

2005

Protecting Unconscious, Medically- Dependent Persons After Wendland & Schiavo

Clarke D. Forsythe

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Forsythe, Clarke D., "Protecting Unconscious, Medically- Dependent Persons After Wendland & Schiavo" (2005). *Constitutional Commentary*. 144.

<https://scholarship.law.umn.edu/concomm/144>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

PROTECTING UNCONSCIOUS, MEDICALLY-DEPENDENT PERSONS AFTER WENDLAND & SCHIAVO

Clarke D. Forsythe*

INTRODUCTION

Thirty years ago, the case of Karen Ann Quinlan, a young woman rendered profoundly mentally disabled and incompetent, instigated an enduring national debate as it moved through the New Jersey courts.¹ The *In re Quinlan* decision—which arose a few years after bioethics became a focused discipline in the United States, with initial national debates over organ transplantation² and the definition of “death” in the law³—launched the nation on a profound transformation in the legal, medical, and cultural treatment of the medically dependent and disabled.⁴ Fourteen years after *Quinlan*, in the wake of that change, the Supreme Court decided the landmark case of *Cruzan v. Director, Missouri Department of Health*.⁵ There the Court held that Missouri (and hence the states generally) could require “clear and convincing evidence” of an incompetent patient’s desires be-

* Attorney & Director, Project in Law & Bioethics, Americans United for Life. I am grateful to Edward S. Lloyd for his research assistance.

1. *In re Quinlan*, 355 A.2d 647, 70 N.J. 10 (1976), cert. denied sub nom., Garger v. New Jersey, 429 U.S. 922 (1976).

2. See David Louisell, *Transplantation: Existing Legal Constraints*, in ETHICS IN MEDICAL PROGRESS 78 (G. Wolstenholme & M. O'Connor eds., 1966).

3. See Alexander M. Capron & Leon Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87 (1972).

4. On the significance of the *Quinlan* case, see, for example, Edward R. Grant & Clarke D. Forsythe, *From 'Natural Death' to 'Aid-in-Dying': Reflections on the American Judicial Experience*, in EUTHANASIA: THE GOOD OF THE PATIENT, THE GOOD OF SOCIETY 151, 152 (Robert I. Misbin ed., 1992); Dennis J. Horan, *The Quinlan Case*, in DEATH, DYING & EUTHANASIA 525 (Dennis J. Horan & David Mall eds., 1980); C. Everett Koop & Edward R. Grant, *The "Small Beginnings" of Euthanasia: Examining the Erosion in Legal Prohibitions Against Mercy-Killing*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 585 (1986).

5. 497 U.S. 261 (1990).

fore allowing the withdrawal of life-sustaining nutrition and hydration.⁶ In 1997, acknowledging the considerable change that had transpired, and the ongoing nationwide debate, the Supreme Court rejected a federal constitutional right to assisted suicide in *Washington v. Glucksberg*⁷ and *Vacco v. Quill*.⁸ The Court left the issue of assisted suicide to the states, and, in the wake of those decisions, the voters of Oregon have re-approved assisted suicide,⁹ while those of Michigan and Maine have rejected it.¹⁰

Since *Glucksberg* and *Vacco*, two major cases involving incompetent patients and the withdrawal of nutrition and hydration have been decided by state courts. In 2001, the California Supreme Court decided *Conservatorship of Wendland*,¹¹ which rejected the withdrawal of nutrition and hydration from conscious but disabled wards and received little media attention.¹² In contrast, *Schiavo*,¹³ like *Quinlan* and *Cruzan*, provoked intense media attention and sparked a nationwide discussion over the appropriate treatment of incompetent persons, who should make those decisions, and how they should be made.

In a sense, the *Wendland* and *Schiavo* cases “implemented” the Supreme Court’s decision in *Cruzan*. The state courts applied the “clear and convincing evidence” standard, and the federal courts deferred to the state courts. But did the law adequately protect the life of Theresa Schiavo? Did the courts? Were the procedures applied fair and adequate?

Pursuant to *Cruzan*, *Glucksberg*, and *Vacco*, the states may constitutionally adopt policies and procedures which protect the lives of disabled, unconscious persons.¹⁴ Neurologically-impaired

6. *Id.* at 279.

7. 521 U.S. 702 (1997).

8. 521 U.S. 793 (1997).

9. Edward R. Grant & Paul Benjamin Linton, *Relief or Reproach: Euthanasia Rights in the Wake of Measure 16*, 74 OR. L. REV. 449, 449 (1995).

10. J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 193 (2006).

11. 28 P.3d 151, 26 Cal. 4th 519 (2001).

12. The case received little media attention perhaps because Robert Wendland died before the court’s decision and the California Supreme Court denied withdrawal of nutrition and hydration from the conscious ward. 28 P.3d at 154 n.1.

13. See *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003), *review denied*, 855 So. 2d 621 (Fla. 2003); *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004) (invalidating “Terri’s Law” as a violation of separation of powers), *cert. denied*, 543 U.S. 1121 (2005).

14. Whether the state *has* to provide life-sustaining treatment is another question not addressed here: For a discussion of this issue, see *DeShaney v. Winnebago Depart-*

human beings are entitled to protection as "persons" under the Fifth and Fourteenth Amendments to the Constitution because "person" within the meaning of these amendments encompasses all human beings. Their degree of neurological impairment does not undermine their protection as "persons."

In light of what *Wendland* and *Schiavo* revealed about the inadequacy of state statutes and judicial procedures, the states should consider legislation that (1) enhances the educational value of advance directives, (2) adopts presumptions in favor of sustaining the lives of the unconscious persons if they do not execute advance directives, (3) enhances judicial evaluation of conflicts of interests by guardians, (4) ensures that guardians are exercising informed consent, and (5) clarifies procedures to ensure efficient resolution when the guardian's decision is challenged by family members.

