸⁶ In order to understand its significance, however, it is necessary to describe the interests of the parties in the *Schiavo* case. Terri Schiavo was the incapacitated ward, and she was supposed to be the focus of the guardian’s lawyer’s duty of loyalty. In *Schiavo I*,¹⁸⁷ decided in 2001, Florida’s Second District Court of Appeal had held that the difference of opinion concerning treatment “and the inheritance issue created the appearance of conflict” of interest between Michael, the guardian, and Terri, his ward. In early 2005, Terri’s parents renewed this charge in their “Second Amended Petition to Remove Guardian,” alleging that Michael Schiavo, her husband and guardian, effectively controlled Terri’s representation, that he was represented by counsel throughout the proceeding, but that she was not, and that he had personal

¹⁸⁴ See FLA. STAT. § 765.105(1) (2007) (providing for expedited judicial review when “[t]he surrogate or proxy’s decision is not in accord with the patient’s known desires or the provisions of this chapter”); § 744.3021(3) (allowing for the appointment of “an attorney to represent the interests of a minor at the hearing on the petition for appointment of a guardian.”).

¹⁸⁵ MODEL RULES OF PROF’L CONDUCT R. 1.6, 1.7(f) (2006) (describing conflicts of interest). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §24 (2000).

¹⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.8, 1.14 (2006).

¹⁸⁷ 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001).

and financial interests adverse to those of Terri.¹⁸⁸

A 2005 filing in the Supreme Court of the United States, *Nault v. Mainor*,¹⁸⁹ presented the following question for review: "Whether a court violates due process when it appoints a guardian *ad litem* who has a clear conflict of interest and when it subsequently approves a settlement without considering the conflict of interest between the guardian and the incompetent person."¹⁹⁰ It is somewhat surprising that there is a difference of opinion among the courts that have considered the due process implications of a conflict of interest between a guardian and his or her ward. In Delaware, Hawaii, Mississippi, and Washington State, the absence of an adequate guardian is a denial of due process; but in Alabama, Florida, and Minnesota it is not.¹⁹¹ The Rules of Professional Conduct, however, leave no doubt as to the answer to this question. Rules 1.7(a) and 1.8(g) prohibit representation in any case involving a "concurrent conflict of interest."¹⁹² Rule 1.7(a) provides:

¹⁸⁸ Second Amended Petition to Remove Guardian, *In re* Guardianship of Schiavo, No. 90-2908-GD-003, at 37-50 (Fla. Cir. Ct. 2000).

¹⁸⁹ *Mainor v. Nault*, 101 P.3d 308 (Nev. 2004), *cert. denied*, 546 U.S. 873 (2005). See also Petition for Writ of *Certiorari* to the Supreme Court of Nevada, *Nault v. Mainor*, 546 U.S. 873 (2005) (No. 05-82), 2005 WL 1660295.

¹⁹⁰ Petition for Writ of *Certiorari* to the Supreme Court of Nevada, *Nault v. Mainor*, 546 U.S. 873 (2005) (No. 05-82), 2005 WL 1660295, at *i.

¹⁹¹ Compare, e.g., *Wilmington Medical Center, Inc. v. Severns*, 433 A.2d 1047, 1049 (Del. 1981); *Leslie v. Estate of Tavares*, 984 P.2d 1220, 1231 (Haw. 1999); *In re* R.D. and B.D., 658 So. 2d 1378, 1383 (Miss. 1995); and *Cochran v. Estrada*, No. 46695-O-I, 2001 Wash. App. LEXIS 364, at *4 (Feb. 26, 2001); with, e.g., *In re* E.F., 639 So. 2d 639, 644 (Fla. Dist. Ct. App. 1994) (concluding due process does not require appointment of a guardian *ad litem*); *In re* Frederickson, 388 N.W.2d 717, 721 (Minn. 1986) (finding no due process violation from the failure to appoint a guardian); and *Leigh v. Aiken*, 311 So. 2d 444, 446 (Ala. Civ. App. 1975) (holding due process does not require appointment of a guardian *ad litem*). See also *In re* Pattison, 121 P.3d 423 (Kan. 2005) (suspending lawyer who served as guardian *ad litem* for children from the practice of law because he had developed a romantic relationship with their mother); and *In re* Guardianship of Walther, No. 20095, 2004 WL 1454464 (Ohio Ct. App. June 25, 2004) (removing attorney as guardian of the ward's estate because he represented the ward's son, who was serving as the guardian of the ward's person, and took actions on the son's behalf that were inconsistent with his duty of loyalty to the ward's estate).

