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THE (SURPRISING) TRUTH ABOUT *SCHIAVO*: A DEFEAT FOR THE CAUSE OF AUTONOMY

O. Carter Snead[*]

INTRODUCTION

A survey of the commentary following the conclusion of the Theresa Marie Schiavo matter leaves one with the impression that the case was a victory for the cause of autonomy and the right of self-determination in the end-of-life context. According to the prevailing account, the case involved a husband (Michael Schiavo) fighting for his right as a spouse to vindicate his profoundly disabled wife's wish to decline artificial nutrition and hydration. To do so, Mr. Schiavo had to overcome the efforts of his wife's parents (the Schindlers), and their religious conservative supporters (including politicians both in Florida and Washington), who fought to keep Ms. Schiavo alive at all costs. This battle of autonomy versus the sanctity of all human life (howsoever diminished) raged throughout literally every branch of government, as well as in the national and international media. In the end, though, it was the judicial branch that settled the matter, finding that Michael Schiavo had the right to implement his wife's wishes, free from any governmental intervention or obstruction. It was a decisive victory for autonomy and privacy, and demonstrated that an individual's desire to be free from unwanted life sustaining measures can be honored, even after she is silenced by severe cognitive impairment.

The foregoing narrative is compelling, easy to understand, and fits perfectly within the overarching paradigm typically used to interpret the cultural, legal, and political conflicts of present day America. The only problem with this widely shared understanding of the Schiavo case is that it is wrong in almost every key respect. The above account misstates the formal question in dispute, the principal focus of the Florida courts' inquiry, the substance of the courts' various holdings, the basis for the courts' decisions, and the character of the participants in the larger public debate. In this essay, I will seek to correct these errors and demonstrate that,

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contrary to popular understanding, it is the *defenders* of autonomy and self-determination who should be most troubled by what transpired in the Schiavo matter. Far from being a victory for the cause of freedom, it is instead a cautionary tale of what can happen when the legal preconditions for exercising autonomy are absent or ignored.

WHAT ACTUALLY HAPPENED

It is useful to begin by noting briefly some of the more obvious factual flaws in the prevailing narrative. Contrary to the popular account, the Schiavo matter was not a dispute about which principle – respect for autonomy or the sanctity of all human life – should govern decisionmaking regarding the administration of life sustaining measures. Nor was it a case about who – as between spouses and parents – is best situated to make such decisions for incapacitated loved ones. It also was not a case about who – as between the government and the private individual – should have the final say in this intimate and private domain.

To the contrary, both the Schindlers and Mr. Schiavo agreed from the outset that the relevant good to be defended was Ms. Schiavo's right to autonomy and self-determination. Despite the acrimony and discord between Mr. Schiavo and the Schindlers, they were in complete agreement that the proper task at hand was to discern and implement (if possible) Ms. Schiavo's wishes regarding artificial nutrition and hydration. Thus, the Schiavo case did not involve a philosophical quarrel about what is owed to the profoundly disabled – all parties to the conflict agreed that self-determination was the paramount value. Rather, the case was essentially a *factual dispute* about the content of Ms. Schiavo's intentions. Mr. Schiavo argued that she would not want to continue living under the circumstances, and the Schindlers asserted the contrary[1] (or alternatively, that her wishes had not been sufficiently established to support termination of artificial nutrition and hydration).[2] Accordingly, the outcome of the case cannot properly be interpreted as a victory for the principle of autonomy *over* the sanctity of life, as some have suggested.[3] This deeper (and more

[1] *See generally*, Schindler v. Schiavo, 780 So.2d 176, 178-79 (Fla. Dist. Ct. App. 2001).

[2] The Schindlers also raised the additional arguments that Ms. Schiavo was not in a persistent vegetative state, and that she could recover some of her lost faculties if she were provided with the proper course of therapy. For reasons discussed below, however, these arguments were ancillary to the central question before the court, namely, the content of Ms. Schiavo's actual intentions.

[3] *See generally*, Sheryl Gay Stolberg, *The Schiavo Case: The Legacy; A Collision of Disparate Forces May be Reshaping American Law*, N.Y. TIMES, April 1, 2005, A18

interesting) dilemma was never the focus of the litigants' or the court's inquiry.

The courts in this case likewise were not called upon to determine which party – Mr. Schiavo or the Schindlers – was best suited to act on behalf of Ms. Schiavo. Rather, the court took it upon *itself* to determine the proper course of treatment for Ms. Schiavo, based on its own assessment of the facts and law.[4] The Florida court's holding did not, therefore, authorize Mr. Schiavo to make the final decision for Ms. Schiavo because he was her husband. The court implemented *its own* determination regarding this question. And it did so in a compulsory way – the caretakers of Ms. Schiavo were required, on pain of contempt of court, to follow the court's order to withdraw artificial nutrition and hydration.[5] Thus, the Schiavo matter cannot properly be understood as a victory for spouses over parents in end-of-life decisionmaking, as some commentators have suggested.[6] Similarly, it should not be celebrated as a case in which the individual was empowered to make her decision free from any governmental intervention. It was, in fact, the government (namely, the Florida judicial branch) that decided by its own lights what was owed to Ms. Schiavo.

Though ancillary to the focus of this essay, a brief word about the larger political debate is in order. The conventional wisdom seems to be that this case was merely another skirmish in the now all too familiar conflict between religious conservatives and secular liberals (and their occasional libertarian allies).[7] But this view fails to capture the complexity

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(describing the case as a conflict between those ethicists supporting "autonomy and self determination" and "social conservatives who argue that sanctity of life trumps quality of life").

[4] *See Schindler*, 780 So.2d at 178 (noting that Mr. Schiavo "invoked the trial court's jurisdiction to allow *the trial court* to serve as [Ms. Schiavo's] surrogate decision-maker.") (emphasis added); *see also* id. at 179 (observing that in this case, "the *trial court* essentially serves as [Ms. Schiavo's] guardian") (emphasis added).