I. FROM QUINLAN TO CRUZAN

The common law traditionally recognized a right to self-determination regarding the acceptance or refusal of medical treatment—a right to refuse medical treatment, strictly speaking, but not a "right to die."¹⁵ The landmark judgment in *Quinlan* was rather narrow—at least compared to subsequent state court decisions—but the court's *rationale* applied legal concepts, like substituted judgment and the constitutional right of privacy, in novel ways that had broad repercussions. The New Jersey Supreme Court affirmed a right to refuse medical treatment, a respirator in the case of Karen Quinlan,¹⁶ and held that this right was a constitutional right which could be exercised for an incompetent patient through the "substituted judgment" of a family member.¹⁷

Despite the narrow scope of the judgment, the *Quinlan* case instigated significant legal change in the treatment of the chronically and terminally ill. *Quinlan* "prompted" the passage of living will legislation in the states, beginning with the California Natural Death Act in 1976.¹⁸ Traditional common law rules of

ment of Social Services, 489 U.S. 189 (1989); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Robinson v. California*, 370 U.S. 660 (1962).

15. For a discussion of this issue, see generally Dennis J. Horan, *Comment on the Living Will*, in DEATH, DYING & EUTHANASIA, *supra* note 4, at 369, 370.

16. Her parents never attempted to withdraw Karen's feeding tube, considering it to be basic sustenance.

17. *In re Quinlan*, 355 A.2d 647, 664, 70 N.J. 10, 41 (1976).

18. Grant & Forsythe, *supra* note 4, at 152; Horan, *Comment on the Living Will*,

tort, battery, and informed consent were superseded by statutes and court decisions. Medical care of the chronically and terminally ill became more formalized, with layers of procedures and state and federal laws.¹⁹ The common law definition of “death” was legislatively expanded to include “whole brain death” (beginning with Kansas legislation in 1970).²⁰ States passed legislation to fill the perceived gaps and to clarify the rights of the chronically and terminally ill.

Beginning with California in 1976, virtually every state (and the District of Columbia) has authorized advanced directives by statute.²¹ A review in 1986 of the changes wrought found that legislation and court decisions between 1976 and 1986 had weakened existing legal prohibitions against euthanasia.²² Most states have enacted legislation authorizing the withholding of cardiopulmonary resuscitation (DNR), beginning with New York in 1988.²³ At least 37 states have surrogate decision-making statutes that may operate in the absence of a surrogate designated by the patient.²⁴

The legislative developments were accompanied by a series of state court decisions after *Quinlan—In re Conroy*,²⁵ *In re Jobs*,²⁶ *Brophy v. New England Sinai Hospital*,²⁷ *Gardner*,²⁸ *In re Grant*,²⁹ *Cruzan v. Director, Missouri Department of Health*,³⁰ *In*

supra note 15, app. at 374.

19. See Horan, *Comment on the Living Will*, *supra* note 15, at 369.

20. See Capron & Kass, *supra* note 3, at 88.

21. ALAN MEISEL & KATHY L. CERMINARA, *THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING* 7-7, 7-187 (3d ed. 2004) (Table 7-1, listing state statutes). See generally Dennis J. Horan & Thomas J. Marzen, *Death with Dignity and the Living Will: A Commentary on Legislative Development*, 5 J. LEGIS. 81 (1978); Susan R. Martyn & Lynn Balshone Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 NEB. L. REV. 779 (1984). 1985 was a “decisive year” in state legislative adoption of living wills. “At the outset of 1985, less than half of the states had enacted such laws. By the end of 1985, living will laws were on the books in thirty-six states.” Koop & Grant, *supra* note 4, at 598 & n.36.

22. Koop & Grant, *supra* note 4, at 599.

23. See generally MEISEL & CERMINARA, *supra* note 21, at 6-19.

24. *Id.* at 8-23 (Table 8-1, listing statutes).

25. 486 A.2d 1209, 98 N.J. 321 (1985).

26. 529 A.2d 434, 108 N.J. 394 (1987).

27. 497 N.E.2d 626, 398 Mass. 417 (1986) (permitting withdrawal of assisted nutrition and hydration from patient in persistent vegetative state by 4-3 vote).

28. 534 A.2d 947 (Me. 1987) (permitting withdrawal of nutrition and hydration by 4-3 vote).

29. 747 P.2d 445, 109 Wash.2d 545 (1987) (en banc), *modified*, 757 P.2d 534 (1988) (holding 5-4 that resuscitation measures could be withheld but not nutrition and hydration).

30. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *aff'd sub. nom.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

re *Estate of Longeway*,³¹ *In re Estate of Greenspan*³²—which further defined the right to refuse treatment and reflected great controversy over the permissibility of withdrawing nutrition and hydration from incompetent and mentally disabled patients. This trend of cases, by narrow margins and over significant dissents, rejected any distinction between medical treatment and nutrition and hydration and allowed the withdrawal of nutrition and hydration on the same basis as any medical treatment. Perhaps *Schiavo* indicates that the equivalence seen by judges is not shared by the public.

II. THE SIGNIFICANCE OF *CRUZAN*, *VACCO & GLUCKSBERG*

In 1990, the Supreme Court entered the field with its first “right to die” case, the landmark *Cruzan* decision.³³ The Court upheld, by the narrowest of margins, five-four, the authority of states to maintain nutrition and hydration for patients in a “persistent vegetative state,” except upon evidence of the patient’s intent by “clear and convincing evidence.”³⁴ The Supreme Court resisted the request to “constitutionalize” the area along the lines of a “right to privacy” based on *Roe v. Wade*,³⁵ its holding was narrow and deferential to the states. It did not create a constitutional “right to die” or a right to suicide.³⁶ The Supreme Court in *Cruzan* held that “Missouri may permissibly place an increased risk of an erroneous decision on those seeking to ter-

31. 549 N.E.2d 292, 133 Ill. 2d 33 (1989) (permitting withdrawal of nutrition and hydration by 4-2 vote).

32. 558 N.E.2d 1194, 137 Ill. 2d 1 (1990) (allowing, by 4-2 vote, public guardian to discontinue nutrition and hydration if intent of patient in “persistent vegetative state” regarding withdrawal of feeding tube was established by “clear and convincing evidence”).

33. 497 U.S. 261 (1990).

