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2005

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JUDGING THE SCHIAVO CASE

*Samuel R. Bagenstos**

I don't share the anti-abortion politics of the most vocal supporters of Theresa Schiavo's parents, Robert and Mary Schindler. Nor do I agree with the intemperate attacks visited on the courts following the rejection of the Schindlers' federal lawsuit. But I do think that the manner in which the federal courts handled the case offers cause for regret. The federal courts rushed the case, and in so doing, failed to provide meaningful consideration to the Schindlers' non-frivolous claims under the Americans with Disabilities Act (ADA). The state court ordered Schiavo's feeding and hydration terminated for reasons that had everything to do with her medical condition—a condition that is clearly a "disability" under the ADA. Although there may be good arguments that the state court did not violate the statute, the federal courts did not so much as advert to those arguments. And the case touched on a core concern of many disability rights advocates: the fear that non-disabled people, relying on erroneous understandings of the "quality of life" of people with disabilities, will unjustifiably terminate life-sustaining treatment. Given that background, the federal courts should have taken the time to give the Schindlers' ADA claim at least some serious consideration.

It is certainly understandable that the federal judges assigned to the case wanted to rush things. By the time the case got to federal court, the state courts had considered the matter with care and deliberation through six years of contested litigation. There was no particular reason to believe that the state courts had overlooked something or that federal court intervention was necessary. But it was not up to the federal courts to decide that

* Professor of Law, Washington University. Thanks to Susan Appleton, Mary Crossley, Arlene Mayerson, Martha Minow, Laura Rosenbury, David Shapiro, and, as always, Margo Schlanger for helpful comments on an earlier draft. Thanks as well to Nicolle Neulist for research assistance. Particularly in light of the degree to which many of them disagree with various aspects of my argument, the usual disclaimer is especially apt: All faults are mine.

question. Congress had explicitly directed them to address and resolve the Schindlers' claims *de novo*, notwithstanding any state court proceedings that came before. Federal judges might understandably have been put off by the way the statute singled out a particular case, the lack of meaningful congressional deliberation in the highly charged atmosphere in which the statute was adopted, and the attempts by many politicians to use the courts (as weapons or targets) in a political battle. But neither the district judge nor any of the judges on the three-judge appellate panel assigned to the case was willing to conclude that the statute was unconstitutional. In the absence of such a ruling, the federal courts should have given the parties and themselves enough time to give meaningful consideration to the Schindlers' claims.

I. THE RUSH TO JUDGMENT

When President Bush signed Public Law 109-3[1] at 1:11 A.M. on March 21, 2005, the feeding and hydration tubes had already been removed from Theresa Schiavo pursuant to the state court's order. For those who sought to keep Schiavo alive, time was of the essence. The Schindlers filed their initial complaint that morning, along with a request for a temporary restraining order to reinsert the tubes. The district court held a hearing on the TRO request that afternoon and denied the motion in an opinion issued the next morning, March 22.[2]

It's hard to disagree with the district court's denial of the initial request for a temporary restraining order. To be sure, the balance of hardships clearly favored a TRO: Denial would almost certainly lead to Schiavo's death whereas granting the TRO would merely continue, for some indefinite period of time, the artificial feeding and hydration that Schiavo had been receiving for fifteen years. But under ordinary rules governing interlocutory relief—rules Congress pointedly did not change in Public Law 109-3[3]—a favorable balance of hardships is not enough. The plaintiff must also show at least some meaningful prospect

1. Pub. L. No. 109-3, 119 Stat. 15 (Mar. 21, 2005).
2. *See* Schiavo ex rel. Schindler v. Schiavo, 357 F. Supp. 2d 1378 (M.D. Fla. 2005)
3. *See* Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1227–28 (11th Cir. 2005) (*per curiam*) (showing that "Congress considered and specifically rejected provisions that would have mandated, or permitted with favorable implications, the grant of the pretrial stay").

of success on the merits. The claims in the first complaint were frivolous.[4]

The Schindlers immediately filed a notice of appeal, and that same day—which was just one day after they filed their complaint initiating the federal case—they filed an amended complaint, containing several new causes of action, in the district court. The Eleventh Circuit affirmed the denial of the temporary restraining order by a 2-1 panel vote on the 23rd,[5] and the Schindlers filed a renewed motion for TRO the next day, March 24. The district court held a hearing on the renewed motion that evening, from 6:30 to 9:40 P.M., and issued its opinion denying the motion the next morning.[6] As it had three days earlier, the district court recognized that the balance of hardships tipped strongly in favor of the plaintiffs, but it again found no sufficient likelihood that they would succeed on the merits.[7]

A. THE (UNAPPRECIATED) COMPLEXITY OF THE ADA CLAIM

It is here that I think the district court slipped. Along with several counts that were just as insubstantial as those in the original complaint, the amended complaint included a cause of action under the ADA.[8] That claim was far from frivolous. There is no doubt that Theresa Schiavo was an "individual with a disability" under the statute—her medical condition, which had left her unconscious for fifteen years, clearly constituted a "physical or mental impairment that substantially limit[ed]" her "major life activities."[9] And that medical condition was the sole reason the state courts concluded that she would not choose to receive further feeding and hydration.[10] At least on the face of things,

4. This is not to say that the district court's analysis of those claims was without its flaws. In rejecting the Schindlers' claims under the Religious Land Use and Institutionalized Persons Act and the Free Exercise Clause of the First Amendment, the district court rested entirely on its conclusion that the state court judge was not operating as a state actor when he ordered the termination of Schiavo's feeding and hydration. *See Schiavo*, 357 F. Supp. 2d at 1388. For reasons I discuss below, *see infra* text accompanying notes 52–55, that conclusion was clearly wrong—and almost surely a product of the court's undue haste.

