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SCHIAVO'S RIGHT TO REFUSE FOOD AND WATER: ASCENDANCY OF THE ARTIFICIAL NATURAL PERSON

Joseph S. Bell†

What is man, that thou art mindful of him? And the son of man, that thou visitest him?

– King David, Psalm 8, verse 4.

I. INTRODUCTION

Defining personhood has always been difficult, but it has never lacked an element of the ethereal. The term “person” comes to us from the Latin “persona,” meaning a mask, or one who wears a mask, as an actor would. In ordinary conversation, the term “person” most often refers to a human individual, with no distinction between the mask and the actor. However, from a legal perspective, a “person” is only the mask, a composite of “legal rights and duties,” worn by some unknown and otherwise unimportant actor, to represent a character in the story of legal history. With such an ambiguous actor at its core, the law of personhood has evolved slowly and haphazardly into a patchwork quilt of categories used to make pragmatic and sometimes contradictory decisions about the mask and its actor, whether state, private, or otherwise.

Modern juridical blueprints for defining personhood fail to elucidate a unified and stable theory of the person, resembling instead a disjointed collection of design drawings for legal technicians. While such technicians may be extraordinarily skilled interpreters of these legal schematics, they typically cannot explain the engineering principles behind the original design.


Occasionally, a case comes along that exposes how serious a weakness in that understanding can be, particularly as it relates to proper identification of the focal point of human law, the person. Legal technicians build their machine according to the design specifications, and everything appears to be working correctly. Yet the machine begins to produce results intuitively recognizable as wrong, and everyone is puzzled. Just such a case has emerged from the bitter struggle to control the destiny of a severely cognitively disabled Florida woman named Theresa Marie Schiavo (Terri).

Schiavo is important because it challenges a key assumption of modern right-to-die jurisprudence; that the working definition of legal personhood is sufficiently coherent to justify the judicial imposition of a "prosthetic" autonomy for the severely cognitively disabled. While some may argue that the intensity of public attention to the Schiavo drama was fundamentally a political event, this Comment contends that what transpired was instead a clash between two equally religious theories concerning the nature of personhood. The collision of ideas flowed not out of politics per se, but out of profoundly conflicting intuitions regarding the nature and destiny of humankind. The public malaise during the proceedings, the intense and widespread legal debate among both professional and amateur legal thinkers, and the imagery of police turning away young children trying to help a fellow human being, all represent a public recognition that there has been an elusive yet real breakdown of the

5. Gray, supra note 2, at 7.
6. The cases discussed in this comment collectively referred to as Schiavo include: In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715 (Fla. Cir. Ct. 2000); In re Guardianship of Schiavo, 780 So.2d 176 (Fla. Dist Ct. App. 2001); Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp.2d 1378 (M.D. Fla. 2005); Schiavo ex rel. Schindler v. Schiavo, 358 F.Supp.2d 1161 (M.D. Fla. 2005); Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005); Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005). All references to Trial Transcripts are referring to transcripts of the probate trial designated as In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715 (Fla. Cir. Ct. 2000). The Trial Transcripts were obtained by the author from Barbara J. Weller, attorney for the Gibbs Law Firm, P.A., and are on file with the Liberty Law Review [hereinafter Trial Transcripts].
7. Gray, supra note 2, at 27 (suggesting that while a duty may bind in the absence of volition, a right cannot be exercised without a corresponding volition). The term "prosthetic autonomy" as used here, describes the attempt to reconstruct artificially the volition of a person whose volitional powers are presently inaccessible, in a manner similar to the use of a physical prosthesis to replace a missing limb.
machinery of the law. The legal profession is obliged to understand and fully address that breakdown, yet it cannot do so without resort to those first principles that underlie the legal machinery's original design.

Part II of this Comment explores those first principles by evaluating the evolution of personhood in the areas of religion, philosophy, and contemporary bioethical theory. Part III traces the historical development of the competing legal theories of personhood as courts confronted a growing and bewildering array of definitional problems for borderline personhood. Part IV explores how the Schiavo appellate courts used various elements of currently popular personhood theory, both directly and intuitively, to arrive at their decision. Part V evaluates the current state of personhood in the law and considers how alternative understandings of personhood might have yielded a different outcome in Schiavo. Part VI recommends that end of life jurisprudence establish a system of three safeguards that would better account for the risk of competing religious theories respecting personhood as a function of judicial bias. First, establish a rebuttable presumption that the state is always an actor in disputed end of life cases. Second, adopt civil habeas corpus protection for the severely cognitively disabled in disputed end of life cases. Third, in the interest of equal protection, develop uniform standards for a more scientific approach to judicial determination of cognitive disability. Part VII concludes this Comment.

II. EXTRA-LEGAL SOURCES OF PERSONHOOD THEORY

A. Religious Undercurrents

The search for the meaning of the personhood concept must begin with an exploration of the sacred, for it is in the sacred that we find the earliest clues that being human transcended a merely biological understanding of personhood. Many of the ancient major cultures at some point recognized personhood as a quality possessed or a status achieved, whether by deity, angels, humans, or other forms of sentient life. While the later philosophers

10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
13. See infra Part V.
14. See infra Part VI.
15. See infra Part VII.
17. Ernest Valea, Many Paths to One Goal? The Human Condition in World Religions,
would attempt to forge a meaningful theory of the person from the pristine building block of pure reason, they extracted the major themes of these theories from the raw material of religious metaphysical history. We therefore undertake a brief review of the major strands of religious thought that run before the major philosophical advances in the theory of personhood, as they will prove the words of King Solomon true, that "there is nothing new under the sun."  

The monotheistic religions, Judaism, Islam, and Christianity, have a relatively similar understanding of personhood as expressed both in God and in God's special project, humankind. Christianity adds the idea that personhood, even for God, is always a function of a relation to the Other, as Father, Son, and Holy Spirit are distinct persons in the Godhead who nevertheless exist in relationship to each other. Thus, the Christian God, even as a unitary being, provides the complete and ultimate paradigm of personality; He exhibits all the attributes of the most exalted rationality and the most expansive consciousness, while also expressing by analogy those person-like attributes that are characteristic of personal relationships, such as joy, anger, language, and love.

For such monotheists, humans made in the image of God have a unique place in creation; unlike lesser creatures, they not only have attributes of deity in their makeup, but by virtue of those attributes can engage in a special relationship with God. This apparent hubris is the basis of some objections raised by those who subscribe to a substance-independent notion of consciousness as personhood. For example, Peter Singer accuses monotheists of speciesism for singling out man as uniquely capable of personhood. However, this begs the question of whether man is in fact in a unique relationship with the Creator. If so, then recognition of the uniqueness of

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20. See 1 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 153-54 (John Baillie, John T. McNeill, & Henry P. Van Dusen eds. 1973) (1536) (In Book 1, Chapter 13, Section 25, Calvin describes the Trinity as a unity of essence and a plurality of persons whose relational roles give rise to their personal distinctness).
21. Valea, supra note 17.
22. See Genesis 1:26 ("And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.").
humankind’s status is not hubris but mere situation: this is simply where we find ourselves.

In Christianity, two major theories of personhood exist.\textsuperscript{24} First, the monistic approach posits that personhood only exists when there is a union of soul and body.\textsuperscript{25} In this view, the soul is the life-force generally, as distinct from mere consciousness. Therefore, personhood can be preserved where any degree of human life can be sustained, with or without consciousness. The soul enlivens the body and has no identity without it. As long as the body lives, the soul is present. If the soul is present, there is personhood. Thus, any living human must necessarily be a person as long as life remains.\textsuperscript{26}

The other approach is traditional Christian dualism, which acknowledges that the spirit can exist independently of corporeality.\textsuperscript{27} In this view, a person may exist without a body, but is bound to the body as long as the body lives, on the understanding that when, and only when, the body dies, the spirit returns to the Creator. This is also sometimes referred to as substantive dualism, in that the being that sustains continuous identity is of a real, if immaterial, substance.\textsuperscript{28}

Despite their differences, monotheistic monists and dualists alike would agree that while the biologically human body lives, it possesses intrinsic, categorical personhood, and therefore retains all the rights, if perhaps not all the duties, of being a person.

In contrast to monotheism, pantheism teaches that everything is God, and God is everything.\textsuperscript{29} That is, the label "God" is a label appropriate to put on the sum of all things. Therefore, if God is person, then everything is in some sense person, or at least a partial person, a fragment of the whole. If God is the supreme object of contemplation, the highest being, then identifying God as person can just be another way of saying that God has maximum consciousness. The human quest, under pantheism, is to raise one’s consciousness to higher levels, thus becoming one with the greater divine consciousness.\textsuperscript{30}

However, Buddhist pantheism does not require that deity involves personal consciousness per se, as the ontological limits implicit in relational persons

\begin{thebibliography}{99}
\bibitem{25} J.P. Morland \& Scott B. Rae, \textit{Body \& Soul: Human Nature \& the Crisis in Ethics} 20 (2000).
\bibitem{26} Wolfhart Pannenberg, \textit{What is Man?} 47-48 (1970).
\bibitem{27} Moreland \& Rae, \textit{supra} note 25 at 20.
\bibitem{28} Id.
\bibitem{30} Id.
\end{thebibliography}
seem to conflict with the notion of a fundamentally universal being. Therefore, the Buddha specifically rejected the notion of self. To oversimplify somewhat, the person was really just the composite of the body (rupa), feeling (vedana), cognition (sanna), volition (sankhara), and consciousness (vijnana). Thus, for Buddhist pantheism, the notion of person is illusory, and the quest for Nirvana is the quest to shed the illusion of self.

Hinduism has a wide variety of forms and expressions, embracing ideas of personhood that are in a sense dualistic, yet quite unlike western conceptions of a spirit that can be closely identified with its corporeal manifestation. In a hymn of the Rig Veda, the phrase “make me immortal” expresses succinctly the notion of the persistent self. Yet the spiritual self is not the corporeal expression of self, for there is a barrier of illusion that the self must overcome.

Atheism, while resistive to classification as religion, has nevertheless attempted various means of establishing metaphysical personhood as well. One approach has been to identify the pervasive belief in substantive personhood as a widespread fault in human logic:

In reality, personhood is a concept, an artificial category, nonexistent in nature. Suggesting that a literal moment exists when a cell attains personhood is like saying there’s a detectable instant when adults become senior citizens. The onset of “personhood” can’t be pinpointed or measured because the “event” doesn’t literally happen.

The logic error, reification, is to assign corporeality to an abstraction without justification, i.e., to make the idea of person into a real thing. Thus, for atheism, because substantive personhood is false, all that remains is abstract personhood, which is entirely the product of collective social reasoning.

32. EARL H. BREWSTER, THE LIFE OF GOTAMA THE BUDDHA 66 (1926); Valea, supra note 17.
33. Valea, supra note 17.
34. Id.
35. Id.
36. Id.
38. Another example might be, “the law says thus and such.” The law does not literally speak; that is an attribute normally associated with persons qua persons. Yet so-called reifications often are nothing more than effective shorthand for expressing very large, complex ideas. It seems somewhat hasty to dismiss such ideas out of hand merely because their form of expression does not conform to rather narrow rules of construction.
Atheists frequently regard such ideas as social constructs that can be defined arbitrarily and applied as needed.\textsuperscript{39}

Christian and other religions have retained their theories of personhood in parallel with developments in the philosophical domain. Each of these systems has had to address the relationship between the visible and the invisible, between body and spirit, between material and divine. In consequence of the pervasive but unsystematic religious efforts to define divine and human identity in the context of the sacred, the stage had been set for the emergence of philosophers who would attempt to convert the art of recognizing persons into a science.