34. *Id.* at 280 (“Missouri requires that evidence of the incompetent’s wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.”). *Id.* at 282 (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’” (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982))).

35. 410 U.S. 113 (1973).

36. The Missouri trial court, however, upon remand of the case, found “clear and convincing evidence” of Nancy Cruzan’s wishes, allowed the withdrawal of the nutrition and hydration, and Nancy Cruzan died on December 26, 1990. See *Step-by-Step Chronology of Nancy Cruzan Case Leading to Her Death*, <http://www.christianliferesources.com/?2161> (posted Jan. 1, 1992).

minate an incompetent individual's life-sustaining treatment."³⁷ The Court affirmed Missouri's asserted state interests: "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."³⁸ And, perhaps most importantly, the Court declared that the states have "an unqualified interest in the preservation of human life."³⁹

In the wake of *Cruzan*, litigation was launched to make an end-run around the democratic process and overturn the anti-assisted suicide laws of the states and create a constitutional right to assisted suicide.⁴⁰ An extensive national debate commenced over the implications of any attempt to legalize direct killing or assisted suicide—including the impossibility of limiting the class of patients, the difficulty of enforcing any regulations, and the weakening of the care of the chronically and terminally ill who do not want assisted suicide.⁴¹

In 1997, the Supreme Court refused to create a federal constitutional right to assisted suicide and left the issue to the states.⁴² In *Washington v. Glucksberg*, the Court rejected a substantive due process right to assisted suicide and held that the Washington statutory prohibition did not violate the Fourteenth Amendment.⁴³ The judgment was unanimous, though the Court's opinion was supported five-four (in an opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, Thomas). Justices Stevens, Souter, Ginsburg, and Breyer filed various opinions concurring in the judgment. The Court recognized that "[t]he States' assisted-suicide bans . . . are longstanding expressions of the States' commitment to the protection and preservation of all human life."⁴⁴ The Court reaffirmed that the states have an "unqualified interest in the preservation of human

37. 497 U.S. at 283.

38. *Id.* at 280.

39. *Id.* at 282.

40. Washington voters rejected a ballot initiative to legalize assisted suicide in 1991. California voters rejected a similar ballot initiative in 1993. *Washington v. Glucksberg*, 521 U.S. 702, 717 (1997).

41. See, e.g., NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT, at vii-iii (May 1994); Clarke D. Forsythe, *The Incentives and Disincentives Created by Legalizing Physician-Assisted Suicide*, 12 ST. JOHN'S J. LEGAL COMMENT. 680, 680-81 (1997); Grant & Forsythe, *supra* note 4, at 153-62; Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1 (1985).

42. *Glucksberg*, 521 U.S. 702; *Vacco v. Quill*, 521 U.S. 793 (1997).

43. *Glucksberg*, 521 U.S. at 728; see also Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 673.

44. *Glucksberg*, 521 U.S. at 710.

life."⁴⁵ The Supreme Court explicitly rejected the lower court's holding that the state's interest in protecting life "depends on the 'medical condition and the wishes of the person whose life is at stake,'" and recognized that "Washington . . . has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that *all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law.*"⁴⁶

The Court noted, with emphasis, three fundamental elements of homicide and suicide law that highlight the protection of human beings: First, "[t]he right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable."⁴⁷ Second, "the consent of a homicide victim is 'wholly immaterial to the guilt of the person who caused (his death).'"⁴⁸ Third,

the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, 'the life of those to whom life had become a burden—of those who [were] hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, [were] under the protection of the law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live.'⁴⁹

As Arthur J. Dyck, the Saltonstall Professor of Population Ethics at Harvard School of Public Health, has summarized it, the Court's opinion identified "three major reasons that killing is wrong when it is wrong: (1) killing is a violation of an individual's inalienable right to life; (2) killing runs counter to a human being's natural love of life; and (3) killing violates the sanctity of life."⁵⁰

45. *Glucksberg*, 521 U.S. at 728 (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282 (1990)).

46. *Glucksberg*, 521 U.S. at 729 (quoting *United States v. Rutherford*, 442 U.S. 544, 558 (1979) (emphasis added)).

47. *Id.* at 714 (quoting *Martin v. Commonwealth*, 37 S.E.2d 43, 47, 184 Va. 1009, 1018–19 (1946)).

48. *Glucksberg*, 521 U.S. at 714 (brackets in original). The Model Penal Code's drafters also recognized that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." *Id.* at 715–16 (quoting MODEL PENAL CODE § 210.5 cmt. 5, p. 100 (Official Draft and Revised Comments 1980)).

49. *Glucksberg*, 521 U.S. at 714 (quoting *Blackburn v. State*, 23 Ohio St. 146, 163 (1872)) (brackets in original).

50. ARTHUR J. DYCK, LIFE'S WORTH: THE CASE AGAINST ASSISTED SUICIDE 48

The Court also strongly affirmed various “state interests” in prohibiting assisted suicide. The States “‘may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy. . . . This remains true, as *Cruzan* makes clear, even for those who are near death.’”⁵¹ In addition, “the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.”⁵² Furthermore, “[t]he State’s interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and ‘societal indifference.’”⁵³

In *Vacco v. Quill*,⁵⁴ the Court rejected the claim that New York’s prohibition on assisting suicide violates the Equal Protection Clause of the Fourteenth Amendment.⁵⁵ The Court affirmed that “the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational.”⁵⁶ The Court emphasized that

our assumption [in *Cruzan*] of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract ‘right to hasten death,’ but on well established, traditional rights to bodily integrity and freedom from unwanted touching. . . . By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction. New York’s reasons for recognizing and acting on this distinction—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians’ role as their patients’ healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia [are] valid and important public interests⁵⁷

(2002).

51. 521 U.S. at 729-30 (quoting *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990) (citation omitted)).

52. *Id.* at 731.

53. *Id.* at 732.

54. 521 U.S. 793 (1997).

55. *Id.* at 797.

56. *Id.* at 800-01.

57. *Id.* at 807-09 (citations omitted).