5. *See Schiavo*, 403 F.3d at 1229.

6. *See* Schiavo ex rel. Schindler v. Schiavo, 358 F. Supp. 2d 1161 (M.D. Fla. 2005).

7. *See id.* at 1163–64.

8. *See id.* at 1164–65.

9. 42 U.S.C. § 12102(2)(A)

10. *See, e.g.*, In re Guardianship of Schiavo, 780 So. 2d 176, 180 (Fla. Ct. App. 2001) ("In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the

those facts would seem to establish that Schiavo experienced discrimination "by reason of [her] disability" or "on the basis of [her] disability" in violation of the ADA.[11]

To be sure, the issue is complicated. The Schindlers filed their suit against three defendants: Michael Schiavo (Theresa's husband), Judge George Greer (the state court judge who entered the order terminating feeding and hydration), and the Hospice of Florida Suncoast (where Theresa Schiavo was living at the time of the order). Of these three defendants, it is quite unlikely that Michael Schiavo or the Hospice violated the ADA. To the extent that the complaint challenged the conduct of Michael Schiavo, that conduct occurred in his capacity as an individual, private citizen—not as an employer, government entity, or place of public accommodation, which are the types of entities covered by the ADA.[12] The Hospice clearly *is* covered by the ADA as a place of public accommodation,[13] but it seems to have operated purely neutrally here. When the state court ordered the tube removed, the Hospice did so, and when the state court ordered the tube reinserted, the Hospice did so.[14] The Hospice thus appears to have acted on the basis of the state court's order, not Schiavo's disability.[15]

As for Judge Greer, he was operating as a state actor at the time he ordered that Schiavo's feeding and hydration be terminated. He, or at least the court on which he served and for which he acted, was a "public entity" subject to the antidiscrimination requirements of ADA Title II.[16] But there are still a number of

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most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, would choose to continue the constant nursing care and the supporting tubes in hopes that a miracle would somehow recreate her missing brain tissue, or whether she would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives. After due consideration, we conclude that the trial judge had clear and convincing evidence to answer this question as he did.").

11. 42 U.S.C. §§ 12132, 12182(a).

12. *See* 42 U.S.C. §§ 12112, 12132, 12182.

13. *See* 42 U.S.C. § 12181(7)(F) (public accommodation includes a "professional office of a health care provider, hospital, or other service establishment").

14. *See Schiavo*, 358 F. Supp. 2d at 1165.

15. *See* Bowen v. American Hosp. Ass'n, 476 U.S. 610, 630 (1986) (plurality opinion) ("A hospital's withholding of treatment [from an infant with a disability] when no parental consent has been given cannot violate § 504 [of the Rehabilitation Act], for without the consent of the parents or a surrogate decisionmaker the infant is neither 'otherwise qualified' for treatment nor has he been denied care 'solely by reason of his handicap.'"). The Rehabilitation Act is the predecessor statute to the ADA, and ADA law generally incorporates the substantive principles applied under that statute. *See* 42 U.S.C. § 12201(a); Bragdon v. Abbott, 524 U.S. 624, 631–32 (1998).

16. *See* 42 U.S.C. §§ 12131(1), 12132.

complications. First, one might argue that just as the Hospice acted purely neutrally in implementing Judge Greer's order, Judge Greer acted purely neutrally in implementing Theresa Schiavo's wishes, as best he could determine them. Second, even if the decision to terminate feeding and hydration can be laid at Judge Greer's feet, a line of lower-court "Baby Doe" cases holds that the disability discrimination laws do not apply to decisions to withhold medical treatment—at least where the plaintiff's disability is the reason why the plaintiff needs medical treatment in the first place.[17] These cases rest on a conclusion that Congress never envisioned that the disability discrimination laws would apply to medical treatment decisions,[18] as well as on a formal discrimination principle that would suggest that Schiavo's claim lacks merit: If her disability was the only reason Schiavo needed a tube to provide food and hydration in the first place, then the failure to provide her such a tube does not discriminate on the basis of disability because there are no similarly situated non-disabled people who *were* provided the tube.[19] Third, even if, notwithstanding that precedent, Judge Greer *did* discriminate on the basis of disability, perhaps Schiavo was not a "qualified" individual with a disability as required for statutory protection.[20] If a legitimate medical judgment underlay the decision to withhold feeding and hydration, one might say that she failed to "meet[] the essential eligibility requirements" for receipt of that treatment.[21]

But these arguments are not obviously right. Indeed, there are powerful (although not necessarily dispositive) answers to