[5] *See* Schindler v. Schiavo, 792 So.2d 551, 559 n.5 (Fla. Dist. Ct. App. 2001).

[6] *See generally*, Arthur Caplan, *The Time Has Come to Let Terri Schiavo Die*, MSNBC.COM, March 18, 2005, http://msnbc.msn.com/id/7231440/ (strongly suggesting that the question before the court was whether or not Michael Schiavo should be allowed to make the decision for Ms. Schiavo, given that he is her husband).

[7] *See generally* Editorial, *Exploiting Terri Schiavo; A Blow to the Rule of Law*, N.Y. TIMES, March 22, 2005, at A22 (describing the supporters of the Schindlers as "members of the religious right"); *see also* Abby Goodenough, *Victory in Florida Feeding Case Emboldens the Religious Right*, N.Y. TIMES, October 24, 2003, at A1; *see also* Editorial, *Theresa Marie Schiavo*, N.Y. TIMES, April 1, 2005, at A22 (describing supporters of the Schindlers as those who "hold religious convictions so heartfelt that they could not bow to public opinion or the courts and accept the conclusion that Ms. Schiavo should be allowed to die.").

and peculiarity of the political dimension of the Schiavo matter. The political debate did not feature the usual alignment of politicians and activists who regularly weigh in on contested social issues. Liberal champions such as Senator Tom Harkin, Reverend Jesse Jackson, and Ralph Nader rose to the defense of the Schindler family. Nearly half of the voting members of the Congressional Black Caucus supported federal legislation to authorize the Middle District of Florida to hear, *de novo*, any federal claims asserted on behalf of Ms. Schiavo by the Schindlers.[8] Indeed, not a single U.S. Senator voted against this extraordinary avenue of relief. To be sure, many liberals and conservatives intervened in a manner that one might expect – the former for Mr. Schiavo and the latter for the Schindlers. But these partisans made arguments that seemed to be in deep tension with their overarching philosophies and ideological commitments. Conservatives supporting the Schindlers abandoned both their longstanding deference to the states and their usual opposition to additional layers of federal procedural safeguards for civil rights (manifest in their public arguments regarding the availability of habeas corpus relief, particularly in the death penalty context). Conversely, liberals supporting Mr. Schiavo acted uncharacteristically by arguing for strict deference to the findings of the Florida courts, and against additional federal process aimed at preserving the individual rights and liberties of the weakest and most vulnerable among us. In a departure from the norm, conservatives made impassioned pleas for substantive justice, and liberals persistently argued for reliance on formal process. These inversions and apparent contradictions in the political discourse were oddly reminiscent of another high-profile case arising from Florida, just five years earlier.

SCHIAVO'S IMPLICATIONS FOR AUTONOMY

Granting that the conventional understanding of the Schiavo matter is technically mistaken and should be modified as described above, why should it finally be regarded as a blow to the cause of autonomy and self-determination in this particular domain? To answer this question, it is necessary first to set forth (in cursory fashion) the underlying aim of the defenders of autonomy in this context. Then, it will be necessary to provide a brief sketch of how the law – both as enacted and interpreted – might ideally serve to promote and defend the goods of autonomy and self-determination. I will then use this standard to assess the process and outcome of the Schiavo case. I submit that judged according to this measure, it is clear that both the process and result in the Schiavo case

[8] *See generally* Erin Texeira, *Schiavo Case Divides Black Leaders; Jackson Shows African Americans' Conservative Side*, CHI. SUN TIMES, March 31, 2005, at 28.

undermine the ideal of autonomous decisionmaking at the end of life, and should thus be condemned by those who champion these values in the public square.

Before proceeding with this analysis, it bears noting that I do not in this essay seek to resolve the rich and complex debate over which moral and ethical principles should be paramount when deciding how to act for a profoundly disabled loved one who requires artificial nutrition and hydration, but cannot speak for herself. By focusing exclusively on the principle of autonomy and self-determination, I do not intend to imply that it should have pride of place in such decisions, at the expense of other goods and values. Indeed, I do not even mean to suggest that the proper method for resolving ethical questions such as those presented by the Schiavo case is through applying or balancing abstract principles as such. My narrow purpose in this essay is simply to demonstrate that the legal process utilized in the Schiavo matter utterly failed to advance the cause of autonomy in the end of life context.

A. The Vision of Autonomy at the End of Life

The principle of respect for autonomy and self-determination predominates in modern bioethics: "Because of the intimate and intrusive nature of biomedical decisions, a central focus of bioethics has been to respect and protect an individual's autonomy in making those decisions." [9] Advocates for a robust notion of autonomy ground their claims in the "moral fact that a person belongs to himself and not others nor to society as a whole."[10] The concept of personal autonomy as a principal animating good is also well ensconced in the decisional law of the U.S. Supreme Court:

> It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions . . . about bodily integrity. [11]

The principle of informed consent – the cornerstone of modern

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[9] John A. Robertson, *Precommitment Issues in Bioethics*, 81 TEX. L. REV. 1849, 1849 (June, 2003).

[10] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 777 (1986) (Stevens, J. concurring) (quoting Charles Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977)).

[11] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 849 (1992).

biomedical ethics – is in large measure an extension of this general concept of personal autonomy. Under this venerable doctrine, no medical intervention may be undertaken without the intelligent and voluntary consent of the patient.[12] Implicit in this principle is the freedom to decline medical interventions, regardless of their character (life sustaining or otherwise).

The right to refuse medical treatment has come to be regarded as an essential mechanism for self governance at the end of life:

> [T]he choice between life and death is a deeply personal decision. . . . [T]he Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.[13]

Under this view, autonomy demands that individuals have the right to have their preferences regarding life-sustaining measures honored and implemented, free from governmental or private intervention.