\textbf{B. Philosophical Underpinnings}

One of the most pernicious problems in defining persons is that one must contemplate the criteria for ascertaining personhood from within one's own pre-existing belief system.\textsuperscript{40} That is, to arrive at the conclusion that someone is not merely a something, one must first believe in persons.\textsuperscript{41} Despite this constraint, theorists from all periods of philosophical history have not hesitated to put forth various theories for determining membership in the personhood club. One should note that each of these theories expresses a yet more fundamental and pre-existing belief concerning the relationship between body and soul, expressive of some form of religious or quasi-religious dualism or monism. This is critical to apprehend, because it demonstrates that all beliefs about personhood necessarily invoke metaphysical presuppositions that had their origins in religious thought.\textsuperscript{42} As Alvin Plantinga said, in the context of defining persons, "[h]ow we think about God, then, will have an immediate and direct bearing on how we think about humankind."\textsuperscript{43}

One of the early Christian theorists in the field was Boethius, who proposed that a person was an indivisible substance of a rational nature.\textsuperscript{44} That is, a being was a person if it had individuated and possessed a rational nature. Under this definition, such a being could have the "substance" of a rational nature. That is, such an entity did not have to perform physically those

\begin{itemize}
\item[] 39. Bice, \textit{supra} note 27.
\item[] 40. Smith, \textit{supra} note 16, at 48, 118-20.
\item[] 41. \textit{Id.} at 120.
\item[] 42. RONALD DWORKIN, \textsc{Life's Dominion} 164-65 (1993) (asserting that the core issues in the debates over the sanctity of life are fundamentally religious).
\item[] 43. Alvin Plantinga, \textit{Advice to Christian Philosophers (With a Special Preface for Christian Thinkers from Different Disciplines)}, \textsc{1 Faith and Philosophy} 253, available at http://www.faithandphilosophy.com/onlinearticle/advice.
\item[] 44. MORELAND & RAE, \textit{supra} note 25, at 25.
\end{itemize}
properties that belonged to its non-material and inherently rational substance. Furthermore, such a substance was capable of survival independent of any basis in material substance.45

In the wake of the scientism that arose during the enlightenment period, a hypothesis of immaterial substances came to be regarded as incoherent.46 The empirical sciences demanded evidence of the immaterial, which, as a matter of definition, could not provide material proof of its existence.

Into this newly created vacuum stepped the likes of John Locke and Immanuel Kant. Locke defined a person as “a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places.”47 Thus, in Lockean personhood, it was essential to have not only consciousness, but to have access to the memory of preceding states of the conscious self. While this begins to forge a tighter connection between body and mind, it also creates problems with retaining the personhood of those who have lost the memory of who they were at some previous time in their lives. Alzheimer patients would, under this definition, become a new person with every new episode of contiguous self-memory, but would temporarily cease to be persons during the lapse between.

Kant described a person as a being with rational autonomy.48 For Kant, rationality implied a freedom to choose. Although the outer world could not be experienced directly, the rational mind was free to interact with the inner representation of those things presented to it.49 Such a mind was also under a duty to act as a free moral agent, selecting or rejecting the choices available through the medium of the inner experience.50 Thus, Kant’s dualism envisioned the personal self as a metaphysical entity subsisting in rationality as expressed by the only law that that rationality could access, the law within. Hence, autonomy (“self-law”) became the pivotal defining attribute of the Kantian person.

45. Id.
46. Id. at 18, 88-90.
47. J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 335 (Oxford University Press, 1979) (1690) (at bk. II, ch. XXVII, § 9).
49. IMMANUEL KANT, CRITIQUE OF PURE REASON 155-56 (F. Max Muller trans., 2nd ed. 1896) (1787) (describing the outer world as “completely beyond the sphere of our knowledge”); KANT, METAPHYSIC OF MORALS, supra note 48 at 268-69 (stating that an ethical duty is a strictly internal legislative force).
50. KANT, METAPHYSIC OF MORALS, supra note 48 at 268-69.
John Stuart Mill represents the utilitarian approach to personhood. In general, utilitarian praxis is to identify what action or combination of actions will produce the greatest amount of happiness and pursue that. Thus, for Mill, a person’s dignity was proportional to his or her capacity for experiencing pain or pleasure, because that is how to measure the success or failure of the pursuit of happiness. In such a system, any being capable of experiencing pain and recoiling from it, or pleasure and the desire of it, constitutes a protectable person. Oddly, modern incarnations of this position reduce persons to mere pain detectors. We can all identify with pain, after all. However, the mere fact that an experience is shared does not, in itself, impose a moral template on that experience. It is simply shared. To go from “pleasure is shared” to “pleasure is good” requires a leap into the metaphysical.

C. Modern Bioethical Theory

The current bioethical paradigm is a patchwork quilt of the foregoing descriptions of personhood developed by Locke, Kant, and Mill. This is somewhat alarming, because this confused composite picture of personhood is the engine of bioethical theory-making that informs and drives the legislative and judicial processes. This might be acceptable if the underlying principles were essentially coherent. However, incompleteness and deep internal conflict plague each of the major constituent philosophic constructs. Considered separately or in combination, these principles fail to answer definitively which of the competing dualisms correctly identifies a person.

The “Georgetown mantra” of bioethics principles is the current embodiment of essential bioethical thought. The central principles are respect for autonomy, beneficence, nonmaleficence, and justice. The formulators of these principles freely “acknowledge that they cannot ground these principles on a particular theory of ethics, but appeal instead to ‘common morality.’” Under this regime, the “correct” dualism is between the physicality of the body and the abstraction of self, such that to be a self is precisely equal to having a

53. Id.
55. Id.
56. Id.
certain kind of consciousness, and, then, only as long as one has that consciousness, or at least the "developed capacity" for it.

The Georgetown mantra's notion of the mind as a non-substantive abstraction independent of the body is an artifact of rationalism. The more primitive criteria of capacity for pain and pleasure are a function of the sensory self, and can be traced to empiricism and Mill's utilitarianism. The supposed pragmatic value of using these attributes, aside from the universal referents of pain and pleasure, is their apparent independence from the traditional Christian dualism of body and spirit. This is critical to their acceptance in a postmodern and therefore pluralistic society, because the quest of postmodern polity is to avoid at all costs the imposition of sectarian theories in solving public problems.

1. Person-Category or Person-Function?

Yet each of these criteria has sectarian troubles of its own. All definitions of personhood require the application of metaphysical criteria, but how should one apply that criteria? Should one apply them categorically, as traits typical of the species, or functionally, as descriptions of discrete individuals? If categorical application of the criteria is rejected in favor of evaluating specific individuals in terms of function or ability, to what degree must these criteria manifest themselves in the individual to warrant classifying that individual as a person? Will mere potentiality be sufficient, or must there be, as asserted by M.A. Warren, a developed capacity for the given function? Where a capacity is long from being mature, or has fallen into permanent disuse, through injury or disease, such a being can make no claim to functional personhood. Peter Singer, in arguing for animal rights, has presented the problem of entity valuation based on developed capacity in stark terms:

I have argued that the life of a fetus is of no greater value than the life of a non-human animal at a similar level of rationality, self-consciousness, awareness, capacity to feel, etc., and that since no fetus is a person, no fetus has the same claim to life as a person. Now it must be admitted that these arguments apply to the newborn.

57. Irving, supra note 52.
58. Id.
59. Id.
baby as much as to the fetus. A week old baby is not a rational and self-conscious being, and there are many non-human animals whose rationality, self-consciousness, awareness, capacity to feel, and so on, exceed that of a human baby a week, a month, or even a year old. If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value than the life of a pig, a dog, or a chimpanzee.62

In addition to developed capacity, Warren has also proposed that a person is one who belongs to the moral community.63 To belong to this club, one must be both a moral subject and a moral object. One must make moral judgments, and be an object over which other moral subjects are obliged to make moral judgments. The challenge here is circularity. Ascertaining what is moral is essential to finding personhood, yet those already defined as persons must make the morality by which the moral community is defined, which in turn defines personhood. “Unless the measuring rod is independent of the things measured, we can do no measuring.”64

Thus, if the life of Mr. Singer’s otherwise healthy fetus, who will, by natural and timely biological progression, acquire as actual all the requisite capacity to join the moral club of personhood, is in such peril, then what of the severely disabled? Surely, those whom society deems permanently excommunicated from the society of human persons through severe disability will be seen as even less valuable under such a measuring stick. Worse still, some individuals may possess the consciousness necessary to receive and contemplate the activities of the moral community, yet may be trapped inside a body that can give no intelligible communication to the outer world that such moral thoughts are present.65 Does the notion of participation in the moral community always demand a perception by the moral community that the individual is participating? That would seem to confer, on a majoritarian basis, the power to create personhood ex nihilo, based solely on potentially flawed perception inhering in the moral community.

As a more modest alternative, encoded or potential capacity purports to offer a way to implement the functionalist approach to personhood without

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63. *ON THE MORAL AND LEGAL STATUS OF ABORTION*, supra note 61.
endangering some classes of humans who lack, or appear to lack, the requisite attributes of persons. All that is necessary to survive is to have a primary capacity to develop a secondary capacity that is implicit in one’s DNA. The secondary capacity can be for consciousness, or pain, or a desire for survival, but it does not have to be anything more than incipient. This initially appears to resolve the problem of continuity. A person can be recognized as capable now of becoming capable of other, more person-like things later.

However, such a scheme begs the question of how any criteria could be chosen that would not be subject to the charge of being arbitrary. For any given characteristic, determining that a capability existed in a specific individual’s DNA would be a prerequisite to ascertaining that individual’s personhood. Furthermore, the degree to which a given candidate for personhood possesses a given attribute could be determinative of their personhood, hence of their survival. In some arbitrarily distant future, what level of IQ would be considered person-like? What level of desire for self-continuation must our candidate to personhood possess? How would one measure such a desire for survival? Who would do the measuring?

An additional problem of encoded capacity is that it does not address those who once were competent but have lost, or appear to have lost, the requisite capacities to participate in the moral community. Their DNA, like Singer’s fetus, reflects the presence of the physical apparatus necessary to think, plan, hope, and so forth. Perhaps in some arbitrarily advanced future, the mere presence of such genetic information will bring with it a presumption of potential cure. If that sophisticated future arrives, would a definition of personhood based on potential capacity, that nevertheless excludes some damaged humans based solely on our present society’s incapacity to repair biological damage, be viewed as barbarically underinclusive?

2. The Functional Criteria

Once it has been decided how the criteria will be applied, it becomes necessary to resolve exactly what those criteria shall be, and how they shall be measured. The most basic criterion of human personhood is human biology. Using a genome to identify a human seems a relatively straightforward way to ascertain the proper category of a given organism. Nevertheless, biology

66. Hsiao-chih, supra note 23.
67. Id.
68. Id.
69. The author recognizes that there are numerous discussions regarding whether nonhuman entities may properly be regarded as persons. However, the scope of this comment is narrower, as we seek only to identify the proper range of human persons. For a discussion of
alone leaves a number of unaddressed questions. A human corpse is clearly biologically human, yet it is doubtful any serious participant in the personhood debate would regard it as a person. This is so because, according to common social understanding, only a living human organism is a person. However, this is problematic, because, for modern bioethics, the definition of a living human hinges more on neurological life than on a general life in the body.⁷⁰

Therefore, for a functionalist, a living, genomically human being does not automatically qualify as a person. Only a living, genomically human being that can sustain consciousness may remain in the competition to become a person.⁷¹ Consciousness, however, is sufficiently amorphous that it tends to frustrate efforts at objective measurement. For example, if a persons-as-functions purist asserts consciousness as an unqualified necessity of personhood, the persons-as-category theorist can respond with the sleep question.⁷² If a human being is asleep, and not dreaming, is the human still a person? If not, would ending the physical life of this human during sleep constitute murder? If not, why not? The answer must be that this human is so nearly able to experience consciousness as to be construed a person, based on the speed with which he can rise to person-like consciousness. Therefore, even functional absolutism must retreat to the position of latent as opposed to actual capability.⁷³

Assuming now that our candidate for personhood is living, genetically human, and psychologically aware, it is still not a person unless it can demonstrate moral autonomy. Autonomy ranks as perhaps the highest attribute in the modern theory of personhood. Autonomy is, roughly speaking, the ability to participate in the moral community as a moral choice-maker. Any lesser living being may make choices, such as what food to eat, what physical comforts to seek, and so forth. However, in the Kantian pattern, autonomy is only realized when the self ascends to making moral choices.⁷⁴ If autonomy were considered quantitatively, the more capacity one has for making moral choices, the more one is a person. Conversely, to the extent one’s choices are limited by the choices of others or other forces, the less one is a person. If one has no autonomy, then even with consciousness, one does not deserve the respect reserved for persons. This mode of thinking has profound implications

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70. *Lizza*, supra note 60, at 33.

71. *Id.*


73. *Id.*

for the severely cognitively disabled, for bioethics committees of the not-too-distant future may use this logic to treat severe dementia, that which precludes rational moral choice, as a death state, a state of conscious non-personhood.

