B439. "A Deadly Slippery Slope" The National Law Journal (November 10, 2003) p. 31.

The constitutional debate over whether a feeding tube may be removed from a patient in a persistent vegetative state is a no-brainer, but the moral issues involved are far from cut-and-dried [forgive the puns]. Constitutional scholars by and large agree that courts are to rule on specific cases, while legislatures are to enact general laws but not override court decisions. However, the Florida Legislature, at the urging of Governor Jeb Bush, in effect overrode a court decision that allowed the removal of the feeding tube that has sustained the life of Terri Schiavo for 13 years. The bill hence is widely expected to be declared unconstitutional.

Ever since the 1989 Cruzan case, which held that evidence of a person's wishes as to the withdrawal of treatment must be proved by clear and convincing evidence, patients have had the right to refuse further treatment if they provided instruction to this effect. Schiavo's husband claims that she once told him that she did not want to be kept alive by a machine. Given that the husband reportedly lives with another woman with whom he has a child, is expecting another and will pocket what is left from a huge award Terri Schiavo received from an insurance company and which pays for her care, his word is a thin reed on which to hang such a weighty case.

The fact that Terri Schiavo's parents contest the husband's claim complicates the case further-though not so much legally [husbands' rights trump those of parents in this situation] as politically. Medical staff are reluctant to be caught in such crossfire out of fear of incurring legal suits. A video circulated by the parents showing Schiavo smiling and responding to voices has stirred conservative groups to protest the pulling of the feeding tube.

Most people react viscerally to the fact that Schiavo has been hospitalized for 13 years and that her chances of recovery appear slim. However, if costs are to be relied upon as the criterion for deciding when to let someone die, treatment may soon be denied to anyone who has an incurable, terminal illness and requires costly care. Indeed, philosopher Daniel Callahan has suggested that after a certain age-say, 82-people should be given only ameliorative care, but we ought not try to cure them so that we may shift resources to child care and other "worthy" purposes.

Such suggestions raise a challenge often used in both legal and moral deliberations-the threat of a slippery slope. It is argued that if we deny service to those who are 82 and older, then why not, say, in cases of California-like budget shortfalls, deny service to those who are 72? Or 62? And if 13 years is "too long," then how about 1.3 years? Or 1.3 months? The way to proceed is to notch the slope, to provide a clear marker of how far we are willing to yield [whether to costs or spousal rights] and where we will not go, come hell or high water.

In earlier periods, medical authorities were expected to do "all one can for one's loved ones"-until the heart stopped beating and the lungs stopped exhaling. In the early 1970s, this marker was moved to declare a person legally dead when his or her brain waves are flat. Slowly, this criterion has gained social and moral acceptance. But Schiavo is not brain-dead, only brain-damaged. Although there are established criteria to determine whether a person is in a vegetative state, there is no consensus as to when it becomes permanent. If a moral case can be made that people in persistent vegetative states should be treated like those who are brain-dead, so be it; let's move the marker of who should be considered a goner. Three months may be the new marker, as medical authorities report that no one has ever

recovered after having been in such a state for so long. However, until this is done, Schiavo is legally and morally a living person.

A patient [or those authorized to speak for one] who wishes to refuse further treatment can trump the tilt for life. But evidence of people's desires should be firmer than in this case.

There is a great deal of evidence from countries that allow assisted suicide, such as the Netherlands and Switzerland, that when active euthanasia becomes the rule, physicians often decide-because they "know" the patient has "had enough"-to terminate patients without consulting anyone; they then stop feeding them or inject them with life-ending substances.

In the end, the law is but the extension of morality by other means. Until the moral validity of denying nutrition and hydration to patients who are not braindead is established, then neither a legislature nor a court should be used to open this floodgate.

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