B. The Law's Role in Promoting and Defending Autonomy

What sort of legal framework is best suited to advance this vision of autonomy at the end of life? First, there must be legislation in place that makes the patient's subjective desires regarding life-sustaining measures decisive, over and above any competing claims raised by third parties or the state. The positive law must provide a reliable and transparent mechanism for discerning and implementing the wishes of the patient. An equally important feature of such legislation is the presence of robust safeguards against abuse – including especially the imposition of the preferences of some third party, the state, or even the court, under the false pretense of implementing the patient's intentions. Such displacement of the patient's desires by those of others, or by some "reasonable person," "best interests," or "quality of life" standard is singularly anathema to the ideal of autonomy. The risk of this sort of abuse is especially grave when the evidence of the patient's intentions is scant or ambiguous.

Sound positive law, standing alone, is insufficient to realize the vision of autonomy at the end of life. It is equally important that the laws

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[12] *See generally* Norman L. Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 237 (1973).

[13] *Cruzan*, 497 U.S. at 279-281.

described above be scrupulously applied by those charged with interpreting them. When undertaking to discern the intent of the patient, judges should be particularly mindful of the potential for abuse, as well as vigilant against the natural human tendency to put a thumb on the scale in service of one's own preferences or sympathies.

C. Assessing Schiavo: The Law's Failure

Judged according to these standards, the process and outcome in the Schiavo matter were woefully inadequate to advance the cause of autonomy and self-determination. The decisional and positive law governing the Schiavo matter (and cases like it) is imperfect, but generally oriented towards the values of autonomy and self-determination at the end of life. However, the interpretation and application of these laws by the various courts hearing the Schiavo case profoundly undermined these purposes by ignoring the very features of the law essential to preserving autonomy in this context.

1. The Decisional and Positive Law Governing *Schiavo*

At the broadest level of abstraction, the overarching authorities governing the Schiavo matter (and similar cases) are quite friendly to the vision of autonomy and self-determination described above. The Supreme Courts of the United States and Florida have both recognized a right to refuse unwanted medical treatment.[14] Moreover, a person does not lose this right due to cognitive incapacity; such patients are entitled to have their prior intentions honored and implemented.[15] The Supreme Court of Florida has held that this right to refuse treatment applies to any form of intervention, life sustaining or otherwise (including the administration of artificial nutrition and hydration to non-terminally ill patients, such as Ms. Schiavo).[16] In their comprehensive (and definitive) treatise on the law governing the end of life, Professors Alan Meisel and Kathy Cerminara note that there is an emerging consensus supporting this type of legal regime.[17] It is, without question, a framework that privileges personal autonomy and

[14] *Id.* at 279 & n.7 (locating this interest in the "liberty clause" of the Fourteenth Amendment and explicitly rejecting the view that the right to refuse treatment is grounded in a generalized constitutional right of privacy); State v. Herbert, 568 So. 2d 4, 10 (Fla. 1990) (grounding the interest in the "right of privacy" provided by the state constitution) (courts and commentators refer to this case as *In re* Guardianship of Browning).

[15] *Herbert*, 568 So.2d at 12

[16] *Id.* at 11, n. 6.

[17] ALAN MEISEL & KATHY CERMINARA, THE RIGHT TO DIE § 2.02, 2-5 (Aspen 3d ed. 2005).

self-determination above other considerations and values.

Similarly, the positive law governing the Schiavo case is, in the main, structured to promote patient autonomy. Indeed, the relevant Florida statutes enacted to regulate end-of-life decisionmaking[18] adopt a purely subjective standard for those patients (like Ms. Schiavo) who lack an advance directive memorializing their intentions. For such cases, a third party may carry out the patient's wishes, provided that there is "clear and convincing evidence that the decision would have been the one *the patient would have chosen* had the patient been competent."[19] The Florida statutory law closely tracks the purely subjective standard previously articulated by the Florida Supreme Court:

> One does not exercise another's right of self-determination or fulfill that person's right of privacy by making a decision which the state, the family, or public opinion would prefer. The surrogate decision maker must be confident that he or she can and is voicing the *patient's* decision.[20]

Thus, the Florida statutory authority provides that the subjective intentions of the patient regarding end of life care are decisive, over and above any other party's preferences. Within the spectrum of end of life regulation, Florida's laws arguably offer the strongest protection possible for patient autonomy.

Florida law also includes robust safeguards intended to prevent abuse and error, and to provide maximal assurance that the action taken is truly what the patient would have wanted under the circumstances. Its primary mechanism for these purposes is the standard of proof used to evaluate evidence of the patient's intentions. The patient's desire to decline life-sustaining measures must be proven by "clear and convincing evidence."[21] Furthermore, the law provides that in the face of any ambiguity, the court is to presume that the patient would have chosen to "defend life in exercising his or her right of privacy."[22] By adopting the highest evidentiary threshold available in civil cases, the Florida law aims to provide the utmost degree of certainty that the decision ultimately made truly reflects the wishes of the

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[18] *See* FLA. STAT. § 765.101-546 (2003).

[19] *Id.* at § 765.401(3). If such a determination of the patient's actual intentions is impossible, the surrogate may act in the patient's "best interests."

[20] *Herbert*, 568 So.2d at 13 (Fla. 1990) (quoting *In re:* Guardianship of Browning, 543 So.2d 258, 269) (alteration in original) (citation omitted).

[21] FLA. STAT. at § 765.401(3).