That specter of personhood by committee haunts the modern quest to find a satisfactory jurisprudence of personhood. However, as in physical science, juridical experiments that attempt to build on faulty theoretic premises tend to eventually demonstrate the defects of the theory. Until the Copernican revolution, even the wisest of persons in Europe once believed that so-called epicycles were a valid explanation for the movement of the planets. However, when it became clear through careful study that the sun was the center of the solar system, the need for the tortuous twists and turns of epicycles dissipated. Similarly, law is the laboratory of theories respecting persons. As the modern bioethical theory of persons has unfolded in the practice of law, many weaknesses in the theory have been revealed.

III. MODERN PERSONHOOD JURISPRUDENCE

A. Roe Gives Birth to Cruzan

Law has typically made a distinction between natural and artificial persons. Natural persons, as Blackstone puts it, are persons such as the "God of nature formed us." Presumably, he refers not only to our material makeup, but, as he speaks from within the context of a traditional Christian narrative, he includes our spiritual makeup as well. He contrasts this composite entity issuing from deity with the human-made entity of the artificial person. Such a person exists only because man is its creator. Man confers on it those rights and duties it sees fit to impose.

That was then. For the modern living human being that fails to qualify as a legal person, there are consequences. Declaration of someone’s personhood “is usually 'meant to emphasize the individual's normative standing, implying that treatment of her as a mere thing is inappropriate.'” Thus, acquiring, or failing to acquire the label of “person” is not merely descriptive, but has a corresponding normative effect, sending a critical signal to the legal system as

75. WILLIAM BLACKSTONE, 1 COMMENTARIES *123 (“Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.”).
76. Id.
77. Id.
78. Hsiao-chih, supra note 23.
to how the relevant entity should be treated. For those least able to speak authentically on their own behalf, "mongoloids, psychotics, the autistic, the senile, the profoundly retarded," not to mention the very young and the very old, a message of non-personhood can have deadly effect, as exampled in the case law that follows.

In the march of autonomy from religious and philosophical theory to center stage in American jurisprudence, Roe v. Wade marks a critical juncture and the modern starting point for the development of Right-to-Die case law. Roe promoted the right to privacy, an incipient form of autonomy, from a narrowly applicable ground for common law battery to the status of a pervasive constitutional given. In 1973, Roe challenged Texas criminal abortion laws as unconstitutional. The Supreme Court held that the laws were an unconstitutional violation of Griswold's recently discovered right to privacy, and that such a decision belonged exclusively to the would-be mother during the first trimester, as guided by the medical judgment of her doctor. While the Roe court did grant states limited power to impose control over a pregnancy during the second and third trimesters, the reign of autonomy through privacy in the area of personal medical choices had begun in earnest, and would become the cornerstone of a significantly expanded right to refuse medical treatment in many cases to follow.

Building on Roe, the landmark decision In re Quinlan justified a life-terminating decision based on privacy. In 1975, at age 22, Ms. Quinlan suffered an apparent loss of oxygen to her brain and, due to the resulting brain injury, entered a condition diagnosed as a Persistent Vegetative State (PVS). Her father sought to become her guardian in order to terminate artificial respiration, in the belief she would die naturally. The court held that Ms. Quinlan retained a right to privacy, even while in a PVS, such that she also retained a right of autonomous decision to refuse medical treatment, which her

79. Id.
82. Id. at 153.
83. Id. at 122.
85. Roe, 410 U.S. at 164.
86. Id. at 163-64.
88. Id. at 653-55. For a discussion of some of the difficult problems in defining PVS, see Giacino & Whyte, The Vegetative and Minimally Conscious States: Current Knowledge and Remaining Questions, 20 J. Head Trauma Rehabil. 30, 32-33 (2005).
89. Quinlan, 355 A.2d at 651.
Dismissive of concerns for adverse impact on medical standards and practices, the *Quinlan* court held that, if the guardian and the family were agreeable, and the physicians unable to offer any hope of recovery, cessation of life support could occur with no civil or criminal liability to any participant. Therefore, Ms. Quinlan was taken off the respirator in 1976. However, because she spontaneously began breathing on her own, she did not die until she succumbed to pneumonia in 1985.

The line of cases that evolved from *Quinlan* struggled with the question of how best to determine the end of life wishes of a person diagnosed as permanently cognitively incapacitated. Two basic approaches evolved. One approach used a hypothetically objective “best interests” model, which courts would apply only when they did not know the patient’s end of life wishes at all. Under this model, the statutorily designated decision-maker contemplated what a reasonable person would do in similar circumstances. The other approach used a subjective “substituted judgment” test, under which the court adjudicated the patient’s wishes based on available evidence, and the designated decision-maker simply carried out those wishes.

During this period of legal evolution, some courts used a strictly interpreted version of “clear and convincing” evidence that excluded casual hearsay except as a supplement to more documentary forms of proof. These courts appear to

90. *Id.* at 663.
91. *Id.* at 670.
94. See Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (holding that a severely retarded person with a terminal disease could refuse life-prolonging treatment because, even though he had never been able to form an intent regarding his own death, the court found that his wish would be reasonably evident, to the court at least, if he had had the capacity to realize his circumstances).
95. *See In re Conroy*, 486 A.2d 1209 (N.J. 1985) (holding that an 84-year-old incompetent nursing home patient being fed through a nasogastric feeding tube has the right to refuse medical treatment through a surrogate decision maker, providing certain safeguards are observed. Removal of a feeding tube with consent is not suicide, because a feeding tube is a medical treatment subject to refusal.). See also Corbett v. D’Alessandro, 487 So.2d 368 (Fla. Dist. Ct. App. 1986) (holding that a patient diagnosed as being in a persistent vegetative state with no hope of cognitive restoration had a common law constitutional right of privacy to remove a feeding tube, despite an apparent gap in the controlling Florida statutes respecting feeding tubes).
96. *In re Westchester County Med. Ctr.*, 72 N.Y.2d 517 (N.Y. 1988) (holding that oral evidence of wish to die was not “clear and convincing,” because it did not show “a firm and settled commitment, while competent,” to refuse the feeding tube under “circumstances like
have been more concerned that the patient had demonstrated an unequivocal commitment to devalue their continued physical existence under specific neurological circumstances. Other courts found evidence “clear and convincing” even when the surrogate decision-maker could only guess at the patient’s probable end of life desires based on personal knowledge of the patient’s personal value system.\(^9\) These courts have been more willing to submit to the opinion of third party experts in determining the quality of life basis for ending a life-sustaining treatment.

Then, in 1990, the U.S. Supreme Court spoke for the first time on the right of an incapacitated patient to refuse artificial means of delivering water and nutrition.\(^9\) In 1983, Nancy Cruzan was injured in an automobile accident in which her brain was seriously damaged through lack of oxygen.\(^9\) When her guardians sought a declaratory judgment that would permit them to remove her feeding tube, the Probate Court of Jasper County, Missouri, approved the action.'\(^{100}\) The state appealed and the Missouri Supreme Court reversed.'\(^{101}\)

On appeal, the U.S. Supreme Court openly considered the quality of life principle that inhabited the thinking of the trial court.\(^{102}\) The Court decided that Missouri had the constitutional prerogative to assign an intrinsic value to human life, wholly apart from functional qualifications, and therefore to require the higher evidentiary standard of “clear and convincing” evidence, capable of demonstrating unequivocally the competent wishes of a presently incompetent patient.\(^{103}\) The Court also held that due process was not violated when the Missouri Supreme Court found that the guardian’s substituted judgment fell short of “clear and convincing” when there was a lack of substantial proof that such judgment represented the true exercise of Ms. Cruzan’s volition.\(^{104}\) Nevertheless, on remand, the trial court found that the evidence of Nancy’s desire to die did rise to “clear and convincing” after all, permitting the removal of her feeding tube.\(^{105}\)

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9. See In re Jobes, 529 A.2d 434 (N.J. 1987) (holding that woman diagnosed as being in an irreversibly vegetative state could exercise her right to refuse feeding tube through a surrogate, if the prognosis could be verified by two neurological experts.).


99. Id. at 261.

100. Id.

101. Id.

102. Id. at 262.

103. Id. at 261.

104. Id. at 263.

That same year, the Florida Supreme Court built on the foundation of *Cruzan* in deciding *Browning*.

In 1985, Estelle Browning executed a written declaration providing that upon her hopeless incapacitation, her caretakers should abandon all life-prolonging procedures. The following year she experienced a stroke. Her doctors diagnosed her as being in a Persistent Vegetative State (PVS), and inserted a feeding tube to keep her alive. The *Browning* court found that, while a written declaration created a rebuttable presumption of "clear and convincing" evidence, oral evidence did not enjoy the same presumption, and the petitioner was required to meet that burden of proof using the subjective "substituted judgment" test. Nevertheless, accepting that the burden had been met with oral evidence, the court affirmed the decision of the lower court to permit the removal of the feeding tube despite the statutory requirement of imminent death, citing the Florida constitution's commitment to the right of privacy.

Thus the law that developed from *Roe* to *Cruzan* created a context where actions that once were legally indistinguishable from euthanasia or suicide came to be accepted under the aegis of autonomy (expressed as the right to privacy) and the corollary right to refuse medical treatment. During this period the question moved from whether adjudicated self-destruction was morally right, to whether society could be sure it had afforded its cognitively incapacitated citizens a process that fully protected their personal medical autonomy. That approach, crystallized into statutory form in Florida, was the backdrop against which the Schiavo controversy would unfold.

### B. Statutory Substitutes for Personal Autonomy.

Exemplars of state heath care advance directive statutory schemes rooted in modern bioethical theory are abundant, and Florida, both at the time of the Schiavo litigation and at the present, is no exception. Wrapped around the

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106. *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990).
107. *Id.* at 8.
108. *Id.*
109. *Id.* at 16.
110. *Id.* at 9-12.
113. *See generally* FLA. STAT. ANN. § 765.101 et. seq (West 2007). Note: The HCAD was enacted shortly after a Florida Supreme Court decision in which the Court outlined a methodology for adjudicating end of life decisions, requesting the Florida Legislature to implement the methodology in six months. The HCAD is a direct response to that request. *See*
core case law principles of autonomy coupled with the right to choose or refuse any medical treatment, Florida's Heath Care Advance Directive (HCAD) provides a comprehensive framework for determining both the consent and the medical condition of an incapacitated person.\textsuperscript{114}

The HCAD provides that a patient who does not expressly plan for eventual incapacity be entitled to a substitute medical decision-maker styled as a proxy.\textsuperscript{115} The proxy is to act with "informed consent" in determining whether to subject an incapacitated person to a "life prolonging procedure."\textsuperscript{116} The life-prolonging procedure most suspect is that tending to result in only a "precarious and burdensome existence,"\textsuperscript{117} which has obvious reference to a quality of life perspective, a key descriptor of the functional theory of personhood.

Under the HCAD, competent individuals can use a living will to establish a rebuttable presumption of clear and convincing evidence as to end of life wishes.\textsuperscript{118} When a person becomes incompetent, the designated medical decision-maker cannot act to withdraw life-prolonging procedures unless the patient is unlikely to regain capacity, or has a terminal or end-stage condition, or is in a PVS.\textsuperscript{119} The HCAD, following the classic lines of criteria for functional personhood, defines PVS as a permanent and irreversible condition of unconsciousness marked by a lack of voluntary action or cognitive behavior of any kind, coupled with an inability to communicate or interact purposefully with the environment.\textsuperscript{120}

This incorporation of functional personhood directly into the statutory language permits bioethical practitioners to view PVS-categorized patients as, philosophically speaking, already dead. That such a strong connection can exist between one's operating concept of personhood and one's approach to the death of the cognitively disabled is evidenced in the language used in the British case of Tony Bland:

The doctors can lawfully discontinue all treatment including ventilation, nutrition, hydration and other medical treatment because there is no possibility of him ever emerging from his existing PVS.

\textit{In re Guardianship of Browning}, 568 So.2d 4, 16 (Fla. 1990).

\begin{itemize}
  \item[114.] FLA. STAT. ANN. § 765.101 (West 2007).
  \item[115.] \textit{Id. at} 765.101(15); \textit{Id. at} 765.401.
  \item[116.] \textit{Id. at} 765.101(10) (defining a life-prolonging procedure as "any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function," excluding palliative care).
  \item[117.] \textit{Id. at} 765.102.
  \item[118.] \textit{Id. at} 765.302.
  \item[119.] \textit{Id. at} 765.304.
  \item[120.] \textit{Id. at} 765.101(12).
\end{itemize}
He has no feeling, no awareness, nor can he experience anything relating to his surroundings. To his parents and family he is "dead." His spirit has left him and all that remains is the shell of his body.\textsuperscript{121}

Notice also the distinctly religious flavor of the judge's statement. The judge has clearly stated a particular theory of personhood, that loss of higher brain function equates with the departure of the human spirit, that even a living human being, if he no longer possesses the requisite functionality, must lose his place among legal persons.

