The Criminal Justice System and Health Care

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Robert A. Destro

1. Introduction

In earlier chapters of this book, doubts have been expressed about the role of the criminal justice process in regulating questions of health care, practice, and ethics. In this chapter, I shall explore the tragic case of Terri Schiavo, a severely incapacitated woman who, according to the courts and the media, was 'allowed to die' after the Florida courts ordered her guardian to remove all nutrition and hydration.[1] 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 rehabilitative services. Had Theresa Marie Schindler Schiavo (commonly known as 'Terri') been a criminal facing either the death penalty or a lengthy 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. This chapter explores the legal and ethical reasons why the civil justice system failed so badly, and asserts, finally, that the *Schiavo* case, and others like it, demonstrate that both law *and* medicine are often far too willing to relax civil, criminal, *and*

[1] I argued *Schiavo v Bush*, No SC 04-925, on behalf of Governor Jeb Bush in the Florida Supreme Court. I was the primary author of the Petitions for *Certiorari* filed on behalf of Governor Bush in December 2004, and on behalf of Terri Schiavo's parents in 2005. I also worked on the first draft of, and wrote the initial justification for, the bill that was later to become Public Law 109–3. See n 63 below.

professional ethics standards for severely incapacitated persons who should, in the judgment of some at least, be 'allowed to die.'

2. What happened to Terri Schiavo?

In re: The Guardianship of Theresa Marie Schiavo, Incapacitated[2] (hereafter the *Schiavo* case) is one of the most notable, complex, and cautionary controversies in American legal and political history. It began as the private tragedy of a young woman who suffered a traumatic brain injury. It ended as a legal and political power struggle between the Florida and federal courts and the elected branches of the Florida and federal Governments. During the fifteen year period between Terri's injury and the entry of the final decree ordering the removal of nutrition and hydration, the state of her health and actual cognitive abilities became increasingly irrelevant. By the time the *Schiavo* case finally reached the Florida Supreme Court, the federal courts, and Congress, Terri Schiavo had become irrelevant.

2.1 The medical case and initial court proceedings

The medical facts of the *Schiavo* case are fairly straightforward. Sometime before 05:00 am on 25 February 1990, Theresa Marie (Terri) Schindler Schiavo, then 26 years–old, suffered cardio-respiratory arrest. According to court documents, her husband, Michael Schiavo, found her lying face-down on the floor at 05:00, and he placed a call to Terri's father, Robert Schindler, at around 05:40. 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 05:40. Emergency medical services personnel arrived approximately twelve minutes later (at 05:52) and began resuscitation immediately. According to the Report of the Pinellas County Medical Examiner: 'Although a pulse was documented at 06:32hrs, a measurable systolic blood pressure was not recorded until 06:46hrs[,] almost one hour after resuscitation began.'[3] The result was a massive brain injury.[4] Intensive rehabilitation efforts and the first set of legal proceedings—medical malpractice cases against her primary care physician and the gynaecologist who had been treating her for infertility—began shortly thereafter.

[2] *In Re Guardianship of Theresa Marie Schiavo: Schindler v Schiavo* 780 So 2d 176, 177 (Fla Dist Ct App, 2001), aff'd without opinion *In re Guardianship of Schiavo* 789 So 2d 348 (Fla, 2001) (Table).

[3] '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. Report of the Pinellas County Medical Examiner on Medical Examiner's Case No ME-5050439, 13 June 2005, at 39.

[4] Ibid, at 8.

2.2 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. Her parents, Robert and Mary Schindler, believed him to be unfit to serve in that role, and mounted several attempts (all unsuccessful) to have the court remove him as guardian, and to assert their right as parents under Florida law to undertake that role themselves.

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 stimulation.[5] These disputes led to an ongoing battle over the value of continued rehabilitation, basic medical care, and complaints by Terri's parents that Michael had abandoned her, first by refusing to continue rehabilitation, and later, through his relationship with another woman, with whom he had two children.[6]

Money also played a role in this dispute. The medical malpractice case against the gynaecologist resulted in a 1993 award of $750,000 in economic damages[7] to Terri Schiavo, and $300,000 in damages for loss of consortium and non-economic damages to Michael,[8] 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.[9] 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.[10] When the nursing facility resisted the order, he cancelled it and transferred her to another facility,[11] and, in 2000, to the hospice in which she spent the last five years of her life.[12] From that point forward, her parents alleged, he would not permit routine medical and dental care, or any form of physical stimulation, including physical

[5] See generally the Transcript of Proceedings in the Circuit Court for Pinellas County, Florida, *In re: The Guardianship of Theresa Marie Schiavo, Incapacitated* Case No 90-2908-GD-003, Vol IV (15, 16, 17, 20, 22 October 2002).