III. *WENDLAND & SCHIAVO*

The Supreme Court's "federalist" decisions in *Glucksberg* and *Vacco* shifted attention away from the federal courts and back toward state policy making. This has heightened the importance of state laws and advance directives. Since the Supreme Court's decisions, the supreme courts of California and the Florida have addressed two important cases involving the withdrawal of nutrition and hydration from mentally disabled patients who have left no express, written instructions nor appointed health care guardians.

In 2001, in *Conservatorship of Wendland*, Robert Wendland's wife (appointed as a guardian or "conservator" under California law) sought a court order to withdraw nutrition and hydration from Wendland, who had been "conscious yet severely disabled, both mentally and physically" for more than seven years.⁵⁸ He had executed no "formal instructions for health care or appointed an agent or surrogate for health care decisions."⁵⁹ Wendland's wife was opposed by Wendland's mother and sister.⁶⁰ The trial court denied the application, but the California Court of Appeals reversed.⁶¹ The California Supreme Court described Wendland as "conscious . . . not terminally ill, comatose, or in a persistent vegetative state."⁶² Applying state probate law, the supreme court reversed the court of appeals and unanimously held that the conservator "may not withhold artificial nutrition and hydration from such a person absent clear and convincing evidence the conservator's decision is in accordance with either the conservatee's own wishes or best interest."⁶³

The California Supreme Court recognized the significance of the case, noting that "no decision of which we are aware has approved a conservator's or guardian's proposal to withdraw artificial nutrition and hydration from a conscious conservatee or ward."⁶⁴ The *Wendland* decision was expressly limited by the California Supreme Court to "a narrow class of persons: conscious conservatees who have not left formal directions . . . and whose conservators propose to withhold life-sustaining treat-

58. *Conservatorship of Wendland*, 28 P.3d 151, 154, 26 Cal. 4th 519, 524 (2001).

59. *Id.* at 153-54.

60. *Id.* at 154.

61. *In re Conservatorship of Wendland*, 93 Cal. Rptr. 2d 550 (Cal. Ct. App. 2000).

62. 28 P.3d at 153.

63. *Id.* at 154.

64. *Id.* at 170.

ment for the purpose of causing their conservatees' deaths."⁶⁵ While aware of the intent involved, the court, without any explanation, distinguished the "conscious" ward from "permanently unconscious patients, including those who are comatose or in a persistent vegetative state."⁶⁶ The court recognized the risk that a guardian might withdraw food and fluids from a conscious ward based on the belief "that the conservatee enjoys an unacceptable quality of life" but the court did not justify drawing the line at "consciousness."⁶⁷

In *Guardianship of Schiavo*, the Florida courts granted the request of Michael Schiavo to withdraw nutrition and hydration from his wife, Theresa Schiavo, who—the court concluded—had been in a "persistent vegetative state" since 1990.⁶⁸ Theresa did not leave any written statement of her desires, but her husband, Michael Schiavo, sought to withdraw nutrition and hydration on the ground that that would be her wish based on past statements that she had allegedly made.⁶⁹ The withdrawal of nutrition and hydration was opposed by Theresa's parents, the Schindlers. After all appeals were exhausted in October, 2003, Theresa's feeding tube was removed on October 15, 2003.⁷⁰ On October 21, 2003, the Florida legislature enacted a statute authorizing the Governor of Florida to intervene to prevent withdrawal of nutrition and hydration.⁷¹ On September 23, 2004, the Florida Supreme Court unanimously declared the statute unconstitutional as a violation of separation of powers.⁷² Under intense media attention, all judicial and legislative remedies were eventually exhausted, and Theresa Schiavo died in March of 2005.

65. *Id.* at 175. The significant, last phrase, recognizing the motive of the conservator, was used by the court (in a unanimous decision) several others times throughout the opinion.

66. *Id.* at 175.

67. *Id.* at 174.

68. See *In re Guardianship of Schiavo*, 780 So. 2d 176 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 792 So. 2d 551 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003), *review denied*, 855 So. 2d 621 (Fla. 2003); *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004) (invalidating "Terri's Law" as a violation of separation of powers), *cert. denied*, 543 U.S. 1121 (2005). For a detailed history of the case, see the log compiled by Kathy Cerminara, Nova Southeastern University, Shepard Broad Law Center, and Kenneth Goodman, University of Miami Ethics Programs, <http://www.miami.edu/ethics/schiavo/timeline.htm>.

69. *Bush v. Schiavo*, 885 So. 2d 321, 325 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005).

70. *Schiavo*, 885 So. 2d at 325-28, *cert. denied*, 543 U.S. 1121.

71. *Schiavo*, 885 So. 2d at 328, *cert. denied*, 543 U.S. 1121.

72. *Schiavo*, 885 So. 2d 321, *cert. denied*, 543 U.S. 1121.

IV. THE FOURTEENTH AMENDMENT & UNCONSCIOUS PERSONS

Do the states have a "compelling interest" in the lives of persons who are unconscious or in a persistent vegetative state? Due to the Supreme Court's tendency to introduce "balancing analysis" into every aspect of constitutional law over the past four decades, this is how the question is typically posed in constitutional law.⁷³ This is a significant shift in constitutional interpretation. The Court's balancing analysis diminishes rights in the text of the Fifth and Fourteenth Amendments from rights that precede government into mere state "interests," which can be balanced away or outweighed by other interests the justices might identify.

Nevertheless, *Cruzan* and *Glucksberg* held that the states have an "unqualified interest in the preservation of human life." This is reinforced by the common law, the history and application of the Fourteenth Amendment, and the contemporary consensus across the fifty states in defining "death" as either the common law standard of cardiopulmonary death or as "whole brain death."⁷⁴

The legal term "person" traditionally encompasses all living human beings in Anglo-American law; human being and person were considered synonymous at common law.⁷⁵ This is reflected in modern dictionaries, which uniformly define a "person" as a "human being."⁷⁶ The law may now consider "person" to include

73. See *West Virginia State Bd. of Educ. v. Barnett*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting); STEPHEN PRESSER, *RECAPTURING THE CONSTITUTION* 49-50 (1994); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 286-89 (1986); Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980s 'Reasonableness Test'*, 76 VA. L. REV. 519, 520 (1990); Clarke D. Forsythe, *The Tradition of Interpretivism In Constitutional Interpretation*, 22 VAL. U. L. REV. 217, 229 (1987); Robert F. Nagel, *Liberals and Balancing*, 63 COLO. L. REV. 319, 320 (1992). See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

74. Laura Dietz, et al., 22A AM. JUR. 2D *Death* § 422 (2004); David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 853-54 n.14 (1986) (citing 33 state statutes, as of 1986). "The Uniform Determination of Death Act adopts an alternative test: either the cardiopulmonary or the whole brain definition." *Id.* at 854-55 (citing UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 271 (Supp. 1985)).

