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## NEW TERMS FOR AN OLD DEBATE: EMBRYOS, DYING, AND THE "CULTURE WARS"

Janet L. Dolgin, Ph.D., J.D.\*

### I. INTRODUCTION

The isolation of embryonic stem cells in 1998<sup>1</sup> promised to transform clinical medicine.<sup>2</sup> It also altered the terms of social discourse about abortion, and is reshaping a debate referred to (originally, it seems, by conservative voices) as an American "culture war."<sup>3</sup> This debate pits modernists (or post-modernists), who favor choice and prize autonomous individuality in family settings, against traditionalists, who favor fixed roles and communal loyalty in family settings.<sup>4</sup>

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<sup>1</sup> James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 SCIENCE 1145 (1998). In the same year, scientists at Johns Hopkins University isolated human germ cells from fetal tissue. See Michael J. Shambloot et al., *Derivation of Pluripotent Stem Cells from Cultured Human Primordial Germ Cells*, 95 PROC. NAT'L ACAD. SCI. 13726 (1998); see *infra* note 2 and accompanying text (describing promise of stem-cell research).

<sup>2</sup> The medical promise of embryonic stem cells results from their capacity to differentiate into other types of cells and to proliferate forever *in vitro*. 1 NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION 7-8 (1999), available at <http://www.georgetown.edu/research/nrcbl/nbac/stemcell.pdf> (last visited July 17, 2006).

<sup>3</sup> See STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 205 n.13 (2000) (citing JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 34 (1991) ("America is in the midst of a culture war that has and will continue to have reverberations not only within public policy but within the lives of ordinary Americans everywhere.")).

<sup>4</sup> *Id.* at 44. Carter suggests that

[w]hether or not the United States really is, as some conservative observers insist, mired in a culture war, it is certainly fair to say that the dominant liberal ethos of our public life is only that—the dominant ethos of our *public* life—and is often in conflict with the hopes or plans or most cherished beliefs of many Americans. In

The debate about abortion became increasingly intertwined with partisan politics in the second half of the twentieth century. People committed to theological orthodoxies tended to disfavor abortion, to prize the preservation of gender and age status, fixed roles, and communal loyalty within the domestic arena, and to favor Republican candidates.<sup>5</sup> Those not committed to theological orthodoxies were more likely to favor a right to abortion, to prize choice in designing the parameters of family relationships,<sup>6</sup> and to favor Democratic candidates.<sup>7</sup>

The isolation of embryonic stem cells and the consequent promise of regenerative medicine has shaken that alignment.<sup>8</sup> It has, in particular, encouraged those pro-life adherents anxious to support embryonic stem-cell research to seek a way to mediate between a pro-life position and support for embryo research.<sup>9</sup> Some have responded by fractionalizing the meaning of "embryo" and by suggesting that the moral implications of abortion and of embryonic stem-cell research are distinct matters.<sup>10</sup> Despite such efforts, the pro-life movement, long committed to a platform grounded in images of embryo-as-baby, has struggled to find alternative means of decrying both abortion and a broader set of forces perceived as threatening the sacred character of traditional family values. Among other things, many pro-life adherents have turned their attention to the developing discourse within the United States about end-of-life decision making for people not competent to make deci-

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particular, Americans with traditional views on matters of sex and family life, as well as on the very nature of authority . . . often feel themselves screened out of the mosaic of contemporary America.

*Id.* See also GEOFFREY LAYMAN, *THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS* 66 (2001) ("[T]he ethnoreligious and culture wars models are ideal types and the reality lies somewhere between.").

<sup>5</sup> See *infra* Part II.B. *Embryos, Stem Cells, and the Shifting Debate About Abortion*. Geoffrey Layman states, however, that "the strong attachments of committed evangelical Protestants to the Republican party do not run counter to the ethnoreligious viewpoint." LAYMAN, *supra* note 4, at 67.

<sup>6</sup> See, e.g., KATE WESTIN, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1991).

<sup>7</sup> PEW RES. CTR., *THE PEW FORUM ON RELIGION & PUBLIC LIFE, RELIGION & PUBLIC LIFE: A FAITH-BASED PARTISAN DIVIDE* 10–15 (2005) [hereinafter *PEW FORUM ON RELIGION & PUBLIC LIFE*].

<sup>8</sup> See *infra* Part II.B. *Embryos, Stem Cells, and the Shifting Debate About Abortion*.