[22] Schindler v. Schiavo, 780 So.2d 176, 179 (Fla. Dist. Ct. App. 2001) (quotation omitted).

patient who has been silenced by her disability. It goes without saying that an erroneous decision to terminate life-sustaining measures based on unreliable evidence of a patient's wishes is a grave violation of her right to autonomy and self-determination. A lower evidentiary standard would increase the risk of such error. Moreover, a lesser standard would make it far easier for third parties to succeed in imposing their own preferences at the expense of those of the patient. Similarly, a more permissive standard would allow the court to indulge its understandable, human, yet clearly impermissible impulse to decide the case according to its own subjective assessment of the patient's quality of life. In short, the clear and convincing evidence standard – a bulwark against possible abuse and a means of ensuring a reliable result – is an absolutely crucial element of the Florida law's effort to promote the actual exercise of autonomy by patients no longer capable of expressing their wishes.

It is noteworthy that the Florida law allocates the risk of error to the party seeking to discontinue life-sustaining measures, presumably on the theory that an erroneous decision to terminate such treatment is irremediable. By contrast, an erroneous decision to continue life-sustaining measures results in preservation of the status quo, allowing for the possibility in the future that new evidence of the patient's subjective preferences will come to light, such that her right to self determination can finally (and reliably) be vindicated.

Florida law also aims to prevent error and abuse by providing for the appointment of a guardian to ensure that the wishes of the patient are being identified and implemented, particularly when proxy decision makers are unavailable or unwilling to do so.[23] Moreover, the Florida law makes clear that the presiding judge *may not* serve simultaneously as arbiter of the case at hand and the guardian of the patient.[24] In this way, the Florida law

[23] *See generally*, FLA. STAT. § 744.404. Note, however, that the Florida courts reviewing the Schiavo matter did not make full use of this provision; there was only one guardian ad litem (appointed in 1998) who represented Ms. Schiavo's interests -- attorney Richard Pearse. His term of service was quite brief, and his tenure was not renewed. Instead, the trial court chose to serve as Ms. Schiavo's guardian in this case, noting that an additional guardian ad litem would "tend to duplicate the function of the judge, would add little of value to this process, and might cause the process to be influenced by hearsay or matters outside the record." *Schindler v. Schiavo*, 780 So.2d 176, 179 (Fla. Dist. Ct. App. 2001). Dr. Jay Wolfson later served as guardian ad litem pursuant to legislation passed by the Florida state legislature in 2003. Dr. Wolfson's tenure was also quite brief, and the law authorizing his service was declared unconstitutional.

[24] *See* § 744.309(1)(b). Note, however, that this is precisely what the court did in the Schiavo case, see *supra* nn. 4, 23.

attempts to prevent any party – including the court – from succumbing to the temptation of substituting its own judgment for that of the incapacitated patient.

The final safeguard against abuse and error provided by the Florida law is the nature of the court's jurisdiction in such matters. The jurisdiction exercised in cases such as Schiavo's is that of a guardianship court; its orders to terminate life sustaining measures are *executory* in nature, meaning that even after the decision is rendered, the court retains jurisdiction until the death of the ward: "as long as the ward is alive, *the order is subject to recall and is executory in nature.*"[25] In practice, this means that the court's decision is subject to change and revision based on alteration of the underlying facts or law.[26] This is in stark contrast to a final judgment, which may not be disturbed after it is rendered. The policy reason for designating judicial orders terminating life sustaining measures as executory is clear – if subsequent changes in the law or facts compel the conclusion that the original judgment was erroneous, a mechanism to amend the result is still available. In this way, the Florida law creates another legal hedge against the possibility of a mistaken factual conclusion regarding the patient's true wishes.

Despite its strong orientation towards vindicating the autonomy and self-determination of incapacitated patients like Ms. Schiavo, the law in Florida is imperfect in one crucial respect: it provides no clear means of resolving disputes between family members with competing views of the patient's subjective preferences regarding the administration of life sustaining measures. The law does provide, as described above, for the appointment of a guardian to advise the court when no family member is willing or able to serve as a proxy decision maker, but provided little more by way of guidance.

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[25] *See* Schiavo v. Schindler, 792 So.2d 551, 559 (Fla. Dist. Ct. App. 2001) (emphasis added). Note, however, that the Florida Supreme Court, without explanation or even a single citation to relevant legal authority, declared the order in *Schiavo* to be final rather than executory. Relying in significant part on this error, the Florida Supreme Court declared the interventions of the Florida Legislature and Governor Jeb Bush (via "Terri's Law") to be unconstitutional. *See* Bush v. Schiavo, No. SC04-925, 2004 WL 2109983 (Fla. Sept. 23, 2004). For an extended discussion of executory judgments in the separation of powers context, and for a critique of the Florida Supreme Court's decision in this regard, *see* O. Carter Snead, D*ynamic Complementarity: Terri's Law and Separation of Powers Principles in the End of Life Context*, 57 FLA. L. REV. 53 (January 2005).

[26] *See e.g.*, Miller v. French, 530 U.S. 327, 344 (2000) ("Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law").

2. The Adjudication of *Schiavo*

While Florida's positive and decisional law governing end of life decision-making is imperfect, it is generally structured in such a way as to defend and promote autonomy. In stark contrast, the application and interpretation of these laws by the courts hearing the Schiavo case directly and persistently undermined these values in a manner that should be distressing to anyone who aspires to self governance at the end of life. Contrary to popular understanding, the courts charged by the Florida laws with discerning and implementing Ms. Schiavo's wishes paid scant attention to the centrally important question of her *actual subjective intentions*, and focused most of their time and energy on ancillary factual questions relating to the nature of her condition, and the possible benefits of various therapies. Such questions are more appropriate to a "best interests" or "quality of life" approach, which are paternalistic in character and contrary to the values undergirding the principle of autonomy. To the extent that the courts did take steps to discern Ms. Schiavo's wishes, they did so in an unrigorous and unreliable manner, ignoring crucial procedural safeguards prescribed by the Florida guardianship laws. As a result, it is impossible to have any confidence that the conclusions reached by the courts accorded with Ms. Schiavo's actual wishes. If the court's order to terminate artificial nutrition and hydration was indeed a fulfillment of Ms. Schiavo's subjective desires, this is a happy accident. It was manifestly not the result of a judicial process calculated to advance autonomy and self-determination.