[6] Second Amended Petition to Remove Guardian, 3–8, *In re: The Guardianship of Theresa Marie Schiavo, Incapacitated* Case No 90-2908-GD-003 (10 January 2005).

[7] J. 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' (1 December 2003) 7.

[8] Ibid, 9 and *In re Guardianship of Theresa Marie Schiavo*, 780 So 2d 176, 177–178 (Fla App 2d Dist, 2001) (hereafter *Schiavo* I).

[9] See, for example, Jurisdiction Brief of Petitioners, Robert and Mary Schindler, 1, *Schindler v Schiavo*, 855 So 2d 621 (Fla, 2003), 2003 WL 22400860.

[10] Wolfson, Guardian ad Litem Report, 10.

[11] Ibid.

[12] See Second Amended Petition to Remove Guardian, 15–16.

therapy or rehabilitation, the use of a wheelchair to take her outside, natural light from the window, or music in her room.[13]

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 is assessing Theresa's wishes based upon their own monetary self-interest',[14] 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.'[15] It did hold, however, that Michael could not be permitted to make the decision to continue or refuse life-sustaining treatment. '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.'[16] As we shall see in the discussion below, it is my contention that this ruling was legally and ethically erroneous on several grounds.[17]

2.3 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

[13] Ibid, 17–21.

[14] *In re Guardianship of Theresa Marie Schiavo, Incapacitated* 780 So 2d 176, 178 (Fla App 2d Dist, 2001):

> 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.

[15] Ibid. [16] Ibid.

[17] 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'. Ibid. Its mistake, discussed below in sections 6.4 to 6.5, was that Florida law expressly forbids the appointment of a guardian when there is a potential conflict of interest.

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, 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. 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.

This chapter proposes that enquiries 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, they also provide a powerful lens through which we can analyse the often-erroneous factual assumptions that drive the 'conventional wisdom'.

2.4 Characterizing the Schiavo case

To Terri's husband, Michael, and groups that traditionally support the 'right to die', the *Schiavo* case was little more than a heavy handed attempt by Terri's parents and their supporters to utilize state and Congressional political power to interdict Terri's *own* very personal, and intensely private, choice to forego life-sustaining medical care. To her parents, Robert and Mary Schindler, the *Schiavo* case involved criminal medical and rehabilitative neglect, in which those charged with the responsibility to care for her (her husband, the Florida judiciary, and the State of Florida's Department of Children and Families) lined up to support a factually and legally questionable finding that Terri would have preferred death by dehydration to rehabilitation and life as a person with severely impaired cognitive abilities. To the Florida and federal judiciaries, the case had two, interrelated aspects: (1) the separation of powers; and (2) the right of Terri's proxy to control her medical care. In this view, once the Florida judiciary had determined that Terri would not want to live in such a cognitively impaired state, the Florida Legislature had no authority to authorize the Governor to inquire regarding the adequacy of the judicial process or the continued protection of her rights.[18] To those who supported the Schindler family, including Governor Jeb Bush, a majority of the Florida Legislature, a majority of those voting in the United States

[18] Chapter 2003–418, Laws of Florida.

Congress,[19] and President George W. Bush, the *Schiavo* case was the functional equivalent of a death penalty case in which procedural and substantive errors at the trial level rendered the verdict inherently unreliable.

My goal in this chapter is to explain why the *Schiavo* case provides an excellent example of the dangers that arise for both law and medicine when policy disputes over the proper boundaries of law and medicine are resolved by 'characterization' rather than an analysis that carefully seeks to examine and balance all relevant interests. 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.[20]

I argue here that the *Schiavo* 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. The case was not controversial because it was complex; it was controversial because advocates oversimplified it. The lesson of the *Schiavo* case for the readers of this book is that 'hard cases make bad law'. Working together, legal and medical professionals must find both a common point of departure from which we can analyse our differences, and a common language in which to discuss them.

3. Starting at the beginning: 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.[21]

[19] While this allocution might seem a bit strange, it is, in fact, an accurate description of the process by which Congress adopted the statute authorizing the federal courts to grant Terri Schiavo a new trial. The debate in the United States House of Representatives was televized live, worldwide. There was no debate in the Senate. The bill was adopted by unanimous consent.