¹⁹² MODEL RULES OF PROF'L CONDUCT R. 1.7 and 1.8 (2006).

(a) Except as provided in paragraph (b),¹⁹³ a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.8(g) deals directly with the "Question Presented" in *Nault v. Mainor*,¹⁹⁴ and would not permit a lawyer to represent both the guardian and the ward if there is any sort of conflict of interest between them.¹⁹⁵

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.¹⁹⁶

¹⁹³ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2006). Rule 1.7(b) provides:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Id.

¹⁹⁴ See *supra* text accompanying note 190.

¹⁹⁵ *Accord Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007) (finding attorney may serve as guardian *ad litem* and lawyer if there is no conflict of interest).

¹⁹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.8 (2006). *Accord In re Black*, 883 So. 2d 956 (La. 2004) (disbarring attorney for conflict between his own interests and those of two vulnerable clients).

E. Does Florida Statutory Law Prohibit Conflicts of Interest Between Guardians and Wards Even If Florida Courts Refuse To Hold As a Matter of Florida Constitutional Law That a Conflict of Interest Between Guardian and Ward Creates a Due Process Violation?

Notwithstanding the Florida courts' willingness to permit conflicts of interest between guardians and wards, and, as we shall see, conflicts of duty between judges and litigants, the Florida Legislature has expressly forbidden such conflicts:

(b) No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family, and serves without compensation

(3) Disqualified persons. — No person who has been convicted of a felony or who, from any incapacity or illness, is incapable of discharging the duties of a guardian, or who is otherwise unsuitable to perform the duties of a guardian, shall be appointed to act as guardian *The court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.*¹⁹⁷

VII. APPLYING THE RULES: CAN A "COLORABLE" CASE BE MADE THAT TERRI SCHIAVO WAS DENIED A FAIR TRIAL IN THE "SUBSTITUTED JUDGMENT" CASE IN WHICH THE NATURE OF HER CONDITION AND HER INTENT TO REFUSE TREATMENT WERE LITIGATED?

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process,"¹⁹⁸ and that the adversarial nature of common law trials requires not only that the proceeding be fair, but also that "justice must [also] satisfy the *appearance* of justice."¹⁹⁹

¹⁹⁷ FLA. STAT. § 744.309(1)(b), (3) (2007) (emphasis added).

¹⁹⁸ *In re Murchison*, 349 U.S. 133, 136 (1955).

¹⁹⁹ *Offutt v. United States*, 348 U.S. 11, 14 (1954) (emphasis added).

In civil or criminal cases involving severely incapacitated individuals like Terri Schiavo, the law, the rules of legal ethics, and simple respect for the equal rights and human dignity of the individual require that all of the lawyers and judges involved in the proceeding satisfy themselves that there is no bias on the basis of "disability."²⁰⁰ It should also be apparent by this point that any breach of ethics in the decision-making *process* will cast doubt on the effectiveness of the representation, the reliability of the fact-finding process, and the integrity of the judicial proceeding as a whole.