Mr. Schiavo's legal efforts to discontinue artificial nutrition and hydration for his wife lasted seven years. However, throughout this entire period, there was only one evidentiary hearing (in 2000) devoted to the question of Ms. Schiavo's wishes regarding life-sustaining measures. By any measure, the evidence presented at this hearing was scant, vague, and contradictory. Nevertheless, the court inexplicably concluded that Ms. Schiavo's desire to discontinue artificial nutrition and hydration had been proven by "clear and convincing" evidence.[27] By abrogating its responsibility to scrupulously and rigorously apply this evidentiary standard, the court untethered itself from the essential mechanism provided by the Florida law for ensuring a reliable determination of Ms. Schiavo's wishes.

[27] *See generally, In re:* Guardianship of Schiavo, No. 90-2908GD-003 (Fla. Cir. Ct. February 11, 2000) (order granting authorization to Michael Schiavo to discontinue artificial life support for Theresa Marie Schiavo). ("Feb. 2000 Order").

To fully appreciate the deeply flawed nature of this judicial determination, and to understand its implications for the ideal of autonomous decision-making at the end of life, it is necessary to consider briefly the jurisprudence of the "clear and convincing evidence" standard in this context. Even a cursory account of how courts have consistently applied this evidentiary standard in end of life disputes demonstrates the extraordinary degree to which the Florida courts in Schiavo departed from its proper application.

As mentioned above, the clear and convincing evidentiary standard is the highest available in civil cases. To satisfy this standard, evidence must be "so clear as to leave no substantial doubt" and be "sufficiently strong to command the unhesitating assent of every reasonable mind."[28] To further illustrate the quantum of evidence that is necessary to meet this threshold, consider the following: "The evidence must be of such weight that it produces in the mind fo the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[29] One court put it even more strongly, noting that the clear and convincing evidence standard requires the trier of fact to be "convinced *as far as humanly possible*" that the evidence presented truly represents the wishes of the now-incapacitated patient.[30]

What specific criteria should a trier of fact look to in evaluating evidence of a patient's intent regarding end of life preferences? While Florida law is silent on the specific application of the "clear and convincing" standard in the end-of-life context, a significant number of other jurisdictions have developed a well-settled, uniform, and consistent body of persuasive authority that provides suprisingly clear answers. In cases like Ms. Schiavo's, where the evidence presented consists entirely of past oral communications to others, such statements must demonstrate a "firm, settled, . . . serious, well thought out, consistent decision to refuse treatment *under these exact circumstances* or *circumstances highly similar*

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[28] Conservatorship of Wendland, 26 Cal.4th 519, 552 (Cal. 2001) (quoting *In re:* Angel P., 28 Cal.3d 908, 919 (1981)).

[29] Inquiry Concerning Davey, 645 So.2d 398, 404 (Fla., 1994). See also Matter of Jobes, 529 A.2d 434, 441 (N.J. 1987) (Evidence is "clear and convincing" when it produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence *so clear, direct and weighty and convincing* as to enable [the fact finder] to come to a *clear conviction, without hesitancy, of the truth of the precise facts in issue)* (emphasis added).

[30] Matter of Westchester County Med. Ctr. On Behalf of O'Connor, 531 N.E.2d 607, 613 (N.Y., 1988) (emphasis added).

to the current situation."[31] The weight the trier of fact must accord to such oral communications depends on the "remoteness, consistency, specificity, and solemnity of [the] prior statements."[32] Only reflective, deliberate, solemn, and consistent remarks expressing the desire to decline the type of life-sustaining treatment at issue are sufficient to meet the clear and convincing threshold.

Similarly, courts have unambiguously described the types of prior statements that *do not* satisfy the clear and convincing evidence standard in the end of life context. Not surprisingly, evidence that is "loose, equivocal, or contradictory" falls short of the clear and convincing threshold.[33] Prior statements about end of life preferences that are "general, remote, spontaneous, and made in casual circumstances" are routinely held to be unreliable by courts applying the clear and convincing standard.[34] Courts in cases like Ms. Schiavo's have consistently held that fidelity to the clear and convincing evidence standard requires reliance only on prior statements that speak to the exact (or nearly exact) circumstances at hand. There have been many cases in which a court has declined to authorize termination of life sustaining measures because the now-incapacitated patient's prior remarks about end of life preferences spoke to circumstances distinct from those presented. For example, in *Wendland v. Wendland*, an individual (Mr. Wendland) who became severely cognitively impaired in an automobile accident had previously been heard to say (to numerous witnesses) that he would never want to live "like a vegetable." However, the court held that this did not constitute clear and convincing evidence sufficient to discontinue life-sustaining measures, given that his present condition was technically not vegetative, but rather "minimally conscious."[35] Similarly, in *In re Martin*, the court held that a patient's prior statements that he did not wish to have his life preserved artificially by a machine or if he were ever in a vegetative state, were not clear and convincing evidence supporting a decision to discontinue life sustaining measures in the circumstances presented, because Mr. Martin was neither in a vegetative state, nor relying on a machine to sustain his life artificially.[36] He, like Mr. Wendland, was in a minimally conscious, yet incompetent state.