[20] K. M. Sullivan, 'Post-Liberal Judging: The Roles of Categorization and Balancing', *U Colo L Rev* 63 (1992) 293–4.

[21] See, for example, M. D. Bayless, *Professional Ethics** (2nd edn, Belmont, Calif.: Wadsworth, 1989); M. Davis and A. Stark (eds.), *Conflict of Interest in the Professions* (Oxford; New York: Oxford

The same holds true for lawyers and judges. At the centre of all of our respective professional endeavours 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.[22]

A similar combination of art and science explains the profoundly important role that lawyers and judges play in the 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 defence is both admissible in court and strong enough to withstand the rigours of cross-examination.[23] As the 'arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law',[24] 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'.[25]

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.[26] Because duty is our common calling, a 'professional responsibility'

University Press, 2001); S. S. Phillips and P. Benner (eds.), *The Crisis of Care: Affirming and Restoring Caring Practices in the Helping Professions* (Washington, D.C.: Georgetown University Press, 1994).

[22] A. Trousseau, *Lectures on Clinical Medicine, Vol. 2* (The New Sydenham Society, 1869), submitted to the *British Medical Journal* by A. L. Wyman, retired physician, London, quoted in 'Endpiece—Medicine: Art or science', *British Medical Journal*, 320 (13 May, 2000) 1322.

[23] See American Bar Association [ABA] Model Rules of Professional Responsibility, 3.1, quoted in the text at n 73 below.

[24] American Bar Association [ABA] Model Code of Judicial Conduct, Preamble, available online at <http://www.abanet.org/cpr/mcjc/pream_term.html#PREAMBLE>.

[25] The material quoted in the text is drawn from 28 USC §453 (2007), which prescribes the Oath of Office for each judge or justice of the USA. The United States Code is available online at <http://uscode.house.gov/>. See American Bar Association [ABA] Model Code of Judicial Conduct, Canon 3, available online at <http://www.abanet.org/cpr/mcjc/canon_3.html>.

[26] *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771, (1998) 39 BMLR 1, [1998] Lloyd's Rep Med 26, [1998] PIQR 10 (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 BMLR 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.').

(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 behaviour *across-the-board*.

4. The ethics of due process and equal protection in disputed proceedings to withdraw nutrition and hydration

4.1 The Relevance of the Law of Homicide

'Homicide' is defined by the common law as 'the killing of one human being by another'.[27] 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,[28] but it does impose criminal liability for specific acts or omissions.[29] 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.[30] 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.[31]

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;[32] the other is a judicial decree authorizing families,

[27] See <http://dictionary.reference.com/browse/homicide>.

[28] Florida Statutes, § 775.01 provides that: 'The 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.'

[29] See, for example, Florida Statutes, §§ 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').

[30] See, for example, Florida Statutes, § 382.008 (2007).

[31] See, for example, Florida Statutes, § 406.11 (2007).

[32] See, for example, Florida Statutes, § 922.105(1) ('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.').

physicians, or medical facilities to withhold or terminate life-sustaining care from an incompetent person.[33]

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'.[34] Because death is a sentencing option in these cases, the law requires effective representation of counsel[35] and other procedural safeguards that are supposed to ensure that the trial, appeals, and sentencing are conducted fairly.[36] If the sentence is actually carried out, the law also requires that the method of execution be neither cruel nor unusual.[37]

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.[38] 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:

> ... in 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

[33] Laws expressly authorizing euthanasia at the request of a patient are distinguishable because there is no pretence of judicial process.

[34] Florida Statutes, § 782.04 (defining 'murder'). cf Florida Statutes, § 922.105(5–8) (creating exceptions from the general rules prohibiting for the acts or omissions necessary to execute a death sentence).

[35] K. Cunningham-Parmeter, 'Dreaming of effective assistance: The awakening of *Cronic's* call to presume prejudice from representational absence', *Temple L Rev* 76 (2003) 827.

[36] See, generally, R. Warden, 'Illinois death penalty reform: How it happened, what it promises', in *Symposium: Innocence in Capital Sentencing, J Crim L & Criminology* 95 (2005) 381.