Florida courts have held that Florida's explicit right to privacy²⁰¹ guarantees the right of both competent and incompetent patients to make fully informed decisions to refuse medical treatments, including the assisted provision of food and water.²⁰² If the family members agree about the incompetent patient's wishes, and there is no dissent, the decision to discontinue artificial life support is a private medical decision that needs no court oversight.²⁰³ If there are questions about the oral instructions of the incapacitated person, however, or if an interested party disagrees with the decision, "the surrogate or proxy may choose to present the question to the court for resolution" or "interested parties may challenge the decision of the proxy or surrogate."²⁰⁴ When a dispute arose between Michael Schiavo and Terri's parents over cessation of treatment, Robert and Mary Schindler, acting on behalf of their daughter, presented the question to Judge Greer for review pursuant to Florida Law.²⁰⁵

A guardianship trial that contemplates an order to withhold or withdraw life-sustaining treatment will necessarily consider

²⁰⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2006); MODEL CODE OF JUDICIAL CONDUCT Canon 2(B)(5), (6) (2006) (requiring special attention to elimination of bias on, among other grounds, "disability.").

²⁰¹ FLA. CONST. art. I, § 23. See also Code of Conduct of the Bar of England and Wales, 204, 305.1 (Bar Council 2004).

²⁰² *In re* Guardianship of Browning, 568 So. 2d 4 (Fla.1990); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980) (discussing rights of competent patients).

²⁰³ FLA. STAT. §§ 765.205, 765.305, 765.306, & 765.401 (2007).

²⁰⁴ *In re* Guardianship of Browning, 568 So. 2d 4, 16 (Fla. 1990).

²⁰⁵ Fla. Stat. § 765.401 (2007).

the evidence concerning the patient's condition, as well as evidence about the patient's attitudes about life and death, her beliefs, aspirations, relationships, and fears. Effective representation necessarily includes careful fact investigation, presentation of credible witnesses, active cross-examination, and presentation of direct medical evidence. Without it, the incompetent person's right to privacy can easily fall prey to imbalances in the relative experience, knowledge, or time commitment of the counsel who appear in the case.

Because of the nature of the conflicting interests involved when a family splits into warring camps in a contested proceeding over the termination of life-sustaining treatment, there are only two real ways to understand the dangers that ineffective assistance of counsel can pose to the interests of the incompetent ward. The first is to consult the voluminous case law on "ineffective assistance of counsel" that has arisen in the context of criminal law and procedure.²⁰⁶ The other is to determine whether, and to what extent, it is possible under the facts of the specific case to make a colorable assertion that there is, in fact, a conflict of interest between the incompetent ward and those who purport to represent their interests.

An incompetent person is, by definition, incapable of contributing *in any way* to the preparation or presentation of the case, and cannot possibly observe, or complain about, any conflict of interest. That duty falls to others, namely, the lawyers who seek to represent any party to the proceeding, or the judge who must decide the case.²⁰⁷

²⁰⁶ See generally *Right to Counsel*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 477, 496, 497 n.1558 (2008). See also Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670 (2008) (discussing ineffective assistance of counsel in cases where a client is not informed of the consequences of his or her plea); Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-Of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit*, 62 U. MIAMI L. REV. 1063 (2008).

²⁰⁷ MODEL RULES OF PROF'L CONDUCT R. 4.3, 4.4 (2006). MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (2006) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a

Terri Schiavo did not have *any* legal representation in Judge Greer's courtroom. Michael Schiavo was represented by experienced counsel in both his individual capacity and in his capacity as guardian. Various attorneys represented the Schindlers during the nearly fifteen years of litigation over this guardianship. Which of these counsel represented Terri?

The record shows that Terri was not officially noticed to appear for the proceedings, and she was not provided with a guardian *ad litem*²⁰⁸ assisted by legal counsel. She had no way to confront witnesses against her, or to present her own evidence.

Worse, the record also shows that the court considered explicit allegations of conflict of interest between and among the parties: specifically, disputes over inheritance and over the proper course of treatment.²⁰⁹ Because Terri had not left an advance directive, the first issue for the Florida courts to decide *should have been* the need for a guardian *ad litem* who would be represented by counsel.²¹⁰ Instead, the Second District Court of Appeal held that "there may be occasions when an inheritance could be a reason to question a surrogate's ability to make an objective decision."²¹¹ As noted earlier, due to disagreement between Michael Schiavo and the Schindlers, and an appearance of conflict regarding the inheritance issue, the court held that "Michael Schiavo, as the guardian of Theresa, invoked *the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker*."²¹²

pending or impending proceeding . . .").