17. *See, e.g.*, Johnson v. Thompson, 971 F.2d 1487, 1493 (10th Cir. 1992) ("Such a plaintiff must prove that he or she was discriminatorily denied medical treatment because of the birth defect and, at the same time, must prove that, in spite of the birth defect, he or she was 'otherwise qualified' to receive the denied medical treatment. Ordinarily, however, if such a person were not so handicapped, he or she would not need the medical treatment and thus would not 'otherwise qualify' for the treatment."); United States v. University Hosp., State Univ. of N.Y., 729 F.2d 144, 156 (1984) (concluding that Section 504 "cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning" because "one would not ordinarily think of a newborn infant suffering from multiple birth defects as being 'otherwise qualified' to have corrective surgery performed"). *But see id.* at 162–63 (Winter, J., dissenting) (concluding that Section 504 does prohibit denial of medical treatment newborns need because of their disabilities in some circumstances).

18. *See University Hosp.*, 729 F.2d at 156–59.

19. *See Johnson*, 971 F.2d at 1494; *University Hosp.*, 729 F.2d at 156.

20. 42 U.S.C. § 12132.

21. 42 U.S.C. § 12131(2) (defining "qualified individual with a disability"); *see University Hosp.*, 729 F.2d at 162 (Winter, J., dissenting) (arguing that Section 504 prohibits discriminatory failure to treat newborns with disabilities but acknowledging that no discrimination exists if the refusal to treat rests on "a *bona fide* medical judgment").

them. The argument that Judge Greer simply neutrally implemented Theresa Schiavo's preferences seems a bit artificial. Judge Greer was called upon to decide what Theresa Schiavo *would have wanted.*[22] As the state appellate court observed, he was called upon to do so on the basis of very little evidence: "She had been raised in the Catholic faith, but did not regularly attend mass or have a religious advisor who could assist the court in weighing her religious attitudes about life-support methods. Her statements to her friends and family about the dying process were few and they were oral."[23] It was Judge Greer's judgment—and not Theresa Schiavo's—that she would not have wanted to continue to receive food and hydration given how severe her medical condition was. In making that judgment, he relied not just on Schiavo's few (somewhat conflicting) statements about the issue, but also, at least to some extent, on general testimony about Americans' "values, opinions, and attitudes about the decision to discontinue life-support systems."[24] Judge Greer may well have been correct, but it was he who made the decision.

This is not to say that Judge Greer lacked the legal power to make that decision. If we respect individuals' autonomy in refusing treatment, we need some system for determining what to do with individuals who cannot make that choice at the time treatment decisions must be made. A regime that requires a judge to determine what the individual would have wanted, based on the best available evidence, could reasonably be thought to be more respectful of autonomy than one that simply imposes a rule of treatment or non-treatment across the board without reference to what we know about an individual's preferences. If that is so, then perhaps it makes sense as a legal matter to treat Judge Greer's decision that Schiavo *would not* have consented to continued treatment as equivalent to a decision by Schiavo herself to refuse treatment.

But things are not so simple. To say that a state judge can insulate from review a decision to withhold a patient's treatment simply by deciding that the patient would have wanted to with-

22. *See* In re Guardianship of Schiavo, 851 So. 2d 182, 187 (Fla. Ct. App. 2003) ("[T]he trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself.").

23. *Guardianship of Schiavo*, 780 So. 2d at 180.

24. *Id.* at 179; *see Guardianship of Schiavo*, No. 90-2908GD-003, slip op. 9-10 (Fla. Cir. Ct. 2000) ("[A]s Ms. Tyler noted when she testified as to quality of life being the primary criteria [*sic*] in artificial life support matters, Americans want to 'try it for awhile' but they do not wish to live on it with no hope of improvement. That implicit condition has long since been satisfied in this case.").

hold treatment begs the question. The decision about what the patient would have wanted may well be influenced by (perhaps unconscious) bias against disability. It is commonplace that nondisabled people entertain much more negative views about the quality and desirability of living life with a disability than do people with disabilities themselves.[25] If a state judge, in the course of deciding what an incompetent patient "would have wanted," relies on such biased assessments, it is reasonable to treat the judge's decision as itself discriminatory. Such a decision calls for scrutiny under the disability discrimination laws, and a judge ought not be able to shield his or her decision from such scrutiny simply by deeming the decision to be an exercise of the incompetent patient's choice.

The argument based on the "Baby Doe" cases is also problematic for at least two reasons. First, the "Baby Doe" cases have been substantially undermined by more recent Supreme Court decisions. In *Pennsylvania Department of Corrections v. Yeskey*,[26] the Court emphatically rejected the notion—which was central to the "Baby Doe" cases—that the ADA applies only to those contexts expressly anticipated by Congress. The ADA's broad language extends without limitation to any disability-based discrimination by any "public entity,"[27] and *Yeskey* accords the statute a correspondingly broad sweep.[28] Whether or not Congress specifically intended to apply the ADA to medical treatment decisions by public entities, the statute, after *Yeskey*, clearly does apply to those decisions.

