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REFLECTIONS ON THE TERRI SCHIAVO CASE

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This article presents reflections on the Terri Schiavo starvation case: the public confusion about the facts of the case, the ethical and legal principles governing it, the modern philosophical trends that led to it, the failure of all three branches of government to properly address it, the authority of the Florida governor and the President to intervene to save Terri Schiavo, and how the case illustrated a gross and outrageous lack of political will.

Although there have been and will be many things written about the Terri Schiavo case, which absorbed national attention for a month up until her forced death, a few aspects and implications deserve comment. First, contrary to the way the mainstream media typically characterized it, the case did not concern end-of-life issues. Terri was not terminally ill, she was disabled. She had already lived fifteen years in her condition—which likely was made worse by her husband's unwillingness to permit any rehabilitation efforts after the first few years—and could have lived many, many more. The issue of Terri's wishes was also not truly pertinent. Besides there being conflicting claims about this by both sides, it is doubtful that broad statements in the abstract by her when young and healthy could truly be given credence as a basis for making a judgment now. Michael Schiavo's competence to exercise vicarious judgment is also highly doubtful in light of his obvious conflict of interest (with money in question), his persistent decision for years to withhold many kinds of treatment and care, and—most tellingly—his effectively abandoning his wife to cohabit with another woman with whom he has fathered two children. The case—if our law had worked the way it should—should really have been treated as a criminal and adult protective matter, with the many questions about why Terri landed in the situation in the first place and the lack of adequate care given her never having received the thorough investigation that they merited.

Second, even if it could have been conclusively established that Terri would not have wanted to live in her disabled condition—which is very doubtful given her apparent pro-life sentiments before her collapse—this would not have justified removal of her feeding tube. This would have amounted to suicide, and there is no right, either morally or

legally, to suicide. This case, in the popular mind—encouraged by the media's ignorance or else agenda-promotion—involved the personal decision to turn down medical treatment. Nutrition and hydration, however, are classified as "normal care," not medical treatment of any kind. Sound medical ethics makes it clear that nutrition and hydration can only be suspended when a person is very near to death, and his physical condition would make their provision actually harmful. The fact that a feeding tube was used was irrelevant. Such tubes are common; they are not in any way considered extraordinary or disproportionate. Some call them "artificial" means of providing sustenance—so are baby bottles and spoons. What happened in the Schiavo case was outright intentional (i.e., *forced*) starvation—sought by her husband and sanctioned by the courts. As I said in an interview with NGO Voice, this was not fundamentally different in a moral sense from what happened to St. Maximilian Kolbe at Auschwitz.

If the "right to self-determination," which was invoked by some, here means the common law's right to refuse medical treatment—i.e., not *normal* care—it is one thing, but if it is the ground for a right to suicide it is another. I suspect that for most, this language is just the latest expression of the fixation on "human autonomy" spawned by the Enlightenment. Man foolishly believes—egged on, of course, by the "powers and principalities" which are always trying to tempt him to ruin—that he is only truly free when he can make his own choices without regard to a transcendent moral order.

Third, another modern trend never too far from so-called "right to die" issues is utilitarianism, to which America's historic pragmatism mixed with secularization is particularly prone. Our political society seeks ready solutions to problems that supposedly will keep the burdens on it (especially financial ones) as light as possible. The current absence of firm moral principles or a notion of natural rights makes strong the temptation to dispense with those on the margins—especially if they require a lot of resources and physical and emotional energy to care for. This was observed in the NPR discussion with David Brooks and E.J. Dionne, during the last week of Terri's life, about the "economics" of keeping people alive. I am unsure, but fearful, about the implications of the Schiavo case in the long term. Will it accelerate the legal movement for assisted suicide (at direct and vicarious request)?

My other thoughts concern the actions or inactions of governmental authorities in regard to these matters. Judge George Greer's apparent ignoring of critical facts up and down in the case and possible conflicts of interest merit an investigation. As far as the state appellate courts and the federal district and appellate courts—including

the U.S. Supreme Court—were concerned, they were stuck in a procedural box, missing the forest for the trees. It illustrated the wisdom of the insistence of my constitutional law professor in law school that the appellate courts must make their own findings of fact. Indeed, the case painfully shows how much courts have abdicated any kind of a solomonic role of judging wisely and justly in cases before them. They too often perform almost a mechanical activity, rotely following even outrageous precedents and rigid procedural rules that sometimes subvert justice. Don't get me wrong: precedent and procedure are good and necessary to preserve rights and secure justice, but there are times when they can be stifling. The problem is not that courts have become activistic, but that they have become activistic in the wrong way. A court needs to be activistic in defense of the natural law and our true constitutional tradition; it certainly must not be activistic in asserting ersatz rights or making novel interpretations of the Constitution or statutory law. For example, can anyone take seriously the 11th Circuit Court of Appeal's claim in the case that it was unconstitutional and against the Founding Fathers' intent that the federal government be permitted to step in to stop a person from being starved?