Courts have not only described the *types* of prior statements that fall

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[31] *In re:* Martin, 538 N.W.2d 399, 411 (Mich. 1995) (emphasis added).
[32] *Id*.
[33] Elbaum v. Grace Plaza of Great Neck, Inc., 148 A.D.2d 244 (N.Y. App. Div., 1989).
[34] *Jobes*, 529 A.2d at 443.
[35] *Wendland*, 26 Cal.4th 519.
[36] *Martin*, 538 N.W.2d 399.

short of the clear and convincing evidence standard; many courts have gone so far as to enumerate *specific comments* that should be deemed presumptively unreliable by triers of fact seeking to discern an incapacitated patient's preferences regarding life sustaining measures.[37] For example, there seems to be wide agreement among courts considering the question that "prior statements made in response to seeing or hearing about another's prolonged death do not fulfill the clear and convincing standard of evidence required to show that the incapacitated patient would have wanted medical treatment withheld."[38] Similarly, courts have expressed serious doubts about the reliability of an "off-hand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health."[39] Courts have likewise observed that a prior statement that a person would not "want to be a burden" should not be regarded as clear and convincing evidence of a desire to decline life-sustaining measures.[40] In a similar vein, courts have expressed the view that general statements made in the past that one would not want "to be sustained on anything artificial" or on "life supporting machinery," do not constitute clear and convincing evidence necessary to discontinue life-sustaining measures.[41] As discussed above, the central purpose of the clear and convincing evidence standard is to ensure reliability in determining the now-incapacitated patient's intentions. One court cautioned that reliance on statements like the foregoing could potentially yield disastrous results:

> If such statements were routinely held to be clear and convincing proof of a general intent to decline all medical treatment once incompetency sets in, few nursing home patients would ever receive life-sustaining medical treatment in the future. The aged and infirm would be placed at grave risk if the law uniformly but unrealistically treated the expression of such sentiments as a calm and deliberate resolve to decline all life-sustaining medical assistance once the speaker is silenced by mental disability.[42]

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[37] *Wendland*, 26 Cal.4th 519

[38] *Martin*, 538 N.W.2d*; see also Matter of Westchester County on behalf of O'Connor*, 531 N.E.2d 607 (N.Y. 1988) (deeming as unreliable "immediate reactions to the unsettling experience of seeing or hearing of another's unnecessarily prolonged death"); *Elbaum* (same); *Jobes* (declaring that "informally expressed reactions to other people's medical condition and treatment" are not clear and convincing evidence of one's own intentions regarding life sustaining measures).

[39] *Jobes*, 529 A.2d at 443 (quoting In the Matter of Conroy, 486 A.2d 1209, 1230 (N.J. 1985)).

[40] *O'Connor*, 531 N.E.2d 607.

[41] *See id.*; *see also Conroy*, 486 A.2d 1209.

[42] *O'Connor*, 531 N.E.2d at 614.

What, then, persuaded the reviewing courts that Ms. Schiavo's desire was to decline life-sustaining measures under the circumstances? What quantum of proof was marshaled to demonstrate this proposition to the satisfaction of the most exacting evidentiary standard available in civil cases? A careful review of the record reveals a jarring truth: the evidence deemed "clear and convincing" in the Schiavo case was a veritable parade of every species of presumptively unreliable statement long rejected by courts across the nation called upon to adjudicate end of life disputes.

At the January 2000 trial, the court heard from five witnesses who recounted past comments by Ms. Schiavo ostenisbly relating to her end-of-life preferences. Two witnesses, 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 circumstances, elect to decline artificial nutrition and hydration.[43] An additional witness, Jackie Rhodes, 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. Three witnesses: Michael Schiavo, Scott Schiavo (Mr. Schiavo's brother), and Joan Schiavo (Mr. Schiavo's sister-in-law) testified that Ms. Schiavo had, at various times, expressed her desire to decline life sustaining measures under certain circumstances.

In making its decision, the court discounted the testimony of Rhodes, Schindler, and Meyer. Judge Greer deemed the Schindler testimony to be unreliable based on his understanding that Ms. Schiavo's comments were made in 1976 (the year in which Judge Greer thought Ms. Quinlan had died), when Ms. Schiavo was only 11 or 12 years of age.[44] In fact, Judge Greer's understanding of the *Quinlan* chronology was mistaken -- Karen Ann Quinlan died in 1985, which would suggest that Ms. Schiavo's remarks could have been made when she was between the ages of seventeen and twenty (as Ms. Schindler had originally asserted at the hearing). Similarly, Judge Greer discounted the Meyer testimony based on the same error; he regarded Meyer's testimony as uncredible because Meyer implied that

[43] Tr. of Record at 372-73 (direct examination of Mary Schindler) and 762 (direct examination of Diane Meyer), *In re:* Guardianship of Schiavo No. 90-2908GD-003 (Fla. Cir. Ct. January 2000). ("Jan. 2000 Hr'g")

[44] Feb. 2000 Order at 9.

Karen Quinlan was still alive in 1982.[45] Judge Greer was "mystified" by Meyer's testimony, and concluded that the conversation must have taken place in the 1970s, when Ms. Schiavo was a child.[46] But this, of course, was not necessarily so. Thus, Judge Greer discounted evidence that Ms. Schiavo would not choose to decline artificial nutrition and hydration, based in significant part, on an easily verifiable factual error about a historical event.