[37] cf Florida Statutes, § 922.105(8) ('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 Florida Statutes, § 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, P. R. Nugent, 'Pulling the plug on the electric chair: The unconstitutionality of electrocution', *Wm & Mary Bill of Rights J.* 2 (1993) 185.

[38] American Bar Association [ABA] Model Code of Professional Responsibility, available online at <http://www.abanet.org/cpr/mrpc/mrpc_toc.html>; ABA Model Code of Judicial Conduct, available online at <http://www.abanet.org/cpr/mcjc/>.

suffered by the patient (apart from the procedure to be ended) is often described in heart-breaking detail.[39]

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. 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.[40] Consider the sequence of the orders entered by the court:[41]

(1) The decree of 11 February 2000 authorized the guardian, Michael Schiavo, to 'proceed with the discontinuance of said *artificial life support* for Theresa Marie Schiavo'.[42] 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 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.[43]

[39] R. S. Kay, 'Causing Death for Compassionate Reasons in American Law' 54 *Am J Comp L* 693, 714–15 (2006) (footnotes 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 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 App 2d Dist, 2001) (*Schiavo* I) (footnotes omitted).

[40] Ibid, 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.').

[41] All references to court orders are to the guardianship case: *In re: The Guardianship of Theresa Marie Schiavo, Incapacitated—Michael Schiavo v Robert Schindler and Mary Schindler* No 90-2908GD-003.

[42] Order of 11 February 2000. [emphasis added].

[43] The autopsy takes the position that oral nutrition and hydration would have been impossible given the condition of Terri's throat musculature. Report of the Pinellas County Medical Examiner, 13 June 2005, 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

(2) The decree dated 17 September 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'.[44] That particular tube was removed pursuant to the court's order. 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*.

(3) The final decree, issued by Judge Greer on 25 February 2005, directed 'that the guardian, Michael Schiavo, shall cause the removal *of nutrition and hydration* from the ward, Theresa Schiavo'.[45] This order was unquestionably designed to ensure that Terri Schiavo's life would end—a point underscored by his ruling on the 'Emergency Expedited Motion to Provide Theresa Schiavo with Food and Water by Natural Means' filed on 28 February 2005 by Terri's parents, Robert and Mary Schindler. In that motion, Terri's parents asked that they be permitted to provide food and water to their daughter by mouth. Judge Greer denied that motion on 8 March 2005 because, in his view, their request was the medical equivalent of 'asking for an experimental procedure'.[46] A police guard was then posted outside Terri's room in order to ensure that no fluids were provided.

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)'.[47] Were the patient capable of experiencing the pain and mental anguish that would attend such a horrible demise, there would be no doubt that utilizing such a method for ending the person's life would be 'cruel and

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, for example, S. Begley, *Train Your Mind, Change Your Brain: How a New Science Reveals Our Extraordinary Potential to Transform Ourselves* (New York: Ballantine Books, 2006); J. M. Schwartz and S. Begley, *The Mind and the Brain: Neuroplasticity and the Power of Mental Force* (New York: Regan Books/Harper Collins, 2002).

[44] Order of 17 September 2003 [emphasis added].

[45] Order of 25 February 2005 [emphasis added]. But see Joshua Perry's discussion in text at n 54 below.

[46] Order dated 8 March 2005.

[47] Report of the Pinellas County Medical Examiner, 13 June 2005, 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'. Ibid, 9, Question 8 ('What was the cause and manner of death?').

unusual'—if not barbaric. Theresa Schiavo's *actual* cognitive abilities at the time of her death were thus a critically important—but unknown—fact.[48]

4.2 Comparing the substantive and procedural requirements in capital punishment and disputed withdrawal of treatment cases

In *State v Davis*,[49] 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.'[50] 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'.[51]

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.[52] 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 surrogate may act. 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, and cognitive condition.[53]

Careful examination of the procedural requirements in capital cases and disputed withdrawal of treatment cases leaves little doubt that the law of Florida

[48] Ibid, 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?').

[49] *State v Davis* 872 So 2d 250, 254 (Fla, 2004).

[50] *Gregg v Georgia* 428 US 153, 188, 96 S Ct 2909, 49 L Ed 2d 859 (1976); see *also State 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').

[51] The latter part of the quotation in *State v Davis* is taken from *Sheppard & White, PA v City of Jacksonville* 827 So 2d 925, 932 (Fla, 2002).

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

[53] Florida Statutes, § 765.401(3) (2007) requires that substituted judgment proceedings comply with § 765.205, which defines the powers of the surrogate decision-maker, and § 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 Florida Statutes, § 765.404 (2007).