Nevertheless, to sustain the illusion of autonomy, the Florida HCAD and statutory schemes like it provide that one of several classes of persons may act as a proxy decision-maker for the patient.\textsuperscript{122} Proxies, in order of availability, can be the judicially appointed guardian, a spouse, adult children, a parent, adult siblings, a close adult relative, a close adult friend, or a licensed clinical social worker.\textsuperscript{123} The health provider's bioethics committee, or another bioethics committee if necessary, has the power to choose the proxy.\textsuperscript{124} The proxy can apply "substituted judgment" where evidence of patient wishes is available, or may use a "best interests" approach in the absence of such evidence.\textsuperscript{125} In either case, clear and convincing evidence must support the proxy's decision.\textsuperscript{126}

In the event the decision of a proxy or surrogate has the potential to affect directly any interested parties, the decision is subject to judicial review.\textsuperscript{127} The grounds for a review may include such things as ambiguity of the advance directive, true extent of the patient's capacity, change of the patient's mind, or questions respecting the loyalty, due diligence, and appropriateness of the surrogate or proxy.\textsuperscript{128}

As a defense against potential abuse of the fine line between the various manners of ending the life of incapacitated persons, the statute explicitly denies the validity of any interpretation sanctioning mercy killing, euthanasia, or suicide.\textsuperscript{129}

\begin{itemize}
\item 123. \textit{Id.} at 765.401(1).
\item 124. \textit{Id.} at 765.401(1)(h).
\item 125. \textit{Id.} at 765.401(3).
\item 126. \textit{Id.}
\item 127. \textit{Id.} at 765.105.
\item 128. \textit{Id.}
\item 129. \textit{Id.} at 765.309.
\end{itemize}
In the event of a dispute, the power to act as proxy passes to the court. This is what happened in Schiavo. The court was then bound to apply the same evaluative sequence as the non-judicial proxy, searching first for clear and convincing evidence of Terri’s subjective medical treatment prognostications, then looking to a best interests solution in the absence of sufficient evidence of intent.

C. Do the Autonomy Substitutes Work?

There is a growing consensus that both the current bioethical framework and the statutory schemes founded on it are failures. Failure here is defined in terms of objectives. If a project has spent its best energy, and the objectives remain unmet, it has failed. For many, this failure has taken the form of entering the medical system optimistic that our shared cultural icon of autonomy would be honored, only to find that in practice, conflicting theories of the meaning of autonomy held by the various actors produce unexpected and undesirable results. Arguably, the reason for its failure runs deeper than simply confused philosophical DNA. The essential problem of modern bioethics is that in exalting autonomy to the supreme good, it has embarked on the postmodern journey into the deconstruction of the repository of that supposed good — the human self.

Thus, at one level, the personhood question looks like a matter of not only getting into but also staying in the club. However, Terri’s problem was not that she was not in the club, because, by extending to her the power of precedent (or artificial, or prosthetic) autonomy, she was, at least hypothetically, still in the club. Yet, when a judge allows quality of life factors to enter surreptitiously into the judicial opinion formation process, the judge has made the inherently religious decision that personhood is quantifiable, and that protection of the life interest rises or falls with one’s functionality. Thus, by extending to Terri a right to refuse treatment, when she in fact had no power render a real, current moral choice, the trial court was in effect seeking evidence from her past that under the right circumstances, she would be willing to consent to treatment as a non-person, in an act of “precedent autonomy.”

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130. Id. at 765.105.
132. Channick, supra note 93, at 584.
134. Dworkin, supra note 42, at 226. For a rebuttal of the notion that autonomy is vindicated through choices made far in advance of the actual circumstances, see R. Dresser,
IV. THE PERSON OF TERRI SCHIAVO ON TRIAL

A. The Probate Trial of 2000

Early on the morning of February 25, 1990, Terri collapsed in her home. The exact cause of her collapse remains obscure, but the resulting oxygen deprivation severely injured her brain.\(^{135}\) On June 18, 1990, Pinellas County Probate Court Judge Robert F. Michael appointed Terri's husband, Michael Schiavo, to be her plenary guardian.\(^{136}\) Terri's parents, the Schindlers, were not present at this hearing, and have since stated that neither Michael nor the court ever informed them of the proceedings, despite being in daily contact with Michael during that period.\(^{137}\) In 1992, Michael brought a medical malpractice suit against Terri's physicians, alleging that they had negligently failed to diagnose her for bulimia.\(^{138}\) Michael received a settlement award of about $686,700 for loss of consortium, and Terri received about $1,563,300 into a trust fund for her ongoing medical needs.\(^{139}\) Up to this point, the relationship between the Schindler family and Michael was amicable and cooperative.\(^{140}\)

However, not long after winning the malpractice suit, Michael changed his approach toward the treatment of his wife. In early 1994, Michael gave Terri’s caregivers a “do not resuscitate” order, in the event she experienced cardiac arrest while under their care.\(^{141}\) An employee of the facility challenged the action, and Michael rescinded the order.\(^{142}\) Immediately thereafter, Michael transferred Terri to the Palm Gardens of Largo Nursing Home.\(^{143}\) On May 11, 1998, Michael petitioned the Pinellas County Probate Court for authority to discontinue use of the feeding tube, but because the Schindlers challenged the

\(^{135}\) Dworkin on Dementia: Elegant Theory, Questionable Policy, in BIOETHICS: AN ANTHOLOGY 312 (Helga Kuhse & Peter Singer, eds. 2000).

\(^{136}\) Report of Autopsy, Schiavo, Theresa, Case No. 5050439, at 9. At least two major theories have been proposed to explain this event. One suggests that Terri was bulimic and collapsed as a result of heart failure induced by a potassium imbalance originating in the bulimia. See DIANE LYNNE, TERRI'S STORY 43-46 (2005). The other theory is that Michael Schiavo choked or otherwise injured his wife, resulting in the oxygen deprivation. See id. at 53-55. The aforementioned autopsy report appears to be neutral with respect to both theories.

\(^{137}\) Id.

\(^{138}\) Id. at 66.

\(^{139}\) Id. at 70.

\(^{140}\) Guardian ad litem report to the Circuit Court for Pinellas County, Probate Division at 5, In Re Theresa Marie Schiavo, An Incapacitated Person (December 29, 1998).

\(^{141}\) Id.

\(^{142}\) Id.

\(^{143}\) Id.
action, Michael, as Terri’s proxy under Florida’s HCAD statute, sought judicial intervention. On January 24, 2000, the probate court considered the petition to remove Terri’s feeding tube. The testimony focused on what would become the two major questions controlling the remaining litigation: First, to what degree could the court be medically certain that Terri was in a Persistent Vegetative State (PVS) with no reasonable hope of recovery? Second, was there sufficient evidence from her past that, if she became irreversibly incapacitated, she would consent to die by means of the withdrawal of food and water?

Dr. James Barnhill, M.D., an open advocate of euthanasia, addressed the question of Terri’s medical condition by testifying for Michael that she was indeed in a persistent vegetative state. To get at the question of consent, each side presented testimony attempting to reconstruct the probable wishes of Terri regarding end of life decisions through remembered conversations. The probate court accepted the testimony of three witnesses, Michael Schiavo, Scott Schiavo, and Joan Schiavo. The three family members testified uniformly that Terri had expressed a desire that her future caregivers not keep her alive in

144. See In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715, at *2 (Fla. Cir. Ct. 2000). The probate trial is a response to FLA. STAT. ANN. § 765.105 (providing for judicial intervention where end of life decisions by a proxy are challenged by interested parties).


147. Id.

148. LYNNE, supra note 135, at 136. Unfortunately, due to the pro bono nature of the Schindlers’ legal effort at that time, they were unable to bring in an expert of their own to counter Dr. Barnhill, and therefore stipulated that Terri was in a PVS. See LYNNE, supra note 135, at 134.

149. See generally Trial Transcripts: testimony of Michael, Joan and Scott Schiavo, Mary Schindler, and Diane Meyer.

150. It is unclear how the probate court was able to justify accepting the testimony of Michael Schiavo, or why the Schindlers failed to raise an objection to that testimony, because at the time of trial the Florida Dead Man Statute governing hearsay for agents of incapacitated persons prohibited testimony from guardians with an interest in the litigation. FLA. STAT. ANN. § 90.602(1) (repealed 2005) as of February 2000, reads, in pertinent part: “No person interested in an action or proceeding against ... the assignee, committee, or guardian of a mentally incompetent person, shall be examined as a witness regarding any oral communication between the interested person and the person who is ... mentally incompetent at the time of the examination.”
circumstances like those of Karen Ann Quinlan. The probate court rejected the testimony of two other witnesses, Mary Schindler and Diane Meyer, who testified to Terri’s expression of exactly opposite inclinations in conversations with Terri about Karen Ann Quinlan in the early 1980s. The probate court dismissed that testimony as unreliable, in part because it placed those conversations in the late 1970s rather than the early 1980s, apparently based on the assumption that Karen Ann Quinlan died shortly after her caregivers removed her respirator in 1976. This would have placed Terri’s desire-to-live statements in her early adolescence and her alleged desire-to-die statements in her more mature early adulthood. In fact, Ms. Quinlan died of pneumonia in 1985, meaning that the remembered conversations with Diane Meyer in the 1980s were at least plausible. The probate court would later admit that its assumption was in error, but would let the judgment stand nonetheless, due to its reliance on other factors.

On February 11, 2000, the probate court issued its opinion that the evidence was sufficient under the “clear and convincing” standard to show that Terri was in a PVS and that she had, while competent, expressed to Michael and other

151. See Trial Transcripts: Michael Schiavo’s testimony at page 22, line 25 through page 23, line 11; page 29, line 19 through page 33, line 14; Scott Schiavo’s testimony generally; Joan Schiavo’s testimony generally.

152. See In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715 at *5 (Fla. Cir. Ct. 2000). (The probate court asserts that Quinlan died six years before 1982. That is 1976, the year the respirator was removed, not the year Quinlan died.); For the testimony affirming Terri’s will to live, see Trial Transcripts: Mary Schindler at page 371, line 25 through page 374, line 23; page 409, line 18 through page 415, line 24; Diane Meyer at page 766, line 24 through page 769, line 12; page 775, line 4 through page 787, line 7.