It is also doubtful that the formal discrimination analysis of the "Baby Doe" cases survives the Supreme Court's decision in *Olmstead v. L.C.*[29] In *Olmstead*, the Court held that discrimination on the basis of disability includes the unnecessary placement in institutional settings, rather than community settings, of individuals with disabilities who receive state mental health care. The state argued that its failure to create community placements

25. *See, e.g.*, Carol J. Gill, *Health Professionals, Disabilities, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCHOL., PUB. POL'Y & L. 526, 528–30 (2000) (summarizing empirical evidence on this question).

26. 524 U.S. 206 (1998).

27. 42 U.S.C. § 12132.

28. *See Yeskey*, 524 U.S. at 212 (holding that, even if "Congress did not envision that the ADA would be applied to state prisoners," the statute still applied to them because "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity" but instead "demonstrates breadth") (internal quotation marks and brackets omitted).

29. 527 U.S. 581 (1999).

for people with mental illness could not constitute "discrimination" on the basis of disability because it did not provide community-based treatment to individuals who *lacked* disabilities.[30] But the Court rejected that argument and concluded that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA."[31] If the failure to provide appropriate community-based treatment to people with disabilities constitutes "discrimination"—even when the disabilities are the reason treatment is needed in the first place and even when community-based treatment is not provided to people without disabilities—the "Baby Doe" holding that the ADA does not apply to medical treatment decisions stands on very shaky ground.[32]

Second, even if the formal discrimination analysis of the "Baby Doe" cases were still good law, there seems to be a clear instance of formal discrimination here. The court ordered withdrawal of the feeding and hydration tubes because of the severity of Theresa Schiavo's medical condition. If she had needed those tubes only temporarily, because of a passing, non-disabling condition, Judge Greer would not have ordered that the tubes be withdrawn.[33] It was the disabling nature of Schiavo's condition that tilted the balance.

The "qualified individual" issue was in some ways the most difficult for the Schindlers. It's clear that a doctor can take a patient's medical condition into account in making a medical decision; that's the essence of a doctor's job. And there's no reason why things should be different when the patient's medical condition constitutes a "disability" under the ADA. If a condition that constitutes a "disability" can be mitigated or cured most effectively by a different treatment than that administered for a different, non-"disabling" condition, it would not make sense to say that the doctor must ignore the disability and provide the less effective treatment. Still, the Schiavo case does not quite fit that paradigm. There seems no doubt that continued feeding and hydration would have kept Theresa Schiavo alive. The only question was essentially a normative one: Did it make sense, given

30. *See id.* at 598.

31. *Id.*

32. For further criticism of the analysis of the "Baby Doe" cases, see, for example, Philip G. Peters, Jr., *When Physicians Balk at Futile Care: Implications of the Disability Rights Laws*, 91 NW. U. L. REV. 798, 818–25 (1997).

33. *See Guardianship of Schiavo*, No. 90-2908GD-003, slip op. 8 (noting that Florida law prohibits exercise of substitute judgment if the patient has "a reasonable probability of recovering competency") (internal quotation marks omitted).

the persistent vegetative state in which Schiavo was living and the lack of any realistic prospect of improvement, to keep her alive? Disability rights advocates have long argued, with considerable force, that such quality-of-life judgments often reflect an irrational bias against people with disabilities and an assumption that lives with disabilities are less worthwhile.[34] When, as in the Schiavo case, disability-related quality-of-life concerns drive a decision to withhold a treatment that would clearly be effective in its narrow medical objective, it does not seem at all a stretch to find a violation of the ADA.[35]

None of this is to say that the ADA claim was obviously meritorious. The arguments discussed above suggest, to the contrary, that the case was a close one either way.[36] In particular, it seems unlikely that the statute would be held to require a state to keep alive a person who has lost all consciousness and cognition and who has no prospect of regaining them.[37] But one phenomenon to which the ADA responds is the tendency to believe that disabilities are more limiting than they in fact are.[38] In the medical context, that tendency has frequently manifested itself in physicians' decisions to withhold treatment based on unduly negative predictions about the quality and length of disabled persons' lives.[39] Against that backdrop, it is quite plausible to read the ADA as demanding a skeptical review of a claim that an individual's disability makes treatment futile. It should thus

34. *See, e.g.*, Gill, *supra* note 25, *passim*. This point was a major theme of some disability-rights oriented commentary on the Schiavo case. *See, e.g.*, Harriet McBryde Johnson, *Not Dead at All: Why Congress was Right to Stick Up for Terri Schiavo*, SLATE, Mar. 23, 2005, available at http://slate.msn.com/id/2115208. For general discussions of the problem see, for example, Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1507–08 (2001); Philip G. Peters, Jr., *Health Care Rationing and Disability Rights*, 70 IND. L.J. 491, 501 (1995).

35. For a discussion of relevant legal arguments, see Mary A. Crossley, *Medical Futility and Disability Discrimination*, 81 IOWA L. REV. 179, 220–26 (1995); *see also* Einer Elhauge, *Allocating Health Care Morally*, 82 CAL. L. REV. 1449, 1514–15 (1994) (arguing, from a normative rather than a doctrinal perspective, that wrongful discrimination exists in the refusal to give a medical treatment to an individual because that individual has a condition that is *not* the target of the treatment).