75. *Meadows v. State*, 722 S.W.2d 584, 585 (Ark. 1987) ("The revised [manslaughter] statute used the term 'human being' rather than the presently used 'person,' but the terms are synonymous in common law."); *Hogan v. Greenfield*, 122 P.2d 850, 853, 58 Wyo. 13, 21 (1942) ("'Persons' are of two kinds, natural and artificial. A natural person is a human being.") (quoting legal dictionary).

76. BLACK'S LAW DICTIONARY 1028 (5th ed. 1979); FUNK & WAGNALL'S

more than human beings, but natural persons at common law encompassed all human beings.⁷⁷ Blackstone, in his section on the “law of persons,” wrote that “persons also are divided by the law into either natural persons, or artificial”⁷⁸ and held that life was “a right inherent by nature in every individual.”⁷⁹ This tradition, however, is subject to increasing challenge.⁸⁰

There is considerable evidence that the Framers intended that the meaning of the word “persons” in the Fourteenth Amendment follow the common law rule and include all human beings.⁸¹ This is certainly what prominent members of the Thirty-ninth Congress understood the text to mean, including Congressman Thaddeus Stevens,⁸² Senator Charles Sumner,⁸³ Con-

DICTIONARY 489 (1984); WEBSTER'S NEW WORLD DICTIONARY 1061 (1984).

77. “In keeping with approved usage, and giving terms their ordinary meaning, the word ‘person’ is synonymous with the term ‘human being.’” *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325, 392 Mass. 799, 801 (1984).

78. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119 (U. Chi. Press ed., 1979) (1765).

79. *Id.* at 125.

80. See, e.g., Norman L. Cantor, *The Permanently Unconscious Patient, Nonfeeding and Euthanasia*, 15 AM. J.L. & MED. 381 (1989); Ronald E. Cranford & David Randolph Smith, *Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood*, 13 AM. J.L. & MED. 233 (1987); Steven Goldberg, *The Changing Face of Death: Computers, Consciousness, and Nancy Cruzan*, 43 STAN. L. REV. 659 (1991); Charles M. Kester, *Is There A Person in That Body?: An Argument for the Priority of Persons and the Need for a New Legal Paradigm*, 82 GEO. L.J. 1643 (1994); Douglas O. Linder, *The Other Right-To-Life Debate: When Does Fourteenth Amendment “Life” End?*, 37 ARIZ. L. REV. 1183 (1995); Deborah K. McKnight and Maureen Bellis, *Foregoing Life-Sustaining Treatment for Adult, Developmentally Disabled, Public Wards: A Proposed Statute*, 18 AM. J.L. & MED. 203, 220 (1992) (“These patients [in a persistent vegetative state] have lost every quality associated with personhood, especially the ability to interact with others and their environment, and function at such a low level that they cannot properly be termed ‘alive.’”); Jens David Ohlin, *Is the Concept of Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209 (2005); David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 (1986); Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745 (2001). See *Byrn v. New York City Health and Hosp. Corp.*, 286 N.E.2d 887, 889, 31 N.Y.2d 194, 200-01 (1972) (“[I]t is a policy determination whether legal personality should attach and not a question of biological or ‘natural’ correspondence.”). See generally Robert A. Destro, *Quality of Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONTEMP. HEALTH L. & POL’Y 71 (1986).

81. See generally Brief of American Center for Law & Justice, et al., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902).

82. Representative Thaddeus Stevens, on the day the Thirteenth Amendment was ratified, stated:

This is man’s Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.

CONG. GLOBE, 39th Cong. 1st Sess. 74 (1865).

gressman John Bingham,⁸⁴ Congressman Windom,⁸⁵ Congressman James S. Brown,⁸⁶ and Senator Trumbull.⁸⁷ This should not be surprising since they were educated in the common law and formulated the Fourteenth Amendment against the backdrop of the natural rights doctrine of the common law and the Declaration of Independence.⁸⁸

Blackstone's distinction between natural and artificial persons is reflected in Justice Harlan's 1907 opinion in *Western Turf Association v. Greenberg*, which upheld the constitutionality of a California statute requiring a corporation to admit persons with a ticket of admission.⁸⁹ Justice Harlan denied that the corporation was protected under the Due Process Clause of the Fourteenth Amendment, stating that "the liberty guaranteed by the

83. "[I]n the eyes of the Constitution, every human being within its sphere . . . from the President to the slave, is a *person*." CONG. GLOBE, 37th Cong., 2d Sess. 1449 (1862) (emphasis in original).

84. CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867)

((T)he Constitution of the United States . . . declared that 'no person shall be deprived of life, liberty, or property without due process of law.' By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law the only question to be asked of a creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.)

See Destro, *supra* note 80, at 100 n.126.

85. CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (referring to rights to life, liberty, and pursuit of happiness as "rights of human nature" and stating that the "right of human nature [is] the right to exist").

86. "[D]oes the term 'person' carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels." CONG. GLOBE, 38th Cong., 1st Sess. 1753 (1864).

87. CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866) ("[A]ny legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution . . ."). Senator Trumbull also noted the "great object of securing to every human being within the jurisdiction of the Republic equal rights before the law." *Id.* at 322.

88. So, for example, Congressman Joshua Giddings stated in 1858:

Our fathers, recognizing God as the author of human life, proclaimed it a 'self-evident' truth that every human being holds from the Creator an inalienable right to live If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

CONG. GLOBE, 35th Cong. 1st Sess. App. 65-66 (1858) (emphasis in original).