²⁰⁸ The term "guardian ad litem" is defined in section 39.820(1) of the Florida Statutes in cases involving children as an attorney or other "responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court." FLA. STAT. § 39.820(1) (2007). *See also* FLA. PROB. R. 5.120 (2008) (providing a similar rule for probate proceedings).

²⁰⁹ *See infra* text accompanying notes 214-15.

²¹⁰ FLA. STAT. §§ 744.301, 765.105, & 765.106 (2007).

²¹¹ *In re* Guardianship of Schiavo, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001), *aff'd without opinion*, Schindler v. Schiavo *ex rel.* Schiavo, 789 So. 2d 348 (Fla. 2001) (emphasis added).

²¹² *Id.* (emphasis added).

The importance of the italicized words above is not immediately apparent, so a bit of “unpacking” is in order.²¹³ Both the Probate Court and the District Court of Appeal agreed that *neither* Michael Schiavo *nor* the Schindlers could serve as Terri’s surrogate because both stood to inherit from her estate, *and* there was a conflict between them regarding, among other things, the utility of rehabilitation, the quality of medical care, and Terri’s attitudes toward cessation of life-sustaining treatment.²¹⁴ The Court of Appeal did, however, approve Michael’s request as guardian *on Terri’s behalf* “to allow the trial court to serve as the surrogate decision-maker.”²¹⁵ This made the problem worse, not only for the Schindlers, who objected strenuously, but for Terri herself.

Neither Michael nor the Schindlers could serve as Terri’s surrogate. There was no guardian *ad litem* at this point. Counsel for Michael and the Schindlers were also disqualified by virtue of their respective clients’ conflicting interests. Who, then, acted on Terri’s behalf? The record makes it clear that the Probate Court *itself* undertook the role of “surrogate decision-maker.” As “surrogate decision-maker,” Judge Greer became the *alter ego*, and legal representative, of Terri Schiavo.²¹⁶

This, I contend, was clearly improper.²¹⁷ A judge must serve as a dispassionate trier of fact, and may not participate as a representative of any party.²¹⁸ If the court undertakes such a role, the trial becomes either an advisory process or an instrument of compulsion, rather than an adversary proceeding. This is why section 744.309(b) of the Florida Statutes expressly

²¹³ A useful chart explaining the organization of the Florida court system can be found on the website of the Office of Justice Programs, U.S. Department of Justice, *State Court Organization 2004*, at 287, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf> (last visited May 3, 2009).

²¹⁴ See *supra* note 187 and accompanying text.

²¹⁵ See *supra* note 187 and accompanying text.

²¹⁶ Cf. FLA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(d)(iii) (requiring disqualification in any case in which a family member “within the third degree of relationship” to either the judge or his or her spouse has anything more than a “*de minimus* interest that could be substantially affected by the proceeding.”).

²¹⁷ See *In re T.W.*, 551 So. 2d 1186, 1190 n.3 (Fla. 1989).

²¹⁸ MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5) (2007).

prohibits such a conflict of roles.²¹⁹ When a judge serves as either the advocate or surrogate for any of the parties who have an interest in a case pending before the court, he or she is no longer serving as a judge. In *In Re TW*, the Florida Supreme Court held that:

Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality.²²⁰

For the Schindlers, the judge's conflict of interest made an already difficult case even harder to litigate. But the most serious impact of all fell upon Terri herself. She had *no* representation, legal or otherwise.