Far more troubling than what the Florida court discounted as credible, was what it took to be "clear and convincing." Judge Greer's conclusion that Ms. Schiavo would want, under the circumstances, to decline artificial nutrition and hydration, relied entirely on four statements she allegedly made regarding her own treatment in the event that she should become profoundly disabled. First, the court relied on Mr. Schiavo's testimony that many years prior on a train ride, Ms. Schiavo stated that 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."[47] Ms. Schiavo's uncle had been in a car accident, and was disabled: his right arm was paralyzed, he walked with a severe limp, and had slurred speech.[48] Ms. Schiavo's elderly and ailing grandmother was the sole caretaker for the uncle. Second, Mr. Schiavo testified that he and Ms. Schiavo watched documentaries involving disabled individuals who were profoundly dependant upon others. In response to the suffering of these patients, Ms. Schiavo purportedly asked Mr. Schiavo not to "keep her alive on anything artificial."[49]

The third statement relied upon by the court was the testimony of Scott Schiavo that in 1986, at the funeral following the death of his grandmother, Ms. Schiavo made remarks indicating what her views were regarding life sustaining measures.[50] Scott Schiavo's grandmother had been maintained at the end of her life solely by a host of life sustaining machinery against her clearly stated wishes. According to Scott Schiavo's testimony, the interventions sustaining his grandmother included "something that is breathing for you . . . [and devices that] pump[] blood [into your heart] and oxygen to your brain and everything else."[51] He described the machinery as "lifting [her] off the bed for air. . . [and causing] her chest [to] pump[]

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[45] *Id*. at 5.
[46] *Id*.
[47] Tr. Jan. 2000 Hr'g at 30-31 (direct examination of Michael Schiavo).
[48] *See id.* at 32.
[49] *Id*. at 33.
[50] *See* Feb. 2000 Order at 9.
[51] Tr. Jan. 2000 Hr'g at 100 (direct examination of Scott Schiavo).

up."[52] At the funeral for his grandmother, all of the grandchildren were expressing their anger that the grandmother had been "kept alive on a machine" against her wishes, "after she was gone."[53] According to Scott Schiavo, Ms. Schiavo added her thoughts in response to the suffering of the Schiavo grandmother, and stated, "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."[54] This comment – made at the reception following the Schiavo grandmother's funeral – was the only remark Scott Schiavo ever recalled Ms. Schiavo making about life sustaining measures.[55] Curiously, Scott Schiavo failed to mention this one instance to anyone until nine years after Ms. Schiavo became severely cognitively disabled and profoundly dependant.

The final comment relied upon by Judge Greer to support his conclusion regarding Ms. Schiavo's wishes was reported by Joan Schiavo, Mr. Schiavo's sister-in-law (the wife of his brother, Scott Schiavo).[56] Joan Schiavo testified that:

> We had watched a movie one time on television. It was about somebody. I don't remember. 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 would want the tubes and everything taken out.[57]

Joan Schiavo further testified that she thought that the character in the movie was sustained on a "breathing machine" or a "feeding machine."[58] Joan Schiavo added, however, "I don't remember the movie. I really don't remember the movie."[59] Nevertheless, she seemed to recall that the character's condition was terminal, and that he died within "months to a year,"[60] though she added again that she wasn't sure about this aspect of the movie either.[61] Joan Schiavo, like her husband, failed to mention this conversation until nine years following Ms. Schiavo's collapse and disability.

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[52] *Id*. at 110.
[53] *Id*. at 102.
[54] *Id*.
[55] *See id.* at 105.
[56] *See* Feb. 2000 Order at 9.
[57] Tr. Jan. 2000 Hr'g at 233 (direct examination of Joan Schiavo).
[58] *Id*. at 234.
[59] *Id*. at 239 (cross examination of Joan Schiavo).
[60] *Id*. at 240.
[61] *Id*.

These four statements were the sum and substance of the evidence upon which Judge Greer based his conclusion that Ms. Schiavo would want to terminate artificial nutrition and hydration under the circumstances presented. That such evidence would be regarded as "clear and convincing" is nothing short of astonishing. To the contrary, all of the foregoing comments are paradigmatic examples of statements that courts routinely deem to be presumptively unreliable. First, all of the four statements were "general, remote, and made in casual circumstances." All of the statements were made at least five years prior to Ms. Schiavo's collapse. Two of the four statements were made while watching television or movies; one was made during a casual conversation on a train; one was made during an informal (and highly emotionally charged) conversation at a reception following a funeral. Each statement could also fairly be characterized has an "off-hand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health."

Most damningly, all of the statements attributed to Ms. Schiavo were "made in response to seeing or hearing about another's prolonged death," a category of comment that courts regularly dismiss as unreliable. Compounding this error, all of the statements were made in response to circumstances factually dissimilar to Ms. Schiavo's. Ms. Schiavo's condition was non-terminal. She was not in a coma. Most experts have described her condition as a "persistent vegetative state," characterized by "the absence of cognitive behavior of any kind, and an inability to communicate or interact purposefully with the environment."[62] She was not maintained on a ventilator or other "machine." She did, however, receive artificial nutrition and hydration by means of a PEG tube. By contrast, Ms. Schiavo's uncle's condition was nothing like hers – he suffered from paralysis in one arm, difficulty walking, and slurred speech. Likewise, Ms. Schiavo's condition did not resemble those of the terminally ill comatose character from the movie she and Joan Schiavo purportedly viewed together (to the extent that Joan Schiavo was able to recall the details of this film). Nor was Ms. Schiavo's condition like that of the Schiavo grandmother, who was terminally ill and required all manner of invasive machinery to sustain her life. Finally, it is not clear at all that Ms. Schiavo's condition matched those of the individuals in the documentaries that Mr. Schiavo claimed that they watched together. If Judge Greer had followed the well-developed

[62] The Multi-Society Task Force on PVS, Am. Acad. Of Neurology, *Medical Aspects of the Persistent Vegetative State – First of Two Parts*, 330 NEW ENG. J. MED 1499, 1499 (1994). Ms. Schiavo's parents and their supporters strenuously objected to Ms. Schiavo's diagnosis in this regard.

body of persuasive authority for interpreting such evidence, he would have been compelled to conclude that these statements were not sufficient to support a decision to terminate life-sustaining measures for Ms. Schiavo.