154. See trial court order issued March 9, 2005, In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715 (Fla. Cir. Ct. 2000) (The court here dismisses the impact of the Quinlan death date error because the discounted testimony was supposedly focused on the time of Quinlan’s respirator disconnection, not the time of her death. However, this ignores the fact that the court itself explicitly used the errant time of death for Quinlan as a primary basis for demoting Meyer from a credible to a non-credible witness. Furthermore, the trial court’s distinction between what Terri wanted for Quinlan and what she would want for herself seems contrived at best. It assumes a bifurcation in Terri’s moral reasoning for which there is no evidence. Indeed, Christians are classically taught to desire for others what they would desire for themselves. This is a direct teaching of Jesus and is primordial to the Christian faith. See Matthew 7:12. Logically, then, the burden would be on the court to show that this was not true in Terri’s case, yet it appears blissfully unaware that this question of fact exists at all).
Schiavo relatives that she would prefer to die if hopelessly incapacitated.\textsuperscript{155} However, weeks later, the probate court issued a stay against the order to remove the feeding tube to permit an appeal by the Schindlers to the Florida 2nd District Court of Appeals.\textsuperscript{156} Over the next five years, the litigants would continue their struggle through numerous further appeals, an attempt at intervention by both the Florida Legislative and Executive branches, and a decision of the Florida Supreme court that the attempted legislative intervention violated Florida’s constitutional separation of powers.\textsuperscript{157} During that period, Terri’s feeding tube would be removed two more times, with the final removal order being given by the probate court on February 25, 2005, mandating that Terri’s feeding tube would be removed on March 18, 2005.\textsuperscript{158}

\textbf{B. The Congressional Intervention}

In response, on March 8, 2005, Senator Mel Martinez and Congressman Dave Weldon proposed a bill that would effectively act as the civil equivalent of the federal habeas corpus statute.\textsuperscript{159} Crafted on the premise that innocent persons who are about to die at the hands of the state should receive no less process than guilty persons, the bill would have federalized the presumption of keeping feeding tubes in severely incapacitated patients where explicit end of life directives were missing.\textsuperscript{160} This early version of the bill also would have

\begin{itemize}
\item \textsuperscript{155} In re The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715, at *4 (Fla. Cir. Ct. 2000).
\item \textsuperscript{157} Kathy L. Cerminara & Kenneth Goodman, Key Events in the Case of Theresa Marie Schiavo, UNIVERSITY OF MIAMI ETHICS PROGRAMS, 10-25-2006, http://www6.miami.edu/ethics/schiavo/timeline.htm.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Senator Mel Martinez (R-Fla.) introduced S. 159, 109th Cong. (2005); a bill identical to the one that Congressman Dave Weldon (R-Fla.) introduced in the house. H.R. 1151, 109th Cong. (2005). The legislation is codified at 28 U.S.C. § 2254 (2005).
\item \textsuperscript{160} H.R. 1151, 109th Cong. (2005) which was designed to “amend title 28, United States Code, to provide the protections of habeas corpus for certain incapacitated individuals whose life is in jeopardy, and for other purposes.” H.R. 1151 reads, in pertinent part, as follows: Extension of habeas protections to certain persons subject to court orders. (a) For the purposes of this chapter, an incapacitated person shall be deemed to be in custody under sentence of a court established by Congress, or deemed to be in custody pursuant to the judgment of a State Court, as the case may be, when an order of such a court authorizes or directs the withholding or withdrawal of food or fluids or medical treatment necessary to sustain the person’s life. In a habeas
\end{itemize}
reclassified all incapacitated persons as being in state custody if they were subject to orders removing life support, a critical feature for not only the habeas action, but also in terms of a possible *DeShaney* exception, *infra*. Incapacitated persons so classified would be entitled to deploy the full range of habeas corpus strategies after exhausting state remedies. However, the generally applicable version of the bill failed to gain the unanimous support it needed during the consensus-building phase, in part because Congressman Sensenbrenner was uncomfortable with implementing such a dramatic expansion of scope for the federal habeas corpus rule.

Congressman Sensenbrenner countered with a version of the bill that did not use the habeas corpus approach. This bill was instead narrowly focused on

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161. *Id.*

162. *Id.*

163. Telephone interview with then Schindler attorney Barbara Weller, December 2005. Transcript on File with the Liberty University Law Review. Congressman Sensenbrenner is a Republican House of Representative member from the State of Wisconsin.

164. H.R. 1332, 109th Cong. (2005) which reads, in pertinent part, as follows:

Protection of rights of incapacitated persons

(a) Notwithstanding any other provision of this chapter, not later than 30 days after available State remedies have been exhausted, an incapacitated person, or the next friend of an incapacitated person, may remove any claim or cause of action described in subsection (b) to the United States district court for the district in which the claim or cause of action arose, or was heard. (b) The claim or cause of action referred to in subsection (a) is one in which the State court authorizes or directs the withholding or withdrawal of food or fluids or medical treatment necessary to sustain the incapacitated person’s life, but does not include a claim or cause of action in which no party disputes, and the court finds, that the incapacitated person, while having capacity, had executed a written advance directive valid under applicable law that clearly authorized the withholding or withdrawal of food or fluids or medical treatment in the applicable circumstances. (c) In hearing and determining a claim or cause of
providing a federal appeal to incapacitated persons who, by virtue of a state court decision, were to stop receiving nutrition and hydration.\textsuperscript{165} To ensure a fresh look at the evidence, the bill explicitly required a de novo review of state court evidence and disallowed issue or claim preclusion.\textsuperscript{166}

Nevertheless, while Congress struggled to find a workable legislative compromise, Terri's caregivers removed her feeding tube for the third and final time on March 18, 2005.\textsuperscript{167} When the final form of the Congressional Act emerged, it provided standing only to the Schindler family for a federal appeal of their constitutional claims on behalf of Terri.\textsuperscript{168} The bill, "An Act for the relief of the parents of Theresa Marie Schiavo," passed both houses. The President signed the act into law by early on March 21.\textsuperscript{169}

C. The Federal Hearings

On March 22, making swift use of the Congressional Act, the Schindlers brought constitutional claims to the District Court for the Middle District of Florida.\textsuperscript{170} The District Court reviewed the claims under the standard criteria for granting a Temporary Restraining Order (TRO), finding that, while the

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\item action removed under this section, the court shall only consider whether authorizing or directing the withholding or withdrawal of food or fluids or medical treatment necessary to sustain the incapacitated person's life constitutes a deprivation of any right, privilege, or immunity secured by the Constitution or laws of the United States. (d) The United States district court shall determine de novo any claim or cause of action considered under subsection (c), and no bar or limitation based on abstention, res judicata, collateral estoppel, procedural default, or any other doctrine of issue or claim preclusion shall apply. (e) As used in this section—(1) the term "incapacitated person" means a born individual who is presently incapable of making relevant decisions concerning the provision, withholding, or withdrawal of food, fluids or medical treatment under applicable law; and (2) the term "next friend" means an individual who has some significant relationship with the real party in interest, and includes a parent.
\end{itemize}

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Cerminara & Goodman, supra note 157.
\textsuperscript{168} An Act For the relief of the parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005) (The act provides, in pertinent part, that the "United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain life.").
\textsuperscript{169} Cerminara & Goodman, supra note 157.
balance of the equities fell in favor of the Schindlers, their potential for success on the merits was insufficient to warrant a TRO.\footnote{171}{Id. at 1388.}

The first claim was that Terri did not receive a fair and impartial trial as required by procedural due process, asserting that the trial judge could not successfully be both a surrogate commissioned to implement her end of life wishes and a neutral judicial arbiter of those wishes.\footnote{172}{Id. at 1385.} Despite the philosophical tension between the judge's two roles, this claim failed because the HCAD statute, taken together with Browning, apparently does provide a Florida judge with power to act as both judicial fact-finder and proxy decision-maker in resolving end of life disputes.\footnote{173}{Id. at 1386.} Another Florida guardianship law, which prohibits a judge from being a guardian except for the judge's personal relations, apparently has no practical effect on the HCAD's judicial intervention rule.\footnote{174}{FLA. STAT. ANN. 744.309(1)(b) says, in pertinent part: "No judge shall act as guardian after this law becomes effective, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward’s family, and serves without compensation." However, there apparently is no rule directly governing the relationship between FSA 744.309 and the judicial intervention provision of the HCAD. The fact that the Schiavo court assumed the conflicting roles without rebuke from the Florida court system suggests at least one set of circumstances exist where such a role conflict will be tolerated, despite the notable lack of legislative consideration.} Arguably, the better course would have been to observe both statutes in the area where they overlap. This would likely result in the designation of a neutral third party proxy decision-maker, relieving the judge of a potentially untenable role conflict.

The second claim, that Terri did not have adequate legal representation, failed because the court found that Terri's three sporadically available guardians ad litem, taken together with the extensive litigation history and the skill of Schindlers' current attorneys, satisfied due process.\footnote{175}{Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp.2d 1378, 1385-87 (M.D. Fla. 2005).} However, it is fair to ask whether the more recent crew of attorneys, regardless of their skill, had any real hope of overcoming the legal momentum established during the probate trial, especially after the debilitating twin blows of not being able to bring expert medical witnesses and failing to object to interested hearsay evidence.\footnote{176}{LYNNE, supra note 135, at 136. See also supra note 157 and accompanying text.}

The third claim, that Terri had been denied her right to equal protection by having a single judge determine both her wishes and her destiny, failed because the court found it was not a violation of equal protection to apply different sets
of rules to the competent and the incompetent with respect to determining their end of life wishes.\textsuperscript{177}

The fourth claim, that the court had violated the Religious Land Use and Institutionalized Persons Act (RLUIPA)\textsuperscript{178} by forcing her to act against her faith by removing her feeding tube, failed for the lack of a cognizable state actor.\textsuperscript{179} Similarly, the fifth claim, that her caregivers had violated her religious freedom by forcing her to remove her feeding tube contrary to a decree of the Pope, also failed for the lack of a cognizable state actor.\textsuperscript{180}

The court here fails to recognize that it is the decree of the Pope asserting the “ordinary care” status of feeding tubes that precipitates a conflict between Terri’s religious template and the state’s religious template. During the probate trial, Father Gerard Murphy testified that he thought the Catholic Church’s view on feeding tubes was that they were extraordinary care, and a good Catholic could refuse them without committing sin.\textsuperscript{181} The Pope’s declaration, made in 2004, countermanded this, making feeding tubes “ordinary care,” and making their removal a sin, tantamount to suicide.\textsuperscript{182} Therefore, under current Free Exercise jurisprudence, the probate judge could not continue to press for removal of the tube after such a declaration, unless the removal was known to be free of religious coercion.\textsuperscript{183} However, despite the fact that Terri’s true, contemporaneous wishes were unknown, wishes that might have altered under the new command of the Pope, the probate court forced the legal persona of Terri, in the name of her own autonomy, to perform a profoundly sinful act. This crass violation of the natural Terri’s presumptive religious template, in

\begin{itemize}
  \item \textsuperscript{177} Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp.2d 1378, 1387 (M.D. Fla. 2005).
  \item \textsuperscript{178} 42 U.S.C. § 2000cc-1.
  \item \textsuperscript{179} Schiavo ex rel. Schindler v. Schiavo, 357 F.Supp.2d 1378, 1387 (M.D. Fla. 2005).
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{In re} The Guardianship Of Theresa Marie Schiavo, Incapacitated, 2000 WL 34546715 (Fla. Cir. Ct. 2000); Trial Transcripts: Father Gerard Murphy’s testimony at page 191, line 7 to page 191, line 20.
  \item \textsuperscript{182} John Paul II, Address of John Paul II to the Participants in the International Congress on Life-Sustaining Treatments And Vegetative State: Scientific Advances And Ethical Dilemmas, address delivered in Rome at the Augustinianum University (March 20, 2004), http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp_ii_spe_20040320_congress-fiamc_en.html. \textit{See also} Bishop Robert C. Morlino, \textit{Medical Treatment: Make Decisions Based on Catholic Teaching}, http://www.catholicculture.org/library/view.cfm?recnum=6443 (“To intend suicide should one ever be found to be diagnosed as permanently unconscious is gravely immoral”).
  \item \textsuperscript{183} Lee v. Weisman, 505 U.S. 577, 587 (1992) (observing that the government may not engage in activity that coerces compliance with any particular religion).
\end{itemize}
order to enforce the state’s express religious template, was nothing less than stated-sponsored religious coercion of the most extreme kind.\textsuperscript{184}

Nevertheless, on appeal, the Eleventh Circuit affirmed because, like the District Court, it was unable to believe that the Schindlers’ claims had a substantial likelihood of success on the merits.\textsuperscript{185}

Undaunted by their initial failure, the Schindlers crafted five additional constitutional claims for the district court to consider.\textsuperscript{186} The sixth claim stated that Michael and the hospice violated Terri’s right to therapy and rehabilitation under the Americans with Disabilities Act (ADA).\textsuperscript{187} That claim failed because the district court did not view Michael or the hospice as state actors.\textsuperscript{188} The seventh claim was that the hospice had discriminated against Terri and violated her right to rehabilitation under the Rehabilitation Act of 1973.\textsuperscript{189} That claim failed because, although Terri was indeed handicapped, and the hospice did receive federal funds, the hospice was not withholding food and water because of her disability, but solely because of the court order and the instructions of the guardian.\textsuperscript{190} This conclusion appears to conflict with the conclusion in the preceding claim. If the hospice was acting primarily under compulsion of the

\textsuperscript{184} It is true there was conflicting testimony regarding the relative strength of Terri’s commitment to the rituals of Catholicism. However, there is a substantial gap between poor church attendance habits and the willful commission of self-murder. Evidence at trial did not demonstrate this extraordinary degree of rejection of Church teaching in Terri’s thinking, and unrefuted evidence was given of the opposite, that she respected the teachings of her church. \textit{See generally} Trial Transcripts.

\textsuperscript{185} Schiavo \textit{ex rel.} Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005).