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'. There are, however, important differences.

In a capital punishment case, the defendant is usually competent to stand trial and can participate in the defence 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 process up for years in order to ensure that the trial was conducted fairly and that the court's findings of fact are *objectively* verifiable (ie that the defendant is actually guilty).

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, 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 ward's would have chosen to refuse life-sustaining care under the circumstances. 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'.[54] 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.

As *Wall Street Journal* science reporter, Sharon Begley, points out in the quotation below, there is a 'conventional wisdom' concerning the ability of the brain to adapt to experience, including injury. 'Neuroplasticity' (which can also be referred to as 'cortical plasticity' or 'brain plasticity') is the ability of the brain to adapt *physically* in response to stimuli, and to shift the locus brain function.[55] It should come as no surprise that the Florida courts were just as sceptical about the utility, reliability, and feasibility of fMRI testing for Terri Schiavo[56] as they were

[54] J. E. Perry, 'Biblical bio-politics: Judicial process, religious rhetoric, Terri Schiavo and beyond', *Health Matrix* 16/2 (Spring, 2006) Available at SSRN <http://ssrn.com/abstract=775587>.

[55] See, for example, J. Doyon and H. Benali, 'Reorganization and plasticity in the adult brain during learning of motor skills', *Curr Opin Neurobiol* 15/2 (2005) 161–7; B. Draganski, C. Gaser, V. Busch, G. Schuierer, U. Bogdahn, and A. May, 'Neuroplasticity: changes in grey matter induced by training', *Nature* 427/6972 (22 January 2004) 311–2.

[56] See Letter of Stephen J. Nelson, MA, MD, FCAP, Chief Medical Examiner, 10th Judicial Circuit of Florida, to Jon R. Thogmorton, MD, District 6 Medical Examiner, 8 June 2005, 9 ('Neuropathology Report').

when presented in death penalty proceedings with issues involving the reliability of DNA testing.[57] As Begley comments:

> 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.[58]

To understand the claims made on Terri's behalf by her parents, and the lengths to which the political branches of both the State of Florida and the United States Government went to in the attempts to vindicate this young woman's right to a fair trial, one must first consider not only their substantive claims, but also the procedural and historical context in which they were considered.

The following were the main issues pressed by the Schindler family on Terri's behalf:

(1) Terri's physical and cognitive abilities;

(2) the efficacy of treatment and rehabilitation services, and whether the decision to stop rehabilitation services was medical neglect;

(3) the duration of the dying process after nutrition and hydration have been removed;

(4) the physical, psychological, and emotional condition of a patient dying from lack of nutrition or hydration;

(5) the patient's beliefs and wishes concerning treatment options (including no treatment at all) in the event she became incompetent to make such decisions on her own; and

(6) the need for due process in the guardianship proceeding, including effective assistance of counsel assigned to represent the patient's interests *alone*; and

(7) a hearing before an unbiased judge.

I will deal briefly with the substantive ethical and constitutional issues presented by these claims in Parts 6 and 7.

[57] See B. P. Kuehne, *Criminal Law and Procedure: 1993 Survey of Florida Law*, 18 *Nova L Rev* 235, 259 (1993) noting the discrepancy between 'general acceptance' test for the admission of scientific evidence applied in *Robinson v State* 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:

> 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.

[58] Interview with Sharon Begley, science reporter for *The Wall Street Journal* and author of, *Train Your Mind, Change Your Brain* (New York: Ballantine Books, 2006), National Public Radio, *Science Friday*, 2 February 2007 (hour 2). The mp3 file can be accessed at <http://www.sciencefriday.com/pages/2007/Feb/hour2_020207.html>, (accessed 3 February 2007).

5. 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 Court[59] 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',[60] and of the Governor's October 2003 Executive Order restoring the nutrition and hydration tube sustaining Terri Schiavo's life[61] after Judge Greer's 17 September 2003 order that it be withdrawn.[62] 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 the appellate courts who would be asked to review the record would ever know them. It is my contention that the record in the case had been 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 relief of the parents of Theresa Marie Schiavo',[63] 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:

(1) *Terri's condition.* In her husband, Michael Schiavo's view, 'Terri was beyond any meaningful rescue' after suffering a massive brain injury in 1990, and 'she never had any hope of recovery'.[64] The medical record, however, contained some

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

[60] HB 35-E, Chapter 2003-418, Laws of Florida, available online at <http://election.dos.state.fl.us/laws/03laws/ch_2003-418.pdf> (accessed 4 February 2007).