In another departure from the well-established jurisprudence in this area, Judge Greer chose to rely on statements that were near verbatim examples of comments that courts uniformly deem presumptively unreliable. Specifically, Judge Greer pointed to Ms. Schiavo's remarks that she "would not want to be a burden," and that she would not want to be sustained "on anything artificial" or "on a machine" as a basis for his decision to withdraw her PEG tube.

Finally, in crediting the testimony of Michael Schiavo, Judge Greer relied on evidence that was patently "equivocal and contradictory." Mr. Schiavo's testimony that his wife would want to cease life-sustaining measures, based on his recollection of prior conversations, squarely contradicted *his own testimony* given under oath in prior judicial proceedings. First, during the damages phase of a medical malpractice suit brought on his wife's behalf shortly after her collapse, Mr. Schiavo requested compensatory damages sufficient to care for her "for the rest of [his] life."[63] Indeed, he testified that he was studying to become a nurse so that he could care for her for the rest of her life, which was not expected to be cut short by her disability.[64] At this trial he made no mention of the fact that, based on her prior expressed wishes, he would shortly thereafter decide against sustaining her life by artificial means. But this is precisely the decision that Mr. Schiavo made – a fact that caused Guardian ad Litem Richard Pearse to view with deep skepticism the entirety of Mr. Schiavo's comments regarding his wife's wishes.[65]

Moreover, Mr. Schiavo's account of his wife's wishes directly contradicted comments that he made in a November 1993 deposition in which he discussed his decision not to treat his wife's urinary tract infection. Mr. Schiavo stated that it was his desire at that point to allow Ms. Schiavo to succumb to the infection, because this is what she would have wanted under the circumstances.[66] However, when asked why he refused to take the advice of a physician who suggested that Mr. Schiavo remove her feeding tube (because, according to the physician Ms. Schiavo had "died four years ago"), Mr. Schiavo responded "I couldn't do that to Terry

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[63] Trial Tr. at 28, Nov. 5, 1992 (Michael Schiavo direct examination).
[64] *Id*. at 26-27.
[65] Tr. Jan. 2000 Hr'g at 698-699.
[66] Michael Schiavo Dep. at 15, November 19, 1993.

[sic]."[67]

Judge Greer's determination that the insufficient testimony described above was "clear and convincing" evidence was affirmed by the intermediate appellate court, though in doing so, the court observed that the statements attributed to Ms. Schiavo were "few and . . . oral."[68] Immediately thereafter, the Schindlers came forward with testimony from several witnesses, including an affidavit from a former girlfriend of Mr. Schiavo (Trudy Capone), in which she stated, under oath, that Mr. Schiavo admitted to her on numerous occasions that he had no idea what Ms. Schiavo would choose under her present circumstances.[69] The trial court barred this testimony as untimely. The intermediate appellate court affirmed this judgment, but noted that on remand, the Schindlers would be permitted to file a revised motion for relief under a separate rule of procedure if they could "plead and prove newly discovered evidence of such a substantial nature that it proves" that Ms. Schiavo would not wish to terminate artificial nutrition and hydration under the present circumstances.[70] On remand, Judge Greer concluded that this evidence failed to present a "colorable claim for entitlement to relief from the judgment." This conclusion was affirmed on appeal.[71]

The only questions that the Florida courts were willing to entertain for the balance of the litigation (from 2001 until 2005) had little or no relevance to discerning Ms. Schiavo's actual wishes. There followed a protracted dispute about the nature of Ms. Schiavo's condition, namely, whether it could fairly be characterized as a persistent vegetative state and whether she might benefit from experimental therapies. As suggested above, these inquiries are more appropriate to those approaches to end of life decision-making that turn on what a reasonable person would want under the circumstances, what constitutes the "best interests" of the patient, or what actions the patient's current quality of life would require. Whatever the virtues of these approaches might be, their aim is manifestly not to vindicate the autonomy of the patient by discerning and implementing her actual wishes, as reflected by her prior statements.

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[67] *Id.* at 33-34.

[68] Schindler v. Schiavo, 780 So.2d 176, 180 (Fla. Dist. Ct. App. 2001).

[69] Trudy Capone Aff., May 9, 2001 at 1 ("[Michael Schiavo] said to me many times that he had no idea what [Ms. Schiavo's] wishes were.") (on file with author).

[70] Schindler v. Schiavo, 792 So.2d 551, 554 (Fla. Dist. Ct. App. 2001).

[71] Schindler v. Schiavo, 800 So.2d 640, 643 (Fla. Dist. Ct. App. 2001).

CONCLUSION

The Schiavo case has been discussed at length by the legal, political and cultural commentariat. The bulk of such discussion, however, has been based on false factual premises. A careful review of the record reveals that the Schiavo matter should not be regarded as a victory for spouses over parents or the individual over the government, in making decisions about life sustaining measures. Most importantly, however, a clear understanding of the Schiavo case compels the conclusion that it does not, contrary to popular understanding, represent a victory for the right of autonomy and self-determination in this context. In fact, the opposite is true. While the law governing that case was generally (though imperfectly) calibrated to vindicate these values, the sloppy and seemingly indifferent manner in which the Florida courts approached the crucial (and decisive) question of Ms. Schiavo's wishes prevented the realization of this goal. The Florida courts abandoned the single most important mechanism the law provided for ensuring that Ms. Schiavo's wishes would be reliably discerned and implemented – the clear and convincing evidence standard of proof. As a result, it is not possible to have any confidence that Ms. Schiavo's actual intentions were honored. Not only did the Florida courts persistently refuse to rigorously pursue the question of Ms. Schiavo's actual wishes, they employed the bulk of their resources to conduct inquiry into questions relating to Ms. Schiavo's present and future quality of life. This approach is inconsistent with the ideals of autonomy and self-governance at the end of life. Far from being a victory for freedom, the Schiavo matter represents an abject failure of the law to provide the framework within which autonomy might truly be exercised.

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