89. 204 U.S. 359, 364 (1907).

Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons.”⁹⁰

In *Levy v. Louisiana*, the Supreme Court held that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to exclude illegitimate children from the protection of a state wrongful death statute.⁹¹ The Court “start[ed] from the premise that illegitimate children are not ‘nonpersons.’ They are humans, live, and have their being. They are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.”⁹² In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court assumed that “mentally retarded” persons are protected by the Fourteenth Amendment, holding that discrimination on the basis of mental disability triggers equal protection scrutiny.⁹³

Contrary to the common law and previous Supreme Court decisions, *Roe v. Wade* is sometimes cited as the exception that contradicts the proposition that “person” within the meaning of the Fourteenth Amendment encompasses all human beings.⁹⁴ *Roe* held that “person” within the meaning of the Fourteenth Amendment does not include the “unborn.”⁹⁵ *Roe* often has

90. *Id.* at 363 (citing *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906)). *See also Riggs*, 203 U.S. at 255 (“The liberty referred to in that Amendment is the liberty of natural, not artificial persons.”). *County of Santa Clara v. Southern Pacific Railroad*, 118 U.S. 394, 396 (1886), had previously held that corporations were persons for equal protection purposes. Justices Douglas and Black subsequently expressed doubts about the validity of *Santa Clara*. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576–80 (1949) (Douglas, J., dissenting); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

91. 391 U.S. 68, 72 (1968).

92. *Id.* at 70. *See also Glona v. American Guarantee Co.*, 391 U.S. 73, 75 (1968) (“To say that the test of equal protection should be the ‘legal’ rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of the State to draw such ‘legal’ lines as it chooses.”).

93. 473 U.S. 432, 447 (1985) (“[T]he mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.”). *See generally* Carla Dowben, *Legal Rights of the Mentally Impaired*, 16 HOUS. L. REV. 833 (1979); Benjamin N. Schoenfeld, *A Survey of the Constitutional Rights of the Mentally Retarded*, 32 SW. L.J. 605 (1978); Diane M. Weidert, *Constitutional Rights of the Involuntarily Committed Mentally Retarded After Youngberg v. Romeo*, 14 ST. MARY’S L.J. 1113 (1983).

94. Linder, *supra* note 80, at 1189–92.

95. 410 U.S. 113, 157 (1973). The history offered by the Court in *Roe* has been demonstrated to be erroneous. *See, e.g.*, JOSEPH DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (Carolina Academic Press 2006); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975); Dennis J. Horan, Clarke D. Forsythe, Edward R. Grant, *Two Ships Passing in the Night: An Interpretivist Review of the White-Stevens Colloquy on Roe v. Wade*, 6 ST. LOUIS U. PUB. L. REV. 229 (1987); James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29 (1985).

been cited as a judicial embarrassment however much judges and scholars like the political result.⁹⁶ There is compelling historical evidence “that the legislatures ratifying the Fourteenth Amendment did consider human fetuses to be persons.”⁹⁷ *Roe* was simply wrong on the law’s historic protection of human life.⁹⁸

Since the common law, homicide law has protected the human being as human. It is species-specific and focuses on protecting the biological being.⁹⁹ This is reinforced, even today, by the consensus across nearly all 50 states defining “death” as cardiopulmonary death or “whole brain death.”¹⁰⁰ Whole brain death signifies the imminent demise of the individual as an integrated, functioning organism.

Over the past half century, the traditional natural rights ethic has been challenged by proponents of a quality of life ethic. The traditional natural rights ethic was supported by the common law, as Framers and Justice James Wilson recognized:

With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.¹⁰¹

The traditional ethic is based on the nature of human beings as rational creatures and reflects “a shared moral outlook that characterizes life as sacred, and as an inalienable human right.”¹⁰² As the Declaration of Independence expounded, the ethic lies at the foundation of government by the consent of the people. This

96. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“It [*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”); Michael Stokes Paulsen, *Paulsen, J., Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 196, 196-97 (Jack Balkin ed., 2005).

97. Witherspoon, *supra* note 95, at 31; *id.* app. at 72 (detailing state statutes).

98. See DELLAPENNA, *supra* note 95.

99. See, e.g., Kester, *supra* note 80, at 1646-47 (“Traditionally, the law has conferred legal standing upon any human body capable of independent integrated functioning, that is, upon any ‘living’ human organism.”).

100. See 1 MEISEL & CERMINARA, *THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING* 626-27 (2d ed. 1995) (Table 9-3) (50-state chart).

101. JAMES WILSON, “*On the Natural Rights of Individuals*,” in *THE WORKS OF JAMES WILSON* 296, 316 (2 James DeWitt Andrews ed., 1896). The same passage can be found in *THE WORKS OF JAMES WILSON* 596-97 (2 Robert G. McCloskey ed., 1967).

102. DYCK, *supra* note 50, at 7. See also *People v. Sessions*, 26 N.W. 291, 293, 58 Mich. 594, 596 (1886) (“At common law life is not only sacred but it is inalienable.”).

ethic was explained, as noted above, in the majority opinion in *Glucksberg*.

In contrast, modern proponents of a quality of life ethic have offered a novel, instrumentalist justification for traditional prohibitions against suicide and homicide.¹⁰³ They claim that “the reason that killing is wrong is that the one being killed does not wish to be killed”¹⁰⁴ or that killing is wrong because “the individuals killed are deprived of interests they might otherwise pursue.”¹⁰⁵ If killing is wrong due to the existence of personal interests (rather than intrinsic human worth), the elimination of those interests (through disability) eliminates the wrongfulness of both suicide and homicide. With this novel rationale, proponents “have abandoned, or at least undermined, the moral structure that serves as the principled basis for homicide law.”¹⁰⁶ Consequently, as the *Wendland* decision indicates, clear quality of life assessments are involved.