In *Sandstrom v. Butterworth*,²²¹ the United States Court of Appeals for the Eleventh Circuit (which includes Florida) recognized that an attorney's allegation that the judge has compromised his judicial independence "are among the most perplexing challenges that this Court encounters" and noted:

This habeas corpus appeal presents just such a challenge. It involves one manifestation of the tension that exists between the courts' criminal contempt power and various tenets of constitutional due process. In the case at bar, petitioner's conviction for criminal contempt stands in conflict with an important principle of due process—the right to an impartial tribunal. To uphold the state court's adjudication of contempt would necessarily and significantly intrude upon that fundamental due process value. Alternatively, to vindicate the petitioner's right to an impartial tribunal would require imposing some limitation upon courts' traditionally broad contempt authority. Under the circumstances here, however, the potential impairment of the court's power is outweighed by unfairness to the petitioner. We, therefore, resolve the instant

²¹⁹ See *supra* text accompanying note 197.

²²⁰ *In re T.W.*, 551 So. 2d at 1190 n.3.

²²¹ 738 F.2d 1200, 1201 (11th Cir. 1984).

conflict of values in favor of due process.²²²

The Florida courts apply precisely the same rule in other cases. In *Scott v. Anderson*,²²³ the First District Court of Appeal noted:

The familiar axiom "a man should not be judge of his own case" is of ancient origin, but it has apparently not yet found its way into Florida law to the extent necessary to provide distinct guidelines for deciding under what circumstances a judge must disqualify himself to adjudicate direct criminal contempt charges involving disrespect or criticism directed to that judge. Since the question is ultimately one of federal constitutional import, we must turn to, and be guided by the federal decisions.²²⁴

Because "[a]djudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights[,]"²²⁵ raising questions of bias is one of the most fundamental obligations of the first attorney to recognize the problem. But it is no easy task. The reported cases make it clear that charging the judge with bias during a trial can involve some personal risk to the attorney making the charge.

Although most lawyers and judges understand that "[t]hese are subtle matters, for they concern the ingredients of what constitutes justice,"²²⁶ it is possible that some allegations of bias will be received by the judge, or by the judge's professional peers, as "highly personal aspersions" that "strike 'at the most vulnerable and human qualities of a judge's temperament.'"²²⁷

²²² *Id.*

²²³ 405 So. 2d 228, 233 (Fla. Dist. Ct. App. 1981).

²²⁴ *Id.*

²²⁵ *Sandstrom*, 738 F.2d at 1211.

²²⁶ *Offutt v. United States*, 348 U.S. 11, 14 (1954). Writing for the majority in *Offutt*, Justice Douglas observed that: "The record discloses not a rare flareup, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner." *Id.* at 17.

²²⁷ *Mayberry v. Pennsylvania*, 400 U.S. 455, 466-67 (1971) (quoting *Bloom v. Illinois*, 391 U.S. 194 (1968), and distinguishing the case from *Ungar v. Sarafite*, 376 U.S. 575 (1964), in which comments to the judge did not rise to the level of a claim of bias).

In the reported cases cited here, the attorney's assertions of judicial bias were the basis of a contempt proceeding.

Contempt, however, is not the only personal, professional, or political risk for charging a sitting judge with bias or conflict of interest.²²⁸ The *Schiavo* case provides an excellent example of a far more subtle and insidious constraint on a lawyer's willingness to confront a popular judge on behalf of an unpopular client or cause: political, social, or professional ostracism – or discipline.²²⁹ A judge's unwillingness to make hard calls in high profile cases presents an analogous problem.²³⁰

In the *Schiavo* case, the local bench and bar were clearly invested in the "Death with Dignity" and "Judicial Independence" narratives of the case. The Clearwater Bar Association thought so highly of Judge Greer's "refus[al] to bend to the intense political assault the [*Schiavo*] case brought [upon him]" that it decided "[t]o celebrate [Judge] Greer's resolve" by creating a "George W. Greer Judicial Independence Award that would be awarded as part of its annual Law Day luncheon."²³¹ The message was not even subtle. Otherwise-legitimate assertions of judicial bias or conflict of interest in an attempt to ensure a fair trial for Terri Schiavo had been characterized by

²²⁸ See cases cited at notes 226 and 227 *supra*.