36. *Cf.* Crossley, *supra* note 35, at 182 (finding "inconclusive[]" the legal arguments regarding whether it violates the disability discrimination laws to withhold treatment from an individual with a disability based on medical futility).

37. For an argument that the disability discrimination laws should not be read to impose any such requirement, see Arti Kaur Rai, *Rationing Through Choice: A New Approach to Cost-Effectiveness Analysis in Health Care*, 72 IND. L.J. 1015, 1092–95 (1997).

38. *See, e.g.*, Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 438 (2000).

39. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, MEDICAL DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES (1989); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 273–79 (1993).

have been significant to the federal courts that the Schindlers vigorously contested Schiavo's persistent-vegetative-state diagnosis. As I discuss below, however, those courts did not even address that factual dispute.

B. UNDUE HASTE

The issues, then, were complicated. But the federal courts did not appear even to notice any of these complexities. Rather, just three days after the Schindlers filed the amended complaint that contained the ADA claim, and just one day after the Schindlers filed their renewed TRO motion in light of that and the other new claims, the district court ruled that there was no realistic likelihood of success.[40] Given the speed with which it rendered its opinion, it is not surprising that the district court made some obvious mistakes. The court simply ignored the fact that the Schindlers had named Judge Greer as a defendant in the ADA claim; it discussed the potential liability of only Michael Schiavo and the Hospice.[41] And in rejecting the possibility that the Hospice might be liable, the court ruled that the ADA's "public accommodation" definition "does not include a facility such as Hospice."[42] That ruling disregards the statutory language, which states that a "public accommodation" includes a "professional office of a health care provider, hospital, or other service establishment."[43]

But more important than these mistakes, which are sure signs of a rush job, the district court did not seem at all to understand the complex issues raised by the ADA claim. The court held that "Theresa Schiavo is not 'otherwise qualified' because she would not have any need for a feeding tube to deliver nutrition and hydration but for her medical condition."[44] It relied solely on two pre-*Yeskey*, pre-*Olmstead* cases—the leading "Baby Doe" case of *United States v. University Hospital of State University of New York at Stony Brook*[45] and a subsequent Seventh Circuit decision that itself relied almost entirely on *Univer-*

40. *See Schiavo*, 358 F. Supp. 2d at 1164–65.
41. *See id.*
42. *Id.* at 1165.
43. 42 U.S.C. § 12181(7)(F).
44. *Schiavo*, 358 F. Supp. 2d at 1166. This quote appears in the portion of the district court's opinion that addresses the claim under Section 504 of the Rehabilitation Act, but the analysis applies equally well to the ADA claim.
45. 729 F.2d 144, 156 (2d Cir. 1984).

sity Hospital and another "Baby Doe" case[46]—which held that the disability discrimination laws "cannot be meaningfully applied to a medical treatment decision."[47] The court cited *Olmstead*—ironically, for the proposition that the disability discrimination laws "do[] not mandate the provision of services"[48]—but it did not even begin to recognize that *Olmstead*'s holding might undercut the "Baby Doe" cases on which it placed such heavy reliance. The Court did not mention *Yeskey* at all.

Later on March 25—the same day the district court ruled—the Eleventh Circuit affirmed the denial of the renewed motion for a TRO.[49] The court of appeals corrected some of the district court's errors: Unlike the district court, it acknowledged that the Schindlers had named Judge Greer a defendant on their ADA claim,[50] and it did not repeat the district court's erroneous conclusion that the Hospice was not a "public accommodation."[51] But the court of appeals introduced errors of its own. Most notably, the court held that Judge Greer was not operating as a state actor when, acting in his official capacity, he ordered the termination of feeding and hydration to Theresa Schiavo.[52] That holding seems, on its face, to be inconsistent with *Shelley v. Kraemer*.[53] The court of appeals relied on an earlier Eleventh Circuit case that had held that a state judge does not commit *unlawful* state action merely by entertaining a suit that one private party brought for unlawful purposes against another private party.[54] But that earlier case had expressly recognized that state action should be "found *after* a final judgment or otherwise dispositive order on the merits had been rendered by the state court"[55]—the precise fact setting of the Schiavo case.

Moreover, in affirming the district court's denial of the renewed motion for a TRO the Eleventh Circuit uncritically relied

46. *Grzan v. Charter Hosp.*, 104 F.3d 116, 121–22 (7th Cir. 1997) (citing *University Hosp., supra*; *Johnson v. Thompson*, 971 F.2d 1487, 1493–94 (10th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993)).

47. *Schiavo*, 358 F. Supp. 2d at 1166 (internal quotation marks omitted).

48. *Schiavo*, 358 F. Supp. 2d at 1166.

49. *See* Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005) (*per curiam*).

50. *See id.* at 1293 n.2.

51. *See id.* at 1293–94 (assuming *arguendo* that the Hospice was a "public accommodation").

52. *See id.* at 1293 n.2.

53. 334 U.S. 1 (1948).