\textsuperscript{186} Schiavo \textit{ex rel.} Schindler v. Schiavo, 358 F.Supp.2d 1161 (M.D. Fla. 2005).

\textsuperscript{187} 42 U.S.C. \textsection 12101.

\textsuperscript{188} Schiavo \textit{ex rel.} Schindler v. Schiavo, 358 F.Supp.2d 1161, 1164-65 (M.D. Fla. 2005). 42 U.S.C. \textsection 12181(7)(F) defines a public accommodation as: “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;” The hospice might have qualified, \textit{ejusdem generis}, as a public accommodation under the “other service establishment” term of the statute.


\textsuperscript{190} Schiavo \textit{ex rel.} Schindler v. Schiavo, 358 F.Supp.2d 1161, 1166 (M.D. Fla. 2005). The court also found that Terri was not “otherwise qualified” to receive rehabilitative services. \textit{Id.} An “otherwise qualified” disabled person impliedly has two disabilities, one of which must be overcome to seek treatment for the other. Where the disability to be treated and the disability barring treatment are the same disability, the individual is not “otherwise qualified.” This appears to mean that under the Rehabilitation Act, a person must have at least two independent deficiencies, one to be rehabilitated and the other to be overcome to receive rehabilitation for the first. Under this definition Terri was not “otherwise qualified.” \textit{See also} United States v. Univ. Hosp. of State Univ. of New York at Stony Brook, 729 F.2d 144, 156 (2d Cir. 1984).
state, this would imply it was a state actor. If it was not acting primarily under compulsion of the state, that would imply an act of discrimination cognizable under the Rehabilitation Act. The court does not address this apparent contradiction.

The eighth claim stated that Terri had been denied her procedural due process right to a substituted judgment based on the implied “clear and convincing” evidentiary standard of *Cruzan.* That claim failed because the district court interpreted *Cruzan* as not creating any federal evidentiary standard for end of life decision-making, so that only a state court could evaluate whether consent to die met its own interpretation of the “clear and convincing” standard. It was in this claim that the Schindlers attempted to raise the evidentiary errors of the probate court respecting Karen Ann Quinlan’s time of death. However, owing to the perceived lack of a federal benchmark for clear and convincing evidence respecting the will to die, the court bowed to comity and deferred to the state probate court’s findings without further review.

The ninth claim, that Terri’s death by starvation and dehydration would violate the Eighth Amendment prohibition against cruel and unusual punishment, failed because the proscription against cruel and unusual punishment applies only to those convicted of a crime, and because, once again,

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192.  Schiavo *ex rel.* Schindler v. Schiavo, 358 F.Supp.2d 1161, 1166-67 (M.D. Fla. 2005). Florida’s HCAD statute, FLA. STAT. ANN. § 765.401(3) reads, in pertinent part: “a proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent.” Deferring this evidentiary evaluation to the state, however, appears to beg the question of whether it was proper under a purported de novo review to defer to the probate court’s application the “clear and convincing” standard of review, as opposed to using state law to reexamine the record for compliance with that standard. To terminate the analysis by relying on the state court finding nothing wrong with its own conclusions respecting the standard of review appears to undercut the very question a de novo review of any kind is designed to address. For some lively discussion of these theories and more, see the following blogs: http://legalxxx.blogspot.com, and http://patterico.com.

193.  *Id.* at 1166-67. For a more detailed discussion of the probate court’s factual error, see supra notes 152-54 and accompanying text.

194.  *Id.* It should be noted in passing that this was precisely the point at which the Congressional Act’s de novo review language was aimed. However, because the final language of the Act appeared to make the use of the de novo standard optional, the district court sidestepped an opportunity to explore Terri’s medical condition and end of life desires directly. If the probate court were correct, of course, there would be no need to dig deeper, because Terri was already philosophically dead.
there were no state actors. The court does not address the question of pain, perhaps because it has accepted at face value the legal conclusion of the probate court that Terri was in a PVS, and therefore by definition unable to experience pain. However, the evidence that Terri could experience no pain is disturbingly inconclusive at best.

The Schindlers’ tenth claim was that depriving Terri of food and water against her wish to live violated her Fourteenth Amendment substantive due process right to life. Asserting that substantive due process can protect one against “government actions regardless of the fairness of the procedures used to implement them,” the district court nevertheless retreated once again to the position that because there was no cognizable state actor, the analysis could not reach Terri’s substantive due process right to life. This insulated the district court from having to confront the right to life claim as a new claim not addressed in state court. Such an inquiry would have brooked no deference to the evidence already adduced at the probate trial, but instead would have invoked a full federal rehearing of the two essential themes of that trial: Terri’s true medical condition and Terri’s will to live or die.

The court also stated that, assuming arguendo there had been a state actor, the government could still take a person’s life if the government has provided that person with sufficient procedural due process. That is of course true in the criminal context. However, the court does not support its assertion that a civil taking of life is anywhere contemplated in the Fourteenth Amendment. Rather, the court first uses a criminal case to discuss the independence of substantive due process rights from state procedural due process, and then oddly applies Scalia’s concurrence in Cruzan to show that even substantive due process rights, including life, can be curtailed if due process is provided. It is a questionable use of Scalia’s language because ironically, Scalia was asserting

195. Id.
196. Whether authentically PVS patients experience pain is not an altogether resolved question. See LYNNE, supra note 135, at 126.
197. Id. at 157.
199. Id. See also DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors.").
that the state may curtail Nancy Cruzan's due process right to liberty by compelling her to receive a feeding tube, so that Missouri's interest in life would be able to trump her individual interest in liberty. 203 Contrary to Scalia's notion of curtailed liberty interest, the district court here appears to be making the remarkable decision that the Fourteenth Amendment allows the state to defeat the life interest of an innocent citizen, even if it provides a lesser procedural safeguard than the reasonable doubt standard used in capital criminal procedure.

On March 25, 2005, on appeal, the Eleventh Circuit affirmed the district court's rejection of the Schindlers' constitutional claims, analyzing the various claims in essentially the same manner as the district court. 204 In another appeal, on March 30, Judge Tjoflat in his dissent examined the more general role of due process in the tenth Schindler claim, the right to life. 205 He identified this claim as plausible because Cruzan and other cases probably do imply by analogy that a minimum federal benchmark of "clear and convincing" evidence exists for end of life adjudication. 206 The analogy rests in finding a positive federal requirement for "clear and convincing" evidence where lesser interests than human life are at stake in a civil context, such as the termination of parental rights, or improperly conducted civil commitment proceedings, even though those latter two rights impinge directly on autonomy. 207 It is regrettable that the court ignored Judge Tjoflat's assessment of Cruzan. Giving credence to the existence of a federal due process right to a minimum standard of clear and convincing evidence might have lifted the raw data of the case out from under the heavy layers of state findings and forced a fresh look at Terri's medical condition and her alleged will to live. 208

Judge Tjoflat offered further evidence suggesting the existence of such a minimum standard by analogizing to federal habeas jurisprudence. 209 For example, the Supreme Court has found it necessary on occasion to prevent a hurried execution from occurring before the state court could adequately

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204. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir. 2005).
205. Id. at 1279-82.
206. Id. at 1279. ("The clear and convincing standard of proof has been variously defined in this context as 'proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented.'" Id. (citing Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 285 (1990)).
208. This is a strategy proposed by Dorf. See Dorf, supra note 200.
address the merits. 210 Moreover, the mere claim of a state that it had applied the appropriate standard appropriately did not prevent the Supreme Court from challenging whether “any rational trier of fact,” independent of the state context, could have arrived at the same conclusion. 211 It would be difficult to comprehend these generalizations apart from the presence of an implied federal standard. 212 The fact that an undue or self-created sense of urgency pushes a court to think and act with haste does not protect it from the heightened risk of error or the mistakes in fact made under such circumstances. 213 Judge Tjoflat was convinced that “the District Court should make this determination only after a full and careful review of the evidence, which cannot occur under current time constraints.” 214

On March 31, thirteen days after her feeding tube was removed, Terri died. 215

V. WILL THE REAL TERRI PLEASE ACT?

A. Is the State a Mirror or an Actor?

It is likely that the confused jurisprudence of personhood demonstrated during the Schiavo struggle reflects the unsettled and diverse thinking of the American people themselves in this area. After all, the state is itself an artificial person, created by the people to act on behalf of their collective will, their collective autonomy, as it were. 216 Yet, as the people of this country are religiously diverse, so their individual presences inside the machinery of the law have led to a multiplicity of religious expressions disguised as level-headed judicial pronouncements. 217 The state then becomes a multi-headed hydra, here

212. It is unlikely that the federal court in Jackson would support an independent review of a state decision under the “reasonable doubt” standard if that standard were not valid at the federal level for that kind of case. See also Cruzan v. Missouri Dep’t of Health, 497 U.S. 261, 284 (1990), in which it appears that the Cruzan court, if presented with the question directly, might well have required clear and convincing evidence.
214. Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1280 n.3 (11th Cir. 2005).
217. Scott C. Idleman, Essay, The Concealment Of Religious Values In Judicial
using Christian theories of the embodied soul, there using Kantian dualism's supreme moral chooser, to decide for incompetents what they would do if they were competent. The state provides, as it were, a prosthesis to the person's damaged autonomy, by detecting precedent intent to surrender to some life-threatening condition and by carrying out that intent. However, if the means of detection is flawed, skewed by concealed, perhaps unconscious, judicial religious inclinations, the resulting acts of "autonomy" have little hope of representing the true wishes of the disabled person. If the prosthesis is an ill fit, the maker of the prosthesis must own up to it.

Legislatures create laws in response to underlying conditions that are producing unjust effects in a society. The Fourteenth Amendment is no exception, and it recognizes a state actor to a purpose. The racial prejudice that created slavery and caused the Civil War was rooted in a specific theory of personhood, that because blacks were allegedly functionally inferior to whites, they merited treatment as non-persons. The Fourteenth Amendment is therefore targeted at precisely those kinds of state action that revolve around such degenerative theories of personhood. There is no more principled use of that law than to defend private persons from state-supported theories of diminished personhood, regardless of how ubiquitous or unintentional those theories may be.

Yet most of the Schindlers' claims, relying as they did on a theme of due process, could not succeed on the merits because the district court insisted there was no state actor. One kind of state actor is the private actor who is not performing his own will but the will of the state. The primary candidates for this kind of state actor in the Schiavo calculus were Michael Schiavo and the Woodside hospice. However, government officials may also be a source of state action. Such government officials can include judicial officers. It is


218. Id. at 528.

219. Shelly v Kraemer, 344 U.S. 11 (1948) (addressing the question of whether the judicial enforcement of an otherwise private agreement violated the Fourteenth Amendment, the court found that a judge, merely by using his judicial office to enforce a racially discriminatory private agreement, was indeed a state actor in the sense proscribed by the Fourteenth Amendment).

220. The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Courts have construed this to mean that "[o]nly a state actor can violate the 14th Amendment." See, e.g., Edwards v. U.S. Dept. of Energy, 371 F.Supp.2d 859, 866 (W.D. Ky. 2005).

221. 15 AM. JUR. 2D Civil Rights § 72 (2007).

222. Id.
true that a judge typically enjoys a near-absolute personal immunity from liability, as his or her task is primarily to serve as a neutral arbiter among litigants. Nevertheless, under some limited circumstances, even judges may perform, as a matter of law, affirmative acts of the state.

The district court's principal defense against finding a state actor was *DeShaney v. Winnebago.* *DeShaney* outlined an interpretation of the Fourteenth Amendment that divided state action from private action, and further subdivided state action into categories of active versus passive (or positive versus negative). Under *DeShaney,* if the state is passive in allowing a private actor to harm another private actor, the injured party has no due process claim against the state. Therefore, according to the district court, because Michael Schiavo was a private litigant seeking his own ends, he was not a state actor. The court did not deem the hospice to be a state actor because, although it received some federal money, it was a privately operated facility. Furthermore, because the probate judge was allegedly acting passively by doing no more than adjudicating a dispute between two litigants, no state action was detected.

The policy argument for the austere compartmentalization issuing from the *DeShaney* decision, although wrong, is initially compelling. If the government were liable for all harm incurred through its inaction, this would add an untenable cost to the operation of government. Furthermore, it would foster an undue and unsustainable dependence on government.