[61] Executive Order No 03-201, available online at <http://sun6.dms.state.fl.us/eog_new/eog/orders/2003/october/eo 2003-201-10-22-03.html> (accessed, 4 February 2007).

[62] See discussion at Section 4.1.

[63] Public Law 109-3 119 Stat 15 (21 March 2005) at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ003.109.pdf>. The original draft of the legislation was an amendment to the federal habeas corpus statute, 28 USC § 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 [emphasis added].

[64] M. Shelden, 'Her soul had gone, her body was ready' (interview with Michael Schiavo) *The Telegraph Online*, 30 October 2006. See <http://www.telegraph.co.uk>.

evidence of cognitive function, including a reference to a situation in which Terri had responded verbally to a question posed by a physical therapist.

(2) *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. Both human and animal studies have shown that 'the primary motor cortex (M1) can reorganize 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.'[65]

(3) *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 these subjects, 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 attempt to utilize state-of-the-art 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'.[66]

(4) *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 the claims of those religious forces that attempted to undermine the credibility and legitimacy of the Florida judiciary.[67]

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

[65] R. M. Bracewell, Editorial Commentary, 'Neuroplasticity and Rehabilitation, Stroke: Neuroplasticity and Recent Approaches to Rehabilitation,' *Journal of Neurology Neurosurgery & Psychiatry* 74 (2003)1465.

[66] R. S. Kay, 'Causing death for compassionate reasons in American law', *Am J Comp L* 54 (2006) 693, 714–15 [footnotes omitted]. The Florida courts provided just such detail in *Schiavo*—see quoted passage at n 39 above.

[67] Perry, 'Biblical bio-politics'.

undermine the credibility and legitimacy of the Florida judiciary'.[68] 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.[69] This would have been the outcome had a federal court granted the family's petition for a writ of habeas corpus[70] or, in the alternative, granted the new trial authorized by Congress in Public Law 109–3.[71]

6. 'Thinking like a (good) lawyer': The Code of Professional Responsibility 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 fails to distinguish between the quality of the judicial process and the outcome of the judicial process'.[72]

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 behaviour.

6.1 The duty to make only good faith claims

The first duty of the lawyer is to make an *independent, professional* judgment[73] 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 faith argument for an extension, modification or reversal of existing law. A lawyer

[68] Ibid, assuming that *Bush v Schiavo* 885 So 2d 321 (Fla, 2004), *certiorari denied*, 543 US 1121 (2005), was correctly decided.

[69] See Petition for *Certiorari*, *Bush v Schiavo* No 04-757, October Term 2004, *certiorari denied* 543 US 1121 (2005).

[70] *Schiavo v Greer* 2005 WL 754121, 18 Fla L Weekly Fed D 361 (MD Fla, 18 March 2005) (No 8:05-CV-522-T-30TGW), *vacated by* Schiavo *ex rel Schiavo v Greer* 2005 WL 2240351 (MD. Fla, 21 March, 2005) (No 8:05CV522T30TGW).

[71] See n 63.

[72] See, for example, Perry, 'Biblical bio-politics', 51. See also Perry at 28–29 and n 161 and 168 (recounting allegedly inflammatory comments by counsel for the Schindler family and Governor Bush).

[73] American Bar Association, Model Rules of Professional Conduct (2006) [hereafter ABA Model Rules], Rule 2.1 'Advisor' ('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.'). Available online at <http://www.abanet.org/cpr/mrpc/rule_2_1.html>.

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.[74]

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 was willing to consider the fair trial issue. Consider the following extract from the transcript of the oral argument in *Schiavo v Bush*:

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 powers...[75]

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 proceedings that are the last hope of condemned criminals seeking to avoid the death penalty.

6.2 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 Responsibility recognizes this problem when it advises that 'the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship

[74] Rule 3.1 'Meritorious Claims and Contentions.' Available online at <http://www.abanet.org/cpr/mrpc/rule_3_1.html> (accessed 5 February 2007). 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.

[75] Transcript of oral argument, *Bush v Schiavo*, supra, n 59, at 1. The bracketed material was omitted from the transcript, which appears to have been developed from the recording referenced in n 59. Obvious misspellings of names have been corrected without making note of the change.