²²⁹ See generally, Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); Amy B. Letourneau, *Comment, Stropnick v. Nathanson: Choosy Massachusetts Lawyers, Choose Your Fights With Care!*, 33 NEW ENG. L. REV. 125 (1998) (citing Richard J. Cohen, *Ruling in Discrimination Case "Must Be Opposed,"* MASS. LAW. WKLY., Apr. 14, 1997, at 10, which states that criticism of the result in *Stropnick* "is an absolutely predictable result when an agency is a tool of political correctness.").

²³⁰ See James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795 (1995); R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 LOY. L.A. L. REV. 903 (1995). *Cf.*, Stephen B. Bright, John Randolph Tucker Lecture: *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases are Pending*, 29 LOY. L.A. L. REV. 815 (1995).

²³¹ Aaron Sharockman, *Lawyers Honor Schiavo Judge*, ST. PETERSBURG TIMES, May 7, 2005, at 1, 2005 WLNR 7196893.

the Clearwater Bar Association as part and parcel of an “intense political assault” on judicial independence.

The selection of the first recipient of the “George W. Greer Judicial Independence Award” also sent a message about politically-correct judging. When it selected Judge W. Douglas Baird of the Sixth Judicial Circuit Court of Pinellas County, Florida, to receive the award, the Clearwater Bar Association conveyed a message that is as ethically stunning as it was legally unwise.

A review of the record of Judge Baird’s actions in *Schiavo v. Bush*²³² shows that he took only one action in that case that merited the honor of being selected as the first recipient of the “George W. Greer Judicial Independence Award.”²³³ He entered a *summary judgment* on Michael Schiavo’s claim that “Terri’s Law” and the Governor’s Executive Order asserting protective custody of Terri Schiavo after Judge Greer’s order to remove the feeding tube had been executed were unconstitutional. Under Florida law,²³³ the entry of summary judgment can mean only one thing: “the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, *conclusively show that there is no genuine issue as to any material fact . . .*”²³⁴

This was the social and legal context in which counsel for the Schindlers moved to have Judge Greer recuse himself,²³⁵ and in which they renewed their motions to have Michael Schiavo removed as guardian.²³⁶ In both cases, the allegation that Terri

²³² *Schiavo v. Bush*, No. 03-008212-CI-20, 2003 WL 25768817 (Fla. Cir. Ct. Nov. 7, 2003) (granting summary judgment), *aff’d*, 871 So. 2d 1012 (Fla. Dist. Ct. App. 2004), *aff’d*, *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), *cert. denied*, *Bush v. Schiavo*, 543 U.S. 1121 (2005).

²³³ Fla. R. Civ. P. 1.510(c) (2009).

²³⁴ *Allenby & Associates, Inc. v. Crown "St. Vincent" Ltd.*, No. 4D08-1737, 2009 WL 1139244 (Fla. Dist. Ct. App. Apr. 29, 2009) (emphasis added).

²³⁵ The Motion to Recuse Judge Greer was filed on April 10, 2001, and it was denied. See Kathy Cerminara & Kenneth Goodman, *Key Events in the Case of Theresa Marie Schiavo*, UNIVERSITY OF MIAMI ETHICS PROGRAMS: SCHIAVO CASE RESOURCES, available at <http://www6.miami.edu/ethics/schiavo/timeline.htm> (last accessed March 5, 2009).

²³⁶ *Id.* at August 10, 2001. There were several attempts to remove Michael Schiavo as guardian. See William R. Levesque, Carrie Johnson & Anita Kumar, *Without a Ruling, the Wait Continues*, ST. PETERSBURG TIMES, Mar. 22, 2005, at 1A, available at

Schiavo and her parents were litigating before a tribunal whose process was irretrievably tainted was (and remains) supported by material facts and law that are very much in dispute.