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224. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978); See also Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948) (ruling that a state court judgment must be a complete nullity to invoke fourteenth amendment civil rights claims).
225. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991). ("Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'" *Id.*).
227. *Id.* at 200.
228. *Id.* at 195 ("[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors").
230. *Id.* at 1165.
232. Paul v. Davis, 424 U.S. 693, 701 (1976) (noting the pervasive and long-standing judicial fear that the Fourteenth Amendment, construed as imposing on the state an affirmative duty to prevent the injury of its citizens, represented a potential "font of tort" litigation.).
233. See generally Toby J. Stern, *Federal Judges And Fearing The "Floodgates Of*
Thinking itself shielded by the general principle of *DeShaney*, the district court hastily dismissed the idea that the action of the probate court constituted state action.235 If the probate court were truly acting only as the passive conduit of private volition, then it would be difficult indeed to make out the judge to be a state actor for purposes of the due process claim.236 Yet this notion of the court’s role as a passive mirror of the winning litigant’s will is not the view expressed by the Florida Court of Appeals:

The trial court’s decision does not give Mrs. Schiavo’s legal guardian the option of leaving the life-prolonging procedures in place. No matter who her guardian is, the guardian is required to obey the court order because the court, and not the guardian, has determined the decision that Mrs. Schiavo herself would make.237

Thus, an odd situation presents itself. If private actor Michael Schiavo is not the one whose private will is to be carried out, who remains?238 If the court is simply a mirror for the winning litigant, whose face is in the mirror? If one takes precedent autonomy as a valid concept, and if one accepts as valid the findings of the probate court, then the only private actor still standing who

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234. *Litigation,* 6 U. PA. J. CONST. L. 377 (2003) (arguing that the fear of opening floodgates of litigation, when used as a pragmatic defense against arriving at an otherwise valid legal conclusion, unjustifiably puts an Article III court off its intended Constitutional course).


236. *Harvey v. Harvey*, 949 F.2d 1127, 1133-34 (11th Cir. 1992). (cited by the district court to prove that “[u]se of the courts by private parties does not constitute an act under color of state law.”). However, the same page of the case also states that “a county probate judge clearly is a state actor.” *See id.* at 1133. Therefore, the district court appears to have oversimplified the implication of *Harvey* by treating the role of the judge and the action of the judge as a single unit. However, the test of state action in *Harvey* is a differentiated composite of the actor and the action; taking the judge to be a state actor is perfectly valid. Whether the judge’s actions merit rebuke under the Fourteenth Amendment is a separate question that relates more to the nature of the action itself.


238. The final order of the Schiavo probate court reads, in pertinent part: “ORDERED AND ADJUDGED that absent a stay from the appellate courts, the guardian, MICHAEL SCHIAVO, shall cause the removal of nutrition and hydration from the ward, THERESA SCHIAVO, at 1:00 p.m. on Friday, March 18, 2005.” Trial court order to remove nutrition and hydration, issued on March 18, 2005, *In re The Guardianship Of Theresa Marie Schiavo, Incapacitated*, 2000 WL 34546715 (Fla. Cir. Ct. 2000).
could have caused the action against the life of Terri is Terri herself. However, if the probate court erred in determining her true wishes, in implementing her true autonomy, in divining her true religion, then the private actor in the mirror is even less than a legal fiction, but a mere mask created by the state. Behind that mask one will find the face, not of Terri Schiavo, but of the probate judge.\textsuperscript{239}

The district court never explored the foregoing questions, but instead sought the shelter of judicial immunity, citing Harvey v. Harvey, a case that explicitly affirms, without contradiction, that a "county probate judge clearly is a state actor."\textsuperscript{240} The district court also cites Torres v. First State Bank of Sierra County,\textsuperscript{241} which states that only the most egregious and deliberate acts of unconstitutional deprivation are actionable under title 42, section 1983 of the United States Code.\textsuperscript{242} However, as a Tenth Circuit decision, Torres is not a controlling authority in the Eleventh Circuit. Additionally, even if Torres did provide individual judges with a defense against a section 1983 action, it does not follow that the state at large is immune from a suit in equity when a state court action is unconstitutional.\textsuperscript{243}

Therefore, the district court's best defense remains DeShaney. However, cases following DeShaney have recognized two exceptions that involve a special relationship between the state and a private person; the "custodial relationship" doctrine and the "state-created danger" doctrine.\textsuperscript{244}

A custodial relationship exists when an individual's liberty is so compromised by some overbearing presence of the government that she loses the ability to take care of herself.\textsuperscript{245} Under Florida's HCAD statute, Terri

\textsuperscript{239} For commentary on the issue, see John Nicholas Suhr, Jr., Cruzan v. Director, Missouri Department Of Health: A Clear And Convincing Call For Comprehensive Legislation To Protect Incompetent Patients' Rights, 40 Am. U. L. Rev. 1477 (1991).

\textsuperscript{240} Harvey v. Harvey, 949 F.2d 1127 (11th Cir. 1992). The statement of the Harvey court that "use of the courts by private parties does not constitute an act under color of state law" does not contravert but rather informs its assertion of the inverse corollary that a probate judge clearly is a state actor. \textit{Id.} at 1133.

\textsuperscript{241} Torres v. First State Bank of Sierra County, 588 F.2d 1322 (10th Cir. 1978).

\textsuperscript{242} \textit{Id.} at 1326-27 ("We do not think that the 'color of law' reference in § 1983 was intended to encompass a case such as this one, where the only infirmities are the excesses of the court order itself, . . . subject to the normal processes of appeal.").


\textsuperscript{244} Niziol v. Pasco County Dist. Sch. Bd., 240 F.Supp.2d 1194 (M.D. Fla. 2002). The Supreme Court has also recognized that conduct which "shocks the conscience" in a constitutional sense may in some circumstances be sufficient to establish a basis for a substantive due process deprivation. Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992).

\textsuperscript{245} White v. Lemacks, 183 F.3d 1253, 1257 (11th Cir. 1999). ("[I]t appears that the only
became entirely dependent on the state by law when the probate judge became the arbiter between the still competent disputing non-judicial actors. Therefore, it does not require a significant leap of the imagination to see the close working relationship of Michael Schiavo, the probate court judge, and the Pinellas County police officers standing guard over Terri at the hospice, as a form of state custody analogous to or perhaps more pronounced than the foster care envisaged by DeShaney.

DeShaney also recognizes a state-created danger. A state-created danger exists when the state, through its agents, has so entangled itself in controlling the well-being of an individual that a failure to aid that individual is tantamount to a positive injury. Thus, the state, by limiting the freedom of an individual, assumes a duty of care to protect that individual from the dangers created by those limitations. In the Eleventh Circuit, an individual enters a state-created danger when “the state affirmatively place[s] him in a position of danger which is distinguishable from that of the general public.” A guardianship relationship with a state court judge who can allegedly ascertain a person’s will to die and then can unilaterally issue an order mandating that person’s death is the paradigmatic fulfillment of the above test.

However, the state actor typically must also show culpable behavior with respect to the danger, such behavior as shocks the conscience or demonstrates indifference. It is reasonable to suppose that a judicial decision to make an essentially religious decision for an incompetent subject would shock the relationships that automatically give rise to a governmental duty to protect individuals from harm by third parties under the substantive due process clause are custodial relationships, such as those which arise from the incarceration of prisoners or other forms of involuntary confinement through which the government deprives individuals of their liberty and thus of their ability to take care of themselves.”).

248. Sanders v. Bd. of County Comm’rs, 192 F. Supp. 2d 1094 (D. Colo. 2001). See also Culberson v. Doan, 125 F. Supp. 2d 252, 270 (S.D. Ohio 2000) (“If Plaintiffs’ facts are viewed in a favorable light, it is also reasonable to conclude that, because Chief Payton had ‘complete control’ of the potential crime scene, he also had ‘constructive and functional’ possession, control or custody of Carrie’s body. By potentially abandoning that control, custody or possession to her murderer and the Baker Family, we conclude that Chief Payton’s actions may have violated Plaintiffs’ substantive due process.”).
249. Id. at 200.
251. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:17.
252. Id.
conscience, especially when that decision flies in the face of the subject’s known religion.

**B. Religious Autonomy and the Afterlife**

If, as has been proposed in this Comment, the decision concerning what constitutes a life worth living is a function of one’s view of personhood, and if one’s view of personhood is inextricably intertwined with one’s cosmology, i.e., one’s religion, then any such decision is inherently religious. Therefore, for any agent of the state, using a religiously premised notion of personhood, to impose death on an incompetent individual incapable of communication or self-defense, is acting in a way that both shocks the conscience and demonstrates extreme indifference. This is particularly true when one’s conscience is informed, at least in part, by the Free Exercise and Establishment clauses of the U.S. Constitution. In the words of Justice Kennedy:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.”

Some have argued, and rightly so, that not all religious influence on state action is inconsistent with modern Establishment Clause jurisprudence. Nevertheless, under *Lemon*, there are limits beyond which the state may not go. The state must have a secular purpose for the rules that it generates, and those rules must not foster an excessive entanglement with religion. In determining the purportedly probable autonomous choice of a living human being as to whether to live on under difficult circumstances or to refuse life-

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253. DWORKIN, supra note 42, at 164-65.
254. The First Amendment to the United States Constitution, which reads in pertinent part, “[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I.
258. See Agostini v. Felton, 521 U.S. 203, 234 (1997) (stating that for any given law, the primary purpose must be secular and the primary effect must neither advance nor inhibit religion).
sustaining medical treatment, at least two secular purposes can be offered. First, the social burden of compelling an otherwise healthy family unit to care for an incompetent indefinitely deprives society of the family vitality that would naturally ensue from the speedy demise of a disabled human being who is already being treated as dead. Second, the economic burden of long-term care for such an individual drains both personal and public resources to excess.

However, it is difficult to imagine a scenario where there could be a more severe entanglement with religion than to have a state actor rendering life-ending decisions based on his personal understanding of the relationship between body and soul. If coercion can be found for lesser things, such as state-sponsored exposure to Christian music or Biblical texts or sectarian prayers at football games, surely coercion can be found where helpless incompetents are forced to accept death sentences, only for lack of thinking to tell someone what they really believe about the meaning of life, death, and the soul of human persons.

C. Balancing Life, Autonomy, and Religion

Regrettably, in living and dying, all people experience serious limitations to the expression of their personal autonomy, regardless of their best-laid plans. From a young age, a person’s medical privacy is subject to frequent invasions by parents and pediatricians. In growing older, people routinely share their medical secrets with dozens of dentists, eye doctors, gastroenterologists, and other medical professionals. Only by degrees do they attain greater independence, until one day they realize they have begun to grow old, and must begin, by degrees, to surrender back all the hard won gains of their autonomy. For Terri, who was young and vital when she lost her physical autonomy, the ability to express her wishes regarding anything vanished from her, not by graceful degrees, but in a single moment of time.

Thus, there is a serious legal dilemma. Extracting Terri’s “wishes” from the sketchy recollections of self-interested roommates is not just a poor way to determine her current inclinations regarding her medical privacy. It is virtually impossible to ascertain her current autonomous choices without addressing

261. Channick, supra note 93, at 621.
262. Id.
either her spiritual essence or her ongoing intellectual presence, however limited by her physical condition.\textsuperscript{263} Under a theory of functional personhood, protecting the current medical autonomy of a person who has in effect ceased to exist is simply absurd. Inventing an artificial consent to die on behalf of a person who may still be present but whose current inclinations and personal theology are unknown has the potential to destroy the very person whose autonomy it is intended to protect.\textsuperscript{264}

Dworkin has rightly recognized that religion is a central feature of these life-and-death social policy debates.\textsuperscript{265} He contends, for example, that there is a fundamental unity between pro-abortion and anti-abortion theory, in that both are attempts to establish the sanctity of a human life.\textsuperscript{266} The only real differences lie in determination of whose life is viewed as sacred, and how best to affirm that sacredness.\textsuperscript{267} The government’s role would be to remain neutral, allowing both communities to express their particular senses of the sacred as they see fit, but only at the level of individual rights.\textsuperscript{268} For the government to impose a particular template for sacredness on the larger society would involve a violation of the first amendment, as each camp must be allowed to exercise its religious freedom.\textsuperscript{269} The policy emerging from this doctrine is virtually indistinguishable from typical pro-abortion policy. Thus, according to Dworkin, even if both sides are in some sense right, constitutional religious freedom mandates pro-choice policy.\textsuperscript{270}

Logically, this could be extended to the broader question of personhood. The attempt to define a person ultimately devolves to an attempt to assign a metaphysical value to some entity for purposes of extending to that entity a bundle of rights and duties.\textsuperscript{271} In the context of human euthanasia, those opposing euthanasia would tend to assign personhood to such an object based on an explicitly religious theory that personhood is a categorical property that

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265. DWORKIN, supra note 42; see also Eric Rakowski, The Sanctity Of Human Life, 103 YALE L.J. 2049 (1994) (reviewing DWORKIN, supra note 42).