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.

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

6.3 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. Because the guardian is competent and usually a close relation of the ward, the attorney must take great care to distinguish their respective interests.[76]

6.4 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'. 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 was supposed to be the focus of the guardian's lawyer's duty of loyalty. In *Schiavo* I, 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.[77] 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 and financial interests adverse to Terri's.[78]

[76] ABA Model Rules, Rules 1.6, 1.7(f) (conflict of interest). See Restatement (3d) of the Law Governing Lawyers, § 24.

[77] *In re Guardianship of Theresa Marie Schiavo, Incapacitated* 780 So 2d 176, 178 (Fla App 2d Dist, 2001).

[78] Second Amended Petition to Remove Guardian, 37–50.

A recent filing in the Supreme Court of the United States, *Nault v Mainor*,[79] 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.

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.[80] The Rules of Professional Responsibility, 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'. Rule 1.7(a) provides:

> (a) Except as provided in paragraph (b),[81] 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*, 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:

> (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

[79] *Nault v Mainor* 101 P 3d 308 (Nov 2004), *certiorari denied* 126 S Ct 380 (No 05–82, October Term, 2005). The Petition for Writ of *Certiorari* to the Supreme Court of Nevada appears at 2005 WL 1660295.

[80] cf, for example, *Wilmington Medical Center v Severns*, 433 A 2d 1047, 1049 (Del, 1981); *Leslie v Estate of Tavares* 984 P 2d 1220, 1231 (Haw, 1999); *Interest of RD and BD, Minors v Linda D* 658 So 2d 1378, 1383 (Miss, 1995); *In re MC* 2001 Wash App Lexis 364, at 4 with, for example, *In re EF* 639 So 2d 639, 644 (Fla, 1994) (due process does not require appointment of a guardian *ad litem*); *In re Frederickson* 388 N W 2d 717, 721 (Minn, 1986) (no due process violation from the failure to appoint a guardian); *Leigh v Aiken* 311 So 2d 444, 446 (Ala Civ App, 1975) (due process does not require appointment of a guardian *ad litem*).

[81] ABA Model Rules, 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.

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.

6.5 Does Florida statute 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. Section 744.309 of the Florida Statutes governs 'who may be appointed guardian of a resident ward'. It provides, in relevant part:

(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.*[82]

7. Applying the rules: Can a 'colourable' 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',[83] and 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'.[84]

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

[82] Emphasis added.
[83] *In re Murchison* 349 US 133, 136 (1955).
[84] *Offutt v United States* 348 US 11, 14 (1954) [emphasis added].

'disability'.[85] 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 privacy[86] 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.[87] 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. 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'.[88] 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 section 765.401 of the Florida Statutes.

A guardianship trial that contemplates an order to withhold or withdraw life-sustaining treatment will necessarily consider 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' that has arisen in the context of criminal law and procedure. The other is to determine whether, and to what extent, it is possible under the facts of the specific case to make a colourable assertion that there is, in fact, a conflict of interest between the incompetent ward and those who purport to represent their interests.

[85] See American Bar Association [ABA] Model Code of Professional Responsibility, Rule 1.14 [Client with Diminished Capacity], available online at <http://www.abanet.org/cpr/mrpc/rule_1_14.html> and ABA Model Code of Judicial Conduct, Canon 2(B)(5, (6) requiring special attention to elimination of bias on, among other grounds, 'disability', available online at <http://www.abanet.org/cpr/mcjc/canon_3.html>.

[86] Fla Const Art I, § 23 (2007). See also Bar Standards Board (UK), Part III, 305.1.

[87] *In re Guardianship of Browning; Satz v Perlmutter* 379 So 2d 359 (Fla, 1980) (competent patients).

[88] Ibid.

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.

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, she was not provided with a guardian *ad litem*[89] assisted by legal counsel. She had no way to confront witnesses against her, or to present her own evidence. In Terri's case, only those who I have argued were *disqualified* to act on her behalf presented evidence and were represented by counsel.

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. 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. 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'. 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*'.[90]

The importance of the italicized words above may not be immediately apparent, so a bit of 'unpacking' may be in order.[91] 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

[89] The term 'guardian *ad litem*' is defined in Florida Statutes, § 39.820(1) (2007) 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'. Florida Probate Rule 5.120 provides a similar rule for probate proceedings.