In cases like that of Theresa Schiavo, when no advanced directive existed, the continuance of feeding tubes to profoundly mentally disabled patients who cannot feed themselves should be evaluated under a “best interests” calculus that weighs the benefits and burdens of the particular treatment to the patient under the particular medical circumstances. Traditionally, medical ethics distinguished “ordinary” and “extraordinary” treatment; while that principle remains true, medical ethicists have, more recently, sought to distinguish “proportionate” and “disproportionate” means, believing that the latter is clearer. Nevertheless, both really weigh the benefits and burdens of the particular treatment to the particular patient under the particular medical conditions.

103. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (5th ed. 2002); RONALD F. DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 179–217 (1993). For a critique of Dworkin, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 *NOTRE DAME L. REV.* 329 (1993); Richard Stith, *The Priority of Respect: How Our Common Humanity Can Ground Our Individual Dignity*, 44 *INT'L PHIL. Q.* 165 (June 2004); Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 *MD. L. REV.* 289 (1997).

104. DYCK, *supra* note 50, at 7.

105. *Id.* at 43.

106. *Id.* at 44. See also WESLEY J. SMITH, *CULTURE OF DEATH: THE ASSAULT ON MEDICAL ETHICS IN AMERICA* 125–43 (2000); Destro, *supra* note 80; Germain Grisez, *Should Nutrition and Hydration Be Provided to Permanently Unconscious and Other Mentally Disabled Persons?*, 5 *ISSUES IN L. & MED.* 165 (1989) (supporting provision of nutrition and hydration).

Even though the precise diagnosis of Schiavo's neurological state was uncertain, the number of years that had passed since the original hypoxic ischemic event made it very unlikely that she would recover the neurological capacity to feed herself.¹⁰⁷ There was no compelling evidence of her awareness,¹⁰⁸ but that should not be ethically determinative. Her neurological impairment was such that there was no evidence that she suffered, physically or psychologically.¹⁰⁹ Her status as a human being should not be questioned by her state of awareness.

Whether or not the patient's wishes would be determinative in withdrawing the feeding tube if they were known, the fact here is that there is little reliable evidence of the patient's wishes. No advanced directive was ever executed, and oral statements were few, not widely communicated, general and ambiguous.¹¹⁰ The husband did not come forth with the claim about her wishes until several years after she collapsed.¹¹¹ Since her wishes could not be reliably known, it cannot be said that the purpose of withdrawing the feeding tube is to fulfill her wishes.

Because the feeding tube did not impose an objective or subjective burden to Schiavo, the feeding tube was not a disproportionate measure. The feeding tube did what it was designed to do—nourish her. It could not be considered futile for its reasonably intended purpose. There was no underlying terminal or chronic condition that would take her life, assuming the feeding tube and normal nursing care were provided.¹¹²

Some may ask, what is the "benefit" of continuing to feed a person in Schiavo's state? This implies that, if the patient cannot appreciate any benefit, continued feeding has no benefit. The focus of the benefits and burdens calculus, however, is on the effectiveness of the feeding (a more objective question), not the benefit of life itself (a more subjective question). The objective question is appropriate to the particular expertise of the medical profession; the subjective question is a broader social concern that is more appropriately determined by societal norms and law. Because Schiavo was not terminally ill or imminently dying from an underlying condition, the feeding tube had been and

107. *Bush v. Schiavo*, 885 So. 2d 321, 325–27 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005).

108. *Schiavo*, 885 So. 2d at 325, *cert. denied*, 543 U.S. 1121.

109. *See Schiavo*, 885 So. 2d at 325, *cert. denied*, 543 U.S. 1121.

110. *See Schiavo*, 885 So. 2d at 325–28, *cert. denied*, 543 U.S. 1121.

111. *Schiavo*, 885 So. 2d at 325, *cert. denied*, 543 U.S. 1121.

112. *See Schiavo*, 885 So. 2d at 325, *cert. denied*, 543 U.S. 1121.

continued to be effective in sustaining her, and her wishes were not reliably known. Guardianship should have been shifted to her parents (and siblings), who were willing to care for her, when her husband became unwilling or unable to do so for whatever reason.

V. STATE LEGISLATIVE RESPONSES

Given the experience with the growth of euthanasia in the Netherlands, there is a clear risk that the practice of euthanasia in the United States could grow unless restrained by law.¹¹³ In the nearly 30 years since the *Quinlan* decision, the growth of case law and state legislation has promoted passive euthanasia in the United States, with the law in virtually all states allowing the withdrawal of nutrition and hydration to end an incompetent patient's life.¹¹⁴ The *Wendland* and *Schiavo* cases remind us that the care of the neurologically impaired and medically dependent and disabled is still unsettled, and more needs to be done to avoid similar family conflicts over the care of the medically dependent in the future. The *Schiavo* case confirms that future legal and cultural challenges that threaten to further weaken traditional prohibitions against euthanasia will require legislative answers to shore up protection for the medically dependent and disabled. Eric Cohen, the editor of *The New Atlantis* and a resident scholar at the Ethics and Public Policy Center, has reframed the issue in the *Schiavo* case:

We have asked whether she is really in a persistent vegetative state, instead of reflecting on what we owe people in a persistent vegetative state. We have asked what she would have wanted as a competent person imagining herself in such a condition, instead of asking what we owe the person who is now with us, a person who can no longer speak for herself, a person entrusted to the care of her family and the protection of her society. . . . Treating autonomy as an absolute makes a person's dignity turn entirely on his or her capacity to act

113. See CARLOS GOMEZ, REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS (1991); HERBERT HENDIN, SEDUCED BY DEATH: DOCTORS, PATIENTS AND THE DUTCH CURE 135-55 (1997); K. Green, *Physician-Assisted Suicide And Euthanasia: Safeguarding Against the 'Slippery Slope'—The Netherlands Versus the United States*, 13 IND. INT'L & COMP. L. REV. 639 (2003); John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407 (1995).

114. Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable: Cruzan and the Looming Debate Over Active Euthanasia*, 2 MD. J. CONTEMP. LEGAL ISSUES 99 (1991).

autonomously. It leads to the view that only those with the ability to express their will possess any dignity at all"¹¹⁵

Under economic and social pressures, health care experts have been debating the ethical and legal authority to withdraw treatment that is "futile."¹¹⁶ It seems inevitable that efforts to withdraw treatment, including nutrition and hydration, based on judgments of "futility" will increase in health care institutions in the near future. In a certain narrow sense, physicians have traditionally had the authority to withdraw medical treatment that is truly futile, in the sense of providing no benefit in treating the patient's underlying medical condition for which it was originally prescribed. The prospect is that "futility" will come to mean any care to unconscious patients.¹¹⁷

Hence, states should consider legislation that increases legal protection for unconscious, medically-dependent persons. This could include laws that (1) enhance the educational value of living will forms, (2) limit claims of medical "futility" to treatments which fail to achieve their intended purpose, (3) adopt presumptions in favor of sustaining the lives of unconscious persons if they do not execute advance directives,¹¹⁸ (4) enhance judicial evaluation of conflicts of interests by guardians, (5) ensure that guardians are exercising informed consent, and (6) clarify procedures to ensure efficient resolution when the guardian's decision is challenged by family members.¹¹⁹

There are many problems with the *Schiavo* case, but four stand out: the conflict of interest by the guardian, the controversy over Schiavo's uncertain neurological state, the lack of deference given to the willingness of her parents, the Schindlers,

115. Eric Cohen, *How Liberalism Failed Terri Schiavo*, THE WEEKLY STANDARD, Apr. 4, 2005, at 19, 21, 22.

116. See, e.g., WESLEY J. SMITH, *supra* note 106, at 125-43; Laurence B. McCullough, *The Hidden Issue in Futility Judgments: Justifying Turning the Traditional Logic of Beneficence on Its Head*, in EUTHANASIA: THE GOOD OF THE PATIENT, THE GOOD OF SOCIETY, *supra* note 4, at 139.

117. See WESLEY J. SMITH, *supra* note 106, 125-43.

118. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) ("It is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person's life does.")

119. Cf. *In re Guardianship of L.W.*, 482 N.W.2d 60, 71-72 (Wis. 1992) (adopting a three-part test to ensure the dispute is handled fairly and expeditiously: the presumption should be that continued life is in the best interests of the ward; the guardian has the burden to show the existence of PVS to a high degree of medical certainty; and the decision to withhold or withdraw treatment is in the ward's best interests and was made in good faith).

to act as caregiver for their disabled daughter, and the fiction that incompetent patients have—through the doctrine of “substituted judgment”—“the *same* right to refuse medical treatment as a competent person.”¹²⁰ Courts persist in this fiction in cases, like Theresa Schiavo’s, where the patient left no written statement of her wishes; the “substituted judgment” is made by a guardian with a significant conflict of interest; and the patient’s contemporary wishes, in the context of her *current* medical condition, cannot be ascertained. The parents’ willingness to care for Theresa Schiavo was treated as entirely subordinate to the fiction that her “desires” were known and would be faithfully implemented by the guardian. “Substituted judgment” is a fiction because it cannot satisfy key criteria for decision-making by a competent patient:

- (1) [T]he patient must have the capacity to make the decision;
- (2) the patient must be able to decide voluntarily, free from coercion;
- (3) the patient must receive sufficient information to make a good decision; and
- (4) the patient must come to a genuine understanding of the nature and implications of the proposed treatment.¹²¹

A competent, able-bodied, substitute decision-maker cannot make such a decision for an incompetent patient because such decisions can only be informed if the patient makes the decision in the context of his or her own illness.¹²²

CONCLUSION

The Supreme Court in *Cruzan* and *Glucksberg* affirmed that the states have an “unqualified interest in preserving human life” and therefore do not have to allow suicide or euthanasia in cases of “diminished” quality of life. Despite *Cruzan* and *Glucksberg*, the Supreme Court denied review (at least four

120. *Bush v. Schiavo*, 885 So. 2d 321, 326 (Fla. 2004) (citing the court’s prior decision in *In re Guardianship of Browning*, 568 So. 2d 4, 12 (Fla. 1990)). See generally Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, 1 ISSUES IN L. & MED. 131 (1985).

121. JOHN KILNER, *LIFE ON THE LINE: ETHICS, AGING, ENDING PATIENTS’ LIVES, AND ALLOCATING VITAL RESOURCES* 84–85 (1992).

122. “Best interests” might conceivably be a better standard than “substituted judgment,” but the California Court of Appeals in the *Wendland* case (later overturned by the supreme court) used a “best interests” standard to agree with a conservator that Robert Wendland would be better off dead. 93 Cal. Rptr. 2d 550, 556 (Cal. Ct. App. 2000). A “best interests” standard would have to be appropriately defined by statute.

times) in *Schiavo*,¹²³ implying that the Court did not believe that the procedures applied by the Florida courts unconstitutionally denied Terri Schiavo due process or the equal protection of the law. Enhanced legal protection will have to come, if at all, through state legislatures.

Nearly twenty years ago, it was observed that there has been an “ongoing process by which a ‘quality-of-life’ ethic is being adopted in place of the original natural rights ethic which has governed American law since the Declaration of Independence,” and “the primary method being utilized by courts and commentators to effect the change from the original natural rights . . . ethic to one which rests upon the quality of a given life to society is a functional definition of what it means to be a human person.”¹²⁴ Twenty years later, *Schiavo* is recent evidence that courts have abandoned their assumed role in protecting human rights and that legislatures will have to preserve the natural rights ethic over the functional understanding of human persons. It is timely to recall, as Oliver Wendell Holmes once said, “that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”¹²⁵

123. *Schiavo*, 885 So. 2d 321, cert. denied, 543 U.S. 1121 (2005); *Schiavo*, 885 So. 2d 321, application for stay of enforcement denied, 544 U.S. 915 (2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005), application for stay of enforcement denied, 544 U.S. 945 (2005); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005), application for stay of enforcement denied, 544 U.S. 957 (2005).

124. Destro, *supra* note 80, at 87–88 (1986).

125. *Missouri, Kan. & Tex. Ry Co. v. May*, 194 U.S. 267, 270 (1904).