266. DWORKIN, supra note 42, at 162-66.

267. Id.

268. Id.

269. Id.

270. Rakowski, supra note 265, at 2051 (commenting on DWORKIN, supra note 42, at 273).

271. GEORGE, supra note 9, at 9-11.
\end{footnotesize}
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2007] can be assigned without reference to instantiated functionality. Similarly, those favoring euthanasia would tend to assign personhood to an object based on an implicitly religious theory that possession of certain functionalities confers sacredness to that object. Thus, per Dworkin's theorem, the government cannot impose either view on the medical decision-making of private individuals without violating their religious liberty. Whether by concurrent, precedent, or artificial autonomy, no private decisions to refrain from life-sustaining treatment would be subject to scrutiny other than potential abuse, coercion, and such like. The resulting policy would be, once again, very like the pro-euthanasia vision of reality.

The fatal flaw in both such schemes is that authentic government neutrality with respect to religion is not an achievable condition. This deflection from neutrality occurs on at least two levels. First, lawmakers are people, and these people bring their own schema of things universal to the table when they conceive legislation. Indeed, the modern view of the law is that it is little more than "the codification of the will of the people," suggesting that the culture from which legislators are selected provides a guide to the religious theories that will surface in legislation. Therefore, regardless of best efforts to the contrary, legislation will ultimately bear the mark of the religious theories of the people who construct it. Areas where religious presuppositions have not been carefully examined are subject to the greatest likelihood of oblique religious influences.

Second, judges are people too, and are equally capable of being carriers of implicit religious paradigms, and cannot help but bring those paradigms into the opinion-formation process. Thus, a judge whose personal religious theory on the nature of personhood has a more Kantian than Boethian flavor, and who may not even recognize the presence of such a paradigm, may unwittingly (or wittingly) impose his views on helpless others. Furthermore, he may do so with impunity, simply because he holds a view that is concordant with the socio-theological majority of the moment, and because he is not

272. Id. at 41-42. See also RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996) (describing the seemingly irresolvable tension in religion clause jurisprudence when attempting to maintain state neutrality without resorting to at least quasi-religious reasoning).


275. Id.

276. Idleman, supra note 217, at 517.
deemed a state actor in such cases. This is the reason Dworkin’s utopia ends up looking just like the pro-euthanasia, pro-abortion utopia. It really is based on the same overarching premise that individualistic autonomy is the primary good. Dworkin is effectively saying that the ideal religion is his.

Because we now are beginning to see that “[t]he autonomy model cannot provide answers to these questions,”277 we need to begin finding more realistic limits to the use of “pretend” autonomy as the operating paradigm for rendering life-ending decisions. Thus, perhaps the best and most consistent way to keep the door open to the genuine exercise of autonomy is never to deliberately end the life of the person whose autonomy is in doubt.278 Autonomy cannot exist apart from the metaphysical premise that creates it.279 Therefore, the life interest and the autonomy interest are coextensive to one another.280 This is consistent with the holding in Cruzan, wherein a state may assert an unqualified interest in the life of its citizens, while at the same time allowing its citizens to resist unwanted medical intrusions of the state, as safeguarded by a jealous regard for truth in end-of-life determinations.281 Yet it is possible to improve upon the whispered truths of Cruzan.

VI. PROPOSALS: CAN INCAPACITY BE MADE SAFER FOR BOTH LIFE AND AUTONOMY?

A. Clarify the Role of the State

One way to compel the necessary due diligence in end of life disputes is to establish a rebuttable presumption that any judicial dispute resolution that results in the termination of a human life is by definition an act of the state. If it is contended that the state has merely acted on behalf of the incapacitated person as a private actor, the role of the state should be consciously addressed for what it is, a fiction designed to provide a convenient solution to a unique problem. The state has added an invisible actor to the drama and has told him or her what lines to say based on inconsistent and half-remembered conversations, some of which may be self-interested fabrications. The state has effectively attempted to read the mind and become the voice of the incapacitated person.

278. George, supra note 263.
279. George, supra note 9, at 9-11.
280. Id.
However, if the state knows it can trigger substantive due process right to life claims when it has custody of the abstract autonomy interest of one of its citizens, it will drive defensively. For example, in cases where there is a strong potential to infringe on a cognitively disabled citizen’s religious liberty interest, perhaps it will handle that interest with greater care for the quality of evidence. This could result in a significantly greater effort to achieve at least the same level of certainty accorded to its other end of life judicial processes, and could motivate the eventual unambiguous assertion of a federal standard of clear and convincing evidence in such cases.

B. Create a Civil Habeas Corpus for the Cognitively Disabled

The district court, when confronted with the Schindlers’ claim that death by dehydration and starvation was cruel and unusual punishment, responded that because Terri was not guilty of any crime, the state could properly subject her to death by starvation and dehydration.\(^{282}\) Ostensibly, this was a recognition of her prosthetic autonomy, her right to refuse treatment. Yet it has a distinctly Orwellian feel of doublespeak.

Nevertheless, some jurisdictions have recognized that a deeper set of principles animates the concern for the well-being of persons compelled to die by an order of the state. For example, in 2004 the Tennessee Court of Appeals observed that “[t]he state and federal constitutional prohibitions against cruel and unusual punishments proscribe more than physically barbarous punishment. They embody broad and idealistic concepts of dignity, civilized standards, humanity, and decency. The basic concept underlying these prohibitions is nothing less than human dignity.”\(^{283}\)

To retain the certainty critical to end of life dispute resolution, and the judicial credibility that accompanies it, the state must retain an active and responsible role in the process. One way to do this is to analogize disputed end of life cases to criminal executions and grant an automatic stay of execution to allow one last full-scale federal review before ending the life of a person whose will to live or die is not known beyond all reasonable doubt. This would be styled as a federal civil habeas corpus for cognitively disabled persons. That is in fact how the Schindlers’ legal team viewed their request for injunctive relief.\(^{284}\) The difficulty with such an analogy is that the sentencing judge in a

\(^{282}\) See supra notes 195-97 and accompanying text.


\(^{284}\) Telephone interview with Barbara Weller (Schindler attorney); Telephone interview with Andrew Schlafly of the Association of American Physicians and Surgeons, Inc. (Transcript on file with the Liberty University Law Review).
criminal case is not normally a state actor for purposes of due process analysis. However, as pointed out above, the involvement of the state in imposing the state’s religious theory of death on an incapacitated person is profoundly more personal than simply deciding whether a competent person has committed larceny or murder.

Therefore, a more lasting reform would result if the original federal legislation proposed by Congressmen Martinez and Weldon were enacted permanently into law as a civil equivalent to the criminal habeas corpus statute. A civil habeas corpus for the cognitively disabled would act as a modern Bateson’s Belfry, a final opportunity to send a signal of life from the living grave of a false PVS diagnosis. This would be altogether consistent with the life and liberty values that underpin the criminal habeas corpus:

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man’s imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Human dignity is an expression of respect for that human creature we are willing to recognize as a person. Conferred on such persons are the rights and duties of personhood. Among those rights are natural, but not prosthetic, autonomy, and an inalienable right to life.

C. Use Better Science to Make Better Bioethical Choices

To determine the extent of a person’s cognitive injury in a manner consistent with equal protection, it is necessary to measure that person’s condition against a uniform, scientifically up-to-date, and accurate standard. Otherwise, casual,

285. Bateson’s Belfry was a British invention of the 18th century designed to allay the popular fear of being buried alive. It consisted of a coffin fitted with an external post at the top of which there hung an iron bell. A cord ran from inside the coffin out to the bell, allowing one who had been inadvertently interred to ring the bell and perchance be rescued. See generally Jan Bondeson, Buried Alive (2002).

inaccurate, or biased evaluations will continue to produce rates of PVS misdiagnosis as high as forty-three percent, creating an underclass of silent and helpless victims, subject to the well-intended but under-informed and unequally applied medical decisions of caregivers. Therefore, the medical community primarily involved in the diagnosis and care of the severely cognitively disabled must design and promulgate a set of national medical standards for assessing degrees of cognitive injury that will provide the most thorough diagnostic tools and the most optimistic treatment vectors achievable.

For example, the definition of “persistent vegetative state” is currently undergoing serious challenges in the scientific community. With the advent of the Functional MRI (fMRI), it is now possible to evaluate with much greater precision the degree and kind of neurological activity occurring within the human brain, damaged or otherwise. It offers the primitive beginnings of a kind of mental x-ray, where the activity of specific neural groupings are monitored in such detail that specific kinds of high order mental activity can be revealed where before none could have been detected. Other advances are waiting in the wings as well, such as possible uses of the recent discovery that some who have been designated PVS may on occasion recover because there is a slow but real restoration of the damaged neocortical tissue.

It is unthinkable that with the availability of such technology, society would simply shut the door on one diagnosed under the older technology as PVS, without really being sure who is “in there.” If medical testing can be used to “exonerate” a supposedly PVS patient through the detection of a vital thought life in the darkened chambers of a damaged brain, that patient may be promoted to a diagnosis of being in a Minimally Conscious State (MCS), and thus receive better medical and legal treatment. Such patients, despite their “locked-in” condition, can begin to hope for productive life someday, especially as modern medical science begins to grapple with and discard its older categories of cognitive disability.

287. Andrews et al., supra note 65, at 316.
289. Id.
The fact that many have analogized the Schiavo case to questions of criminal justice is not accidental. It is part of the intuitive response that the machinery of the law is producing an irrational product. Until the machine is fixed, there must be meaningful, short-term remedies for those voiceless souls trapped inside. Severely cognitively disabled persons struggling to reconnect with the world of the moving before someone pulls the plug need one final opportunity to tell the world they are still there, that they are still a person. A civil habeas corpus for the severely cognitively disabled would go a long step in that direction.

VII. CONCLUSION

In Cruzan, the Supreme Court stated that a commitment to the protection and preservation of human life is a core value of all civilized nations, finding universal expression in criminal punishment for murder:

Whether or not Missouri’s clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. 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.

Nevertheless, if the best anyone can do is to adjudicate constructive living wills from the thinnest of evidentiary fabric using unexamined religious premises packaged as concern for another’s autonomy, it should not be surprising when some raise the concern of potential abuse. When life is entirely materialistic by definition, such that being a human is nothing but being a body, then, when the body becomes defective, life becomes worthless. Slippery slope arguments are probably subject to overuse in legal discourse. Yet in cases such as Schiavo, a discernable trend to increase the granularity of

end of life decision-making using a materialistically grounded “quality of life” principle as the differentiating mechanism should raise some alarm that the system may lack stability.

By contrast, the monotheistic valuation of the person is rooted in a concept of unconditional, personal love. Those threads of theistic systems that see the love of God as unconditional, likewise comprehend the valuation of human persons not as contingent on meeting certain conditions, or falling above or below some uncertain point on a “quality of life” continuum, but simply on the intrinsic worth of God’s image made evident in human form. Such an unconditional valuation has the capacity to protect society and its individuals from the specter of personhood by uncertain degrees as determined by anonymous committees. That seems a worthy goal for a mature system of jurisprudence.

This Comment has now put on the table various proposals to fix the malfunctioning machinery of the law with respect to the autonomy of the severely cognitively disabled. Each is promising in its own right, but deeper questions remain. Are we moving in the direction of defining down the disabled? If so, what would be the reasonable stopping point? When society as a whole openly invites itself to define the disabled and the otherwise unwanted as lower order beings in the spectrum of humanity, the strong and immediate reaction of human conscience has historically been to recognize and reject such a definition. A more subtle problem develops when smaller, niche categories are formed that have a similar problem achieving personhood, but because they are more diffuse and more obscure, they are less provoking to the social conscience.

Let us hope we can do better than to let the devaluation of persons happen by default.

294. For example, John 3:16.
295. Moreland & Rae, supra note 25, at 324-25.
296. The boiling frog analogy is apropos here.