[90] *In re Guardianship of Theresa Marie Schiavo: Schindler v Schiavo* 780 So 2d 176, 177–178 (Fla App 2d Dist, 2001), aff'd without opinion *In re Guardianship of Schiavo* 789 So 2d 348 (Fla, 2001) (Table) [emphasis added].

[91] A useful chart explaining the organization of the Florida court system can be found on the website of the National Center for State Courts, available at <http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCCS_Charts1.pdf> (accessed 12 March 2007).

of life-sustaining treatment. 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'. 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.[92]

This, I contend, was clearly improper. A judge must serve as a dispassionate trier of fact, and may not participate as a representative of any party. If the court undertakes such a role, the trial becomes an advisory process, rather than an adversary proceeding. This is why Section 744.309(b) of the Florida Statutes expressly prohibits such a conflict of roles.[93] 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 *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 decision maker. A judge who becomes an advocate cannot claim even the pretense of impartiality.[94]

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*,[95] 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

[92] Compare Canon 3(E)(1)(d)(iii) of the Florida Code of Judicial Conduct (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').

[93] See § 744.309(b) of the Florida Statutes, discussed at n 53 above.

[94] *In re TW*, 551 So 2d 1186, 1190 n 3 (Fla S Ct, 1989).

[95] 738 F 2d 1200, 1201 (11 Cir, 1984).

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 conflict of values in favor of due process.[96]

The Florida courts apply precisely the same rule in other cases. In *Scott v Anderson*,[97] 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.

Because '[a]djudication before a neutral and unbiased tribunal stands as one of the most fundamental of due process rights',[98] raising questions of bias is, under the code of ethics, one of the most fundamental obligations of the first attorney to recognize the problem. Even then, allegations of bias, even those that are, as in Terri's case, founded on questions of law, are 'highly personal aspersions'[99] leveled at the trial judge that carry 'such a *potential* for bias as to require disqualification.'[100]

Counsel for the Schindlers did move to have Judge Greer recuse himself. They also moved to have Michael Schiavo removed as guardian. In both cases, the allegation that Terri Schiavo and her parents were litigating before a tribunal whose process was irretrievably tainted was factually and legally supportable. In *Mayberry v Pennsylvania*, the Supreme Court of the United States addressed precisely this situation when it noted that '[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication',[101] and its decision 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'.[102]

These facts, we argued, were sufficient to raise a colourable 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.

[96] Ibid, at 1201.
[97] 405 So 2d 228, 233 (Fla 1st DCA, 1981).
[98] *Sandstrom* 738 F 2d (11 Cir, 1984) at 1210.
[99] *Mayberry v Pennsylvania* 400 US 455, 466–467 (1971)
[100] Ibid (emphasis supplied), quoting from *Ungar v Sarafite* 376 US 575, 84 S Ct 841 (1964) at 847 (distinguishing *Mayberry* from that case, in which comments to the judge did not rise to the level of a claim of bias).
[101] 400 US at 465, 91 S Ct at 505.
[102] *Sandstrom* 738 F 2d at 1210, citing *United States v Meyer* 462 F 2d 827, 842 (D C Cir, 1972).

8. Conclusion

The burden of this chapter 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. It is, rather, to argue a point that is taken for granted in all criminal cases in which the 'Great Writ' of habeas corpus might be employed. A 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 requiring scrupulous attention to the preservation of procedural due process rights.[103] 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 the subject's liberty'.[104]

Not surprisingly, the conventional wisdom 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 severe 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 chapter 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. Neither profession need worry about intrusion into the respective spheres of the other unless there is some professional, ethical, or process lapse that creates probable cause to proceed.

There were several such lapses in the *Schiavo* case. Public Law 109–3, 'For the relief of the parents of Theresa Marie Schiavo' shows that Congress viewed the

[103] *Chalk v State of Florida* 443 So 2d 421, 422 (Fla 2d DCA, 1984).
[104] Ibid.

Schiavo case as one involving *process*. Like Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority*, Congress and the President were 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 opinion that the defendants' [legal procedures,] treatment or diagnosis accorded with sound medical [or legal] practice'.[105]

And so, I close this chapter with an admonition for both legal and medical professionals. Ethics requires taking personal responsibility for one's actions. If one can do that, and can prove that those actions are reasonable under the circumstances, neither has anything to fear from the criminal or civil law.

[105] See *Bolitho*. Bracketed material indicates the author's changes from Lord Browne-Wilkinson's original text and meaning.