It was very interesting to behold the confusion about what the law is by such usual opponents of judicial activism as Rush Limbaugh. He strongly rebuked a caller who urged that Florida Governor Jeb Bush simply order state authorities to take custody of Terri to insure that she be fed, irrespective of what the courts said. He said that that would be violating "the law," and that such action would be "like Hitler." Limbaugh did not seem to be aware of what he was saying: he was, in essence, identifying law simply with what the courts say it is. None of the liberal spokesmen he customarily excoriates could have provided a better underlying rationale for judicial activism—or a better basis for archonocracy (i.e., rule by judges) and legal arbitrariness.

As far as the "Hitler" comment was concerned, Limbaugh forgets the very nature of the relationship between judiciary and executive in the American constitutional order. In fact, he ignores the very essence of each branch of government. Judicial decisions are not, and never have been, self-enforcing. They depend upon the executive branch for that. The great prestige, respect, and sense of their preeminent competence in discerning what the law is establishes the expectation—more, essential duty—that executives will enforce their decisions. Still, *it is an executive function*, and if an executive believes that a judicial action is clearly unconstitutional, illegal, or immoral he has no obligation to carry it out—and, in fact, can resist it or act against it. If Limbaugh or anyone else is unsure of that, he should consult Federalist

78. Did either Jeb Bush or his brother in Washington have the authority to save Terri? Yes, on many grounds. There were probably a few hundred statutory rationales for state or federal executive intervention. Even if there were not, they had inherent executive power to act. As the great constitutional scholar Edward S. Corwin wrote, the Founding Fathers generally believed that the president should have "broadly discretionary residual power"—this includes protecting citizen rights—"when other governmental powers fail." They clearly failed in the Schiavo case. Did you hear that, Rush? Not Hitler, but the Founding Fathers. Roughly the same standards apply for the Florida governor within his state as for the president nationally.

One wonders how long any president or governor would wait to determine if he had inherent executive power to intervene if some mayor set up a concentration camp for a certain part of his city's population.

Some people vehemently objected to the Congressional effort to help Terri—weak as it was, and utterly without follow-through—on the grounds that it violated federalism. Indeed, it was sadly amusing to hear the likes of Representative John Lewis of Georgia—an advocate of aggressive federal action on all other civil rights matters—saying that this was a state issue. While federalism is an expression of the principle of subsidiarity—doing whatever can be done at a more localized level—that is so central in social ethics, such an absolutization of federalism does violence to subsidiarity. When there is a crying need for a central government response—as when authentic human rights are being trampled—it must happen. Maybe conservative absolutizers of federalism should take the occasion of the passing of the great Pope John Paul II to look at what he and other popes have said about subsidiarity and the role of government generally.

One day as the Schiavo starvation progressed, I was listening to a radio talk show discussing the No Child Left Behind Act. What immediately struck me was that while we are insistent on making a massive government commitment to social engineering with a quasi-utopian objective—to make all children successful students—we are ignoring the first purpose of government: the life, safety, and security of citizens. Not only was government not rushing to protect Terri's life, it was sanctioning its destruction. Such confusion about government's role is a symptom of a philosophically, ethically, and spiritually confused age.

In the final analysis, however, it was not intellectual confusion that precluded Terri's rescue, but lack of will. The Bush brothers and Congress simply lacked the courage to challenge the courts, even though in this case it would have been a minor-league constitutional

confrontation with few likely consequences for either. The lack of will may also have been due to simple politics, as was suggested by comments by a Jeb Bush aid to the pro-life lawyer who helped draft the statute that saved her life previously. If that is so—many of the Pinellas County, Florida government officials in the case were Republicans—this would be nothing unusual. History has recorded more serious outrages than this—many of them—that were due to "politics."

The author originally wrote this for the Catholic Social Commentary (CSC) Service, which features op-ed type articles that are posted on the web site of the Society of Catholic Social Scientists. The commentary was written shortly after Terri Schiavo's death for the CSC Service and NGO Voice.