54. *See Schiavo*, 403 F.3d at 1293 n.2 (citing Paisley v. Vitale, 807 F.2d 889, 893–94 (11th Cir. 1986)).

55. *Paisley*, 807 F.2d at 893 (internal quotation marks omitted).

on the "Baby Doe" cases to rule that the disability discrimination laws were "never intended to apply to decisions involving the termination of life support or medical treatment."[56] Like the district court, the court of appeals did not appear to recognize that *Olmstead* or *Yeskey* might undermine the continuing force of those cases. Indeed, unlike the district court, the court of appeals never even cited *Olmstead*.

The March 25 decision was the Eleventh Circuit's last word on the merits of the Schiavo appeal. The court denied *en banc* rehearing five days later.[57] It did so over the dissent of Judge Tjoflat, joined by Judge Wilson, who warned that "the hurried pace of this litigation" had prevented the court from "giv[ing] the plaintiffs' claims the reasoned attention they deserve."[58] Theresa Schiavo died the next day, March 31.

Significantly, the federal courts *never* addressed the crucial factual question regarding the extent of Schiavo's impairment. Although the Florida courts concluded that Schiavo was in a persistent vegetative state,[59] and Schiavo's subsequent autopsy seems clearly to confirm that conclusion,[60] the accelerated proceedings prevented the federal courts from conducting their own *de novo* review of that question as Public Law 109-3 required.[61] Indeed, the district court did not discuss the issue at all, nor did the appellate panel. The two judges in the panel majority did briefly discuss the facts in their concurrence in the denial of rehearing *en banc*, but they addressed only the question of what Schiavo would have wanted; they did not address the medical dispute. Even so, the judges pointedly declined to engage in *de novo* review of the state court findings: "Given the credibility determinations that the state trial court was authorized to and did make, the evidence clearly was sufficient to meet the clear and convincing evidence standard, which the Florida courts had imposed and did apply in this case."[62]

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56. *Schiavo*, 403 F.3d at 1294 (citing *University Hosp.*, *supra*; *Johnson*, *supra*). The court also relied on *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996), a pre-*Yeskey*, pre-*Olmstead* case that held that the ADA is not "violated by a prison's simply failing to attend to the medical needs of its disabled prisoners."

57. *See* Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270 (11th Cir. 2005).

58. *Id.* at 1279 (Tjoflat, J., dissenting from denial of rehearing *en banc*).

59. *See Guardianship of Schiavo*, 851 So. 2d at 185, 186.

60. *See, e.g.*, John-Thor Dahlburg & Karen Kaplan, *Autopsy Says Schiavo was Oblivious to Surroundings*, L.A. TIMES, June 16, 2005, available at 2005 WLNR 9518169.

61. *See* Pub. L. No. 109-3, § 2.

62. *Schiavo*, 404 F.3d at 1279 (Carnes and Hull, JJ., concurring in denial of rehearing *en banc*).

II. WHY THE RUSH?

The ADA claim was before the federal courts for a total of three days before those courts issued their dispositive opinions. And the district court and the three-judge appellate panel each entertained the TRO request involving that claim for only a matter of hours. Although the issues were complex and contested, the federal courts felt sufficiently confident that the claim had no merit that they refused to issue even a brief temporary restraining order to keep Theresa Schiavo alive while they considered it. As I have shown, their haste led to some obvious errors, and the federal courts failed to grapple with—or even advert to—the difficult issues raised by the ADA claim.

Why did the federal courts move the proceedings so quickly? As Herman Badillo said when state troopers stormed Attica prison on September 13, 1971, "[t]here's always time to die. I don't know what the rush was."[63] The federal courts would not even have had to allow the litigation to follow the normal timetable, with full discovery and a trial (a process the Eleventh Circuit panel majority predicted would take "many months, if not longer"[64]). The district court could have granted a brief TRO and set a hearing a week or two later on a motion for a preliminary injunction. Such a brief delay would have given the district court a chance to seriously think about the issues in the case. If, after the hearing on the preliminary injunction, the court concluded that there really was no prospect of success, it could have permitted Schiavo's feeding and hydration to be terminated then. All that would have been lost was a couple of weeks.

But the district court did not grant even such a brief delay. The explanation cannot be that the legal issues were obvious or easy. I hope I have shown that they were not, though perhaps the lawyers did not frame them in the manner that would have been the most helpful to the Schindlers or the courts. Rather, the most obvious explanation is that the federal judges assigned to the case perceived the equities as strongly tilting in favor of ending the litigation as soon as possible. The state courts, after all, had considered the case with extraordinary care—to the point of bending over backwards to entertain and carefully review the Schindlers' request to reopen the case and present new evidence.[65] There was no particular reason to believe that the

63. TOM WICKER, A TIME TO DIE 286 (1975) (quoting Badillo).
64. *Schiavo*, 403 F.3d at 1226 n.4.
65. The Florida Circuit Court entered its original opinion directing the withholding

Schindlers could present the federal courts with any probative evidence or argument that the Florida courts had not exhaustively addressed. Given the history of the state-court litigation, the words of the Florida trial judge must have weighed heavily on the federal judges:

> Five years have passed since the issuance of the February 2000 Order authorizing the removal of Theresa Schiavo's nutrition and hydration and there appears to be no finality in sight to this process. The Court, therefore, is no longer comfortable in continuing to grant stays pending appeal of Orders denying Respondents' various motions and petitions. The process does not work when the trial court finds a motion to be without merit but then stays the effect of such denial for months pending appellate review. Also, the Court is no longer comfortable granting stays simply upon the filing of new mo-

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of feeding and hydration on February 11, 2000, after hearing evidence from the Schindlers. *See* In re Guardianship of Schiavo, No. 90-2908GD-003 (Fla. Cir. Ct., Feb. 11, 2000). The Florida District Court of Appeals affirmed that judgment, based on the record before the circuit court, on January 24, 2001. *See Guardianship of Schiavo*, 780 So. 2d at 180. On April 24, 2001, after the Florida Supreme Court denied discretionary review, Schiavo's feeding and hydration were discontinued. *See* In re Guardianship of Schiavo, 792 So. 2d 551, 555 (Fla. Ct. App. 2001). But the Schindlers filed a motion for relief from judgment based on newly discovered evidence two days later. *See id.* On July 11, 2001, the Florida Court of Appeals directed the trial court to entertain that motion for relief from judgment, and it denied Michael Schiavo's motion to enforce its earlier mandate. *See id.* at 554. The trial court denied the motion for relief from judgment, but the Florida Court of Appeals reversed. *See* In re Guardianship of Schiavo, 800 So. 2d 640 (Fla. Ct. App. 2001). In an opinion entered on October 17, 2001, the appellate court expressed "skepticism" about the new evidence proffered by the Schindlers, *id.* at 644, but it nonetheless held that the trial court must "permit certain limited discovery and conduct an evidentiary hearing to determine whether the new evidence calls into question the trial court's earlier decision," *id.* at 642. On remand, the trial court permitted discovery for almost a year and conducted a hearing at which it entertained testimony from six physicians—Schiavo's treating physician, two experts chosen by Michael Schiavo, two experts chosen by the Schindlers, and one expert chosen by the court—and reviewed additional documentary evidence. *See* In re Guardianship of Schiavo, 2002 WL 31817960 at *1 (Fla. Cir. Ct., Nov. 22, 2002). After exhaustively considering the new evidence, the trial court refused to alter its original judgment. *See id.* at *2–*5. The Florida District Court of Appeals affirmed that judgment on June 6, 2003. *See* In re Guardianship of Schiavo, 851 So. 2d 182 (Fla. Ct. App. 2003). Although the Florida appellate courts review the denial of a motion for relief from judgment for abuse of discretion, the Florida District Court of Appeals "closely examined all of the evidence in th[e] record" and "concluded that, if we were called upon to review the guardianship court's decision de novo, we would still affirm it." *Id.* at 186. After the Florida Supreme Court invalidated, on state constitutional grounds, a statute the legislature had adopted that permitted the Governor to issue a stay of the order to terminate Schiavo's feeding and hydration, *see* Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004), the Schindlers filed a new motion for relief from the original circuit court judgment, which the trial and appellate courts denied, *see* In re Guardianship of Schiavo, 916 So. 2d 814 (Fla. Ct. App. 2005).

> tions and petitions since there will always be "new" issues that can be pled.[66]

The Schindlers' federal court suit thus had all the hallmarks of an eleventh-hour habeas petition filed by a death-row inmate, a petition filed merely for delay, with no realistic hope of success.[67] And the fact that the ADA claim was not raised until the Schindlers' amended complaint (albeit one filed only a day after the original complaint) must have added to the sense of dilatoriness.

But however impressed the federal judges were with the care and deliberation of the state courts—and however much they thought the Schindlers filed their federal suit merely for delay—Congress specifically directed the federal courts to "determine de novo any claim of a violation of any right of Theresa Marie Schiavo" and to do so "notwithstanding any prior State court determination."[68] Respect for Congress thus required the federal courts to decline to accord weight to the prior state court proceedings.

The federal judges may not have felt terribly inclined to respect Congress in this case. The enactment of Public Law 109-3 does not appear as Congress's finest hour. The statute disregarded the results of the careful state-court proceedings and required extraordinary federal-court review of a single case without any particular reason to believe that the case was any different from thousands of other cases that did not arouse congressional attention. Vocal advocates of the statute sought cynically to employ the Schiavos' and Schindlers' family tragedy as a political weapon, an effort highlighted by the notorious "talking points memorandum" that urged Republicans to use the Schiavo case to gain partisan advantage.[69] The race to enact the statute also deprived Congress of any meaningful opportunity for deliberation.

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66. In re Guardianship of Schiavo, 2005 WL 459634 (Fla. Cir. Ct., Feb. 25, 2005).

67. *Cf.* Mark Tushnet, *"The King of France with Forty Thousand Men":* Felker v. Turpin *and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 166–81 (discussing pressures last-minute capital habeas petitions placed on Supreme Court decisionmaking processes during the 1980s and early 1990s). On the harm to judicial decisionmaking of a rush to judgment, see Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185 (2002).