<sup>9</sup> *Id.*

<sup>10</sup> See Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U.L. REV. 101, 150–60 (2003) (considering the fractionalization of understandings of "embryo" in more detail) [hereinafter *Embryonic Discourse*].

sions.<sup>11</sup> The case of Terri Schiavo provided a context within which that discourse has taken shape.

Schiavo's narrative became the first American passion play of the twenty-first century. Unlike the original passion plays—miracle plays that presented the suffering of Jesus—this contemporary version focuses on the suffering of innocents in a post-modern world.

Terri Schiavo's story intensified the debate about abortion by providing an alternative context, one involving the end of life rather than the beginning of life, that has facilitated debate about the meaning of family and about the proper scope of relationships within family settings.

Part II of this essay reviews the debate about abortion in the United States in the years following *Roe v. Wade*.<sup>12</sup> It then describes the consequences for that debate of the isolation of embryonic stem cells. Part III relates Terri Schiavo's story and reviews legal, political and social responses to that story. In doing that, Part III delineates and analyzes ideological<sup>13</sup> parallels between the public debate about Terri Schiavo and the debate about abortion in the United States.

## II. ABORTION, EMBRYOS, RELIGION, AND POLITICS

By the start of the twenty-first century, religious voices were increasingly vocal in partisan politics.<sup>14</sup> Whether a voter regularly attended religious services correlated more strongly with voting preference in the 2004 presidential election than did gender, age, or geography, and correlated with voting preference as strongly as race.<sup>15</sup> Religious commitments have frequently informed American

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<sup>11</sup> See *infra* notes 97–108 and accompanying text.

<sup>12</sup> 410 U.S. 113 (1973).

<sup>13</sup> As used in this essay, the terms *ideology* and *ideological* do not refer to a system of false political beliefs. Rather, the terms refer to basic, underlying assumptions that render a people's world view distinct. The use follows that of the French anthropologist Louis Dumont. Dumont wrote:

Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX 22 (1977).

<sup>14</sup> See generally PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 7 (analyzing link between politics and religion in contemporary U.S.).

<sup>15</sup> *Id.* at 2. The Pew Forum reports:

social movements,<sup>16</sup> and religious sentiment has frequently informed civic life.<sup>17</sup> However, the striking correlation that emerged in 2004 between church attendance (and theological orthodoxy) and a preference for Republican candidates<sup>18</sup> represents a new phenomenon in the history of the United States.<sup>19</sup>

### A. The Debate About Abortion in the First Twenty-Five Years After *Roe*<sup>20</sup>

Some social commentators have identified the 1973 Supreme Court abortion decision<sup>21</sup> as the event that invigorated conservative churches, particularly Protestant churches, actively to enter the political domain.<sup>22</sup> Certainly the debate about abortion galvanized

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Voters [in 2004] who attend church more than once a week (an estimated 16% of the electorate) supported President George W. Bush over Sen. John Kerry by a margin of 64% to 35%, according to the National Election Pool, the exit poll that was conducted for a consortium of major news organizations. Among those attending a house of worship once a week (26% of all voters), the margin was 58% to 41% in Bush's favor. . . . The senator's lead was widest among the estimated 15% of the electorate that never attends worship services; Kerry pulled 62% of that group, compared with 36% for Bush.

*Id.*

<sup>16</sup> Among these social movements are abolition, women's suffrage, and the civil rights movement of the mid-twentieth century. PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 7, at 1.

<sup>17</sup> See, e.g., Robert N. Bellah, *Civil Religion in America*, in ROBERT N. BELLAH, BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONALIST WORLD 168 (1991) (originally printed in 96 DAEDALUS: J. AM. ACADEMY ARTS & SCI. 1 (1967), available at [http://hrr.hartsem.edu/Bellah/articles\\_5.htm](http://hrr.hartsem.edu/Bellah/articles_5.htm) (last visited July 17, 2006) (describing a "well-institutionalized civil religion in America"). Writing in the 1960s, Bellah described this civil religion as a force of cohesiveness rather than as a divisive force. He wrote:

The American civil religion. . . borrowed selectively from religious tradition in such a way that the average American saw no conflict between the two. In this way, the civil religion was able to build up without any bitter struggle with the church powerful symbols of national solidarity and to mobilize deep levels of personal motivation for the attainment of national goals.

*Id.*

<sup>18</sup> PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 7, at 2.