The Florida courts, however, had made up their minds: the charges against Judge Greer and, by implication, the Florida courts themselves, were baseless. The Supreme Court of the United States addressed precisely this situation in *Mayberry v. Pennsylvania*, when it noted that “[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”²³⁷ *Mayberry* has been read by the Eleventh Circuit as not “turn[ing] on proof of actual bias, but instead [it was] centered around a ‘presumption’ of bias.”²³⁸

These facts, we argued, were sufficient to raise a colorable claim that Terri had been denied a fair trial in the original guardianship proceeding, and that she and her family were entitled to a new trial in which both her condition and her intent would be fully and fairly litigated. It should come as no surprise that we failed.²³⁹ Although Congress provided in Public Law 109-3 for a trial *de novo* in the federal court, the United States District Court for the Middle District of Florida heard no evidence. In the words of the Eleventh Circuit: “the district court considered the federal constitutional claims *de novo*” by reviewing only the “prior proceedings” in the Florida courts,

2005 WLNR 23899652.

²³⁷ *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

²³⁸ *Sandstrom v. Butterworth*, 738 F.2d 1200, 1210 (11th Cir. 1984) (citing *United States v. Meyer*, 462 F.2d 827, 842 (D.C. Cir.1972)).

²³⁹ *Schiavo ex rel Schiavo v. Greer*, No. 8:05CV522T30TGW, 2005 WL 2240351 (M.D. Fla. Mar 21, 2005) (vacating the order rejecting the application of a writ of habeas corpus on the grounds that the trial court lacked jurisdiction over the case pursuant to the *Rooker-Feldman* doctrine, and that “Petitioners had failed to satisfy 28 U.S.C. §2254’s requirement that Mrs. Schiavo was “in custody pursuant to the judgment of a State court.”). After Congress adopted Pub. L. No. 109-3, 119 Stat. 15 (2005), the United States District Court for the Middle District of Florida denied a temporary restraining order on, among other grounds, a determination that the *status quo* had changed when the feeding tube was removed pursuant to Judge Greer’s order. *Schiavo ex rel Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), *aff’d* *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005) (affirming denial of temporary restraining order on the grounds that trial court’s finding that parents had failed to demonstrate substantial case on merits of their claim was not abuse of discretion); 403 F.3d 1289 (11th Cir. 2005) (rejecting claims on the merits), *cert. denied*, 544 U.S. 957 (2005).

“and made its own independent evaluation of them.”²⁴⁰

VIII. CONCLUSION

The burden of this article was not to disprove any of the points made by either Michael Schiavo or critics of those who sought, however unsuccessfully, to defend Terri Schiavo's interests. Though my criticism of the defective process that led to the final order to withdraw nutrition and hydration might be taken to engage that question, my purpose here is far more limited. I am more than satisfied to make the point that *nobody* knows precisely what Terri Schiavo's cognitive condition was at the moment her PEG tube was withdrawn. Though I have not examined the record in the Eluana Englaro case, I strongly suspect that this datum was missing in her case as well.

Armed with this information, the analogy to a capital case is clear. All lawyers who have studied the “great writ” of *habeas corpus* should be willing to concede that proceeding seeking *habeas corpus* in a guardianship case would (or should) not need to question any of the specific findings in order to state a claim for a new trial. It need only make a showing that the process errors in the guardianship case were so serious that the record *and the proceeding itself* were tainted by a denial of due process.

Like an involuntary commitment or a capital punishment case, the discontinuation of assisted feeding constitutes a deprivation of life, liberty, and property interests. Unless one is willing to assert—contrary to emerging scientific evidence—that *all* persons in a persistent vegetative state have lost the ability to respond cognitively to a variety of stimuli, advances in science require attorneys and judges to become even more scrupulous in their attention to the preservation of procedural due process rights.²⁴¹ The incapacitated person whose life and liberty interests are being curtailed with state approval has “a right to the effective assistance of counsel at all judicial proceedings which could result in a limitation on that person's liberty.”²⁴²

²⁴⁰ *Schiavo ex rel. Schindler*, 403 F.3d at 1228.