68. Pub. L. No. 109-3, § 2.

69. *See, e.g.*, Mike Allen, *Counsel to GOP Senator Wrote Memo on Schiavo: Martinez Aide Who Cited Upside for Party Resigns*, WASH. POST., Apr. 7, 2005, at A1.

Whether or not a law deserves respect as "good legislation," the courts have a duty to apply that law unless they conclude that it is unconstitutional. Notably, neither the district judge nor *any* of the three judges on the appellate panel assigned to the case were willing to reach such a conclusion. Failing a determination that the statute was unconstitutional, the district court and the appellate panel had an obligation to implement the statute's directive to consider matters *de novo*, without regard to prior proceedings.

Only one federal judge was willing to conclude that Public Law 109-3 was unconstitutional: Judge Birch, in his opinion concurring in the Eleventh Circuit's denial of *en banc* review.[70] But he was not a member of the panel that issued the appellate court's judgment in the case. If the judges in the panel majority believed the statute to be unconstitutional, candor compelled them to say so.[71] However, they said nothing on the subject.

I do not contend that the ultimate result in the Schiavo case was wrong. My critique, rather, is a procedural one, one about

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70. *See Schiavo*, 404 F.3d at 1271–76 (Birch, J., concurring in denial of rehearing *en banc*). Space limitations imposed by the editors prevent me from addressing Judge Birch's argument that the statute was unconstitutional. For present purposes, it should suffice to note that the issue is far more complex than Judge Birch suggested. Judge Birch contended that Public Law 109-3 violated the separation of powers by singling out a particular case and dictating various procedural rules to be applied in it—in particular, by requiring *de novo* review and eliminating defenses based on preclusion, waiver, exhaustion, and the *Rooker-Feldman* doctrine. *See id.* at 1273–75 & nn.4-5. But that argument stands in serious tension with the Supreme Court's decision in Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), which upheld a statute that singled out two pending cases by name and docket number and dictated substantive rules that would apply to them, *see id.* at 434–35. The statute does resemble the colonial-era statutes in which legislatures singled out particular cases to "set aside the judgment and order a new trial or appeal." Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995). In *Plaut*, the Supreme Court held that Article III of the Constitution responded to the abuses of that system by prohibiting legislative interference with the final judgments of federal courts. *See id.* at 219–25. But Article III does not protect *state*-court judgments, and *Plaut* specifically reserved any due process issue. *See id.* at 217. Moreover, the Supreme Court has held that, notwithstanding *Plaut*, "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." Miller v. French, 530 U.S. 327, 344 (2000). Under Florida law, the state-court order remained executory at the time Congress enacted the statute. *See Guardianship of Schiavo*, 792 So. 2d at 559 ("As long as the ward is alive, the order is subject to recall and is executory in nature."). This is not to say that the statute was obviously constitutional; Judge Birch was correct that the statute was "unprecedented in nature, and therefore a lack of controlling case law is unremarkable." *Schiavo*, 404 F.3d at 1274 n.4. But that very "lack of controlling case law" should have inspired a bit more deliberation before racing to the conclusion that the statute was obviously unconstitutional.

71. *See, e.g.*, David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 738 (1987) (arguing that "a great deal is lost in the process of debate if the reasons given by the judge to the public are inconsistent with those he would give in private, or to himself").

the role of a judge in a case like this. Respect for the decision of a coordinate branch of government, and respect for the people to whom that branch is ultimately responsible, required the federal courts to take one of two paths: either conducting the *de novo* review Congress directed or forthrightly holding the statute unconstitutional. The federal courts chose neither path, and that is why I believe the Schiavo case is an occasion for regret.

III. CONCLUSION

Humility should prevent any of us from being too judgmental about the actions taken by the federal judges assigned to the Schiavo case. The cliché is apt: The judges were thrust into the center ring of a political and media circus. The judicial impulse to stand up to the political pressure applied by the Schindlers and their allies in Congress and the right-to-life movement must have been powerful. The impulse to defend the work of the state courts—whose judges had been loudly and unjustly attacked for their rulings in the case[72]—must have been especially powerful.[73]

The final days of Theresa Schiavo's life imposed what must have been unbearable pressures on everyone involved. In the face of such pressure, it is the rare person who can get by without doing anything he or she regrets. Unfortunately—or fortunately—judges are people, too. The federal judges assigned to the Schiavo matter succumbed to the pressure to rush the case. That they did so is understandable, but it is regrettable.

72. *See, e.g.*, Deborah Sontag, *In Courts, Threats Become Alarming Fact of Life*, N.Y. TIMES, Mar. 20, 2005, at 1 ("George W. Greer, a state judge in Florida, has been the target of considerable invective and the recipient of voluminous hate mail and death threats for ordering the removal of a feeding tube from Ms. Schiavo. For weeks, sheriff's deputies have kept Judge Greer under close guard.").

73. Also at work, I think, was the general disinclination of federal judges to hear cases that feel like "family law" cases. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 615–16 (2000); Ankenbrandt v. Richards, 504 U.S. 689, 693–701 (1992). For criticism of that disinclination, see, for example, Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1749–50 (1991).