²⁴¹ *Chalk v. Florida*, 443 So. 2d 421, 422 (Fla. Dist. Ct. App. 1934).

²⁴² *Id.*

Not surprisingly, the conventional wisdom that informs so much of the post-*Schiavo* case commentary is (once again) wrong. Terri Schiavo's case was never about "politicized religious forces" or nefarious attempts by the religious right to create a "culture war flashpoint." It was about whether a person with a traumatic brain injury could get a fair trial in a Florida court. Had she been a condemned criminal, the outcome—and the tenor of the discussion—would have been very different.

And thus, this article ends with the observation with which it began. Read together, the ethics of both law and medicine thus lead inexorably to the conclusion that the boundary between law and medicine is defined by the consistent application of a rule of reason to the facts and circumstances of each case. Because duty is our common calling, a professional responsibility (or "duty") model provides a powerful and precision-crafted lens through which to examine *any* decision, act, or omission by a legal or medical professional.

A good lawyer investigates the facts before drawing a conclusion, addressing the court or a witness, or making a legal argument. A good physician, neuroscientist, or allied health professional does precisely the same thing in the medical or research setting. And a well-informed judge insists that both professions do "right" by the patient whose welfare rests in their hands. Neither profession need worry about intrusion into the respective spheres of the other—or into the privacy rights of patients with consciousness disorders—unless there is some professional, ethical, or process lapse that creates probable cause to suspect that such a violation has taken place.

There were several such violations in the *Schiavo* case. The operative language of Public Law 109-3 confers jurisdiction on the United States District Court for the Middle District of Florida for the sole purpose of holding a trial *de novo* "[f]or the relief of the parents of Theresa Marie Schiavo." Like any trial *de novo*, its outcome would turn on the facts presented at the new trial. Like Lord Browne-Wilkinson in *Bolitho v. City and Hackney Health Authority*,²⁴³ Congress and the President were

²⁴³ *Bolitho v. City and Hackney Health Auth.*, [1998] A.C. 232 (H.L.).

not bound to hold that the parties to a state court proceeding can escape judgment for acts that were not reasonable “just because [of] evidence from a number of medical [and legal] experts who are genuinely [of the opinion] that the [defendants’ legal procedures,] treatment or diagnosis accorded with sound medical [or legal] practice”²⁴⁴ Whatever the opinion of the leading experts might have been during the fifteen-year course of the *Schiavo* litigation, advances in neuroscience now demonstrate conclusively that their opinions on which the Florida courts relied were based on incomplete, and sometimes irrelevant, diagnostic techniques.

And so, I close this article with an admonition for both legal and medical professionals. Ethics requires taking personal responsibility for one’s actions. Cases involving persons with traumatic brain injuries require that lawyers, judges, and witnesses produce a record that contains more than enough information to withstand a charge that the injured person’s condition has been clearly and accurately stated. The record must demonstrate that the attorneys understand the range of medical and scientific opinion concerning the patient’s conditions and the availability of diagnostic options tailored to that condition. In order for the case to have been fully and fairly litigated, there must be no meaningful lapses in the pleadings, discovery process, motions practice, trial, or appellate procedures and briefs.

If one can do all of that, and can prove that the actions taken are reasonable under the circumstances, there is no way in the world that *anyone* could make a plausible claim that the patient’s case was tainted by an ineffective attorney or a biased judge. The facts would speak for themselves.

²⁴⁴ *Id.* The bracketed material in the quotation indicates the author’s changes from Lord Browne-Wilkinson’s original text. Although *Bolitho* involved only the assertion that the court is bound by the opinions of medical experts that the specific “treatment or diagnosis accorded with sound medical practice,” Lord Browne-Wilkinson’s point is, in my view, far broader.

† *Acknowledgments:*

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