<sup>19</sup> See *id.* at 5. In attempting to explain this phenomenon, the Pew Forum on Religion & Public Life pointed to a "mix of social and cultural issues that have come to the fore in the modern era. The so-called moral issues—prayer in school, abortion, homosexuality, gay marriage—have tended to push the religiously observant into one political corner and the more secular into the other." *Id.*

<sup>20</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>21</sup> *Id.*

<sup>22</sup> See STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 43 (2000) (including himself among those who have identified *Roe* as the "transformative moment in the development of conservative Christian organizations").

conservative religious groups after 1973.<sup>23</sup> However, in significant part, social disagreements about abortion have served as a symbol of and as a context for considering a more far-reaching set of disagreements within U.S. society about gender, personhood, and the scope and meaning of familial relationships.<sup>24</sup> These more far-reaching disagreements preceded the post-*Roe* abortion debate by at least a century.<sup>25</sup>

By the middle of the twentieth century, U.S. society and law were increasingly recognizing, even prizing, individualism within family settings.<sup>26</sup> However, a significant minority of people remained staunchly opposed to that development.<sup>27</sup> The larger social debate about family openly posed two visions of personhood against each other. One vision, linked with religious orthodoxy and served by tradition, valued fixed roles, social hierarchy, and social

<sup>23</sup> Efforts to ban abortion in the U.S. began over a century before *Roe v. Wade*, 410 U.S. 113 (1973). See generally KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 14–16 (1984). What Kristin Luker refers to as the “first right-to-life movement” resulted, at the end of the nineteenth century, in the first laws in the U.S. that banned abortion. *Id.* The nineteenth-century movement to ban abortion was supported, and in part shaped, by physician groups concerned with professionalization. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 10–11 (1997); LUKER, *supra* note 23, at 14–39. In addition, the nineteenth-century struggle to prohibit abortion was supported by Catholic moral teachings. LUKER, *supra* note 23, at 58–59.

<sup>24</sup> See generally *Embryonic Discourse*, *supra* note 10 (analyzing debate about abortion as context for considering broader set of social issues).

<sup>25</sup> The American family emerged during the early years of the Industrial Revolution—coincident with the early years of the Republic—in a form that contrasted sharply with the colonial family. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* 4–9 (1986). Before the late eighteenth century, the family was understood as part and parcel of a larger “hierarchically organized, interdependent society.” *Id.* at 4. In the early years of the Industrial Revolution, the family came to be understood as a social domain that contrasted sharply with the world of the marketplace rather than as an extension of the larger society. *Id.* at 4–9. By the middle of the nineteenth century, American society saw the family as a fragile unit. *Id.* at 9–12. By the 1840s, family reformers identified a “crisis of the family” and began to propose laws to contain and regulate family life. *Id.* at 10.

<sup>26</sup> By the second half of the twentieth century, American family law provided for no-fault divorce, see Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions*, 8 FAM. L.Q. 401, 421–23 (1974) (noting that by 1974 only a handful of states had only “fault” grounds for divorce); the paternity of unwed fathers, see, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing interest of unmarried father in children “he had sired and raised”); and prenuptial agreements that allowed couples contemplating marriage to provide for the terms of the marriage’s end, see, e.g., *Posner v. Posner*, 233 So. 2d 381, 384, 386 (Fla. 1970) (upholding prenuptial agreement).

<sup>27</sup> See, e.g., LUKER, *supra* note 23, at 173–75 (1984). Luker commented that for pro-life people, “the family is both beleaguered and sacred, and any policy that seeks to address the members of a family as separate entities, rather than as an organic whole, is a priori harmful.” *Id.* at 173 (footnote omitted).

loyalty within communal, and especially familial, settings.<sup>28</sup> The second vision, linked with secularism and served by modernity, valued autonomous individuality and choice within virtually all, including familial, settings.<sup>29</sup> The gap between these two visions of family was widened and symbolized during the 1970s and 1980s by the practical and ideological successes of the feminist movement.<sup>30</sup> Broadly, the feminist movement of the late twentieth century reflected the transformation of family life from a universe of fixed, hierarchical relationships to one of flexible relationships, shaped by individual choice rather than by tradition and moral absolutes.<sup>31</sup>

The mid-twentieth-century debate about abortion developed alongside this larger debate about gender, families, and relationships and served as an ideological context within which the parameters of the larger debate were considered and reshaped.<sup>32</sup> Moreover, the jurisprudence undergirding *Roe*<sup>33</sup> incorporated the parameters of the family-of-choice and illustrated a modern conception of family.<sup>34</sup>

In upholding an individual woman's right to *choose* abortion, *Roe* asserted implicitly that the law must view family members primarily as autonomous individuals, not as members of larger (familial) communities.<sup>35</sup> In consequence, *Roe* called into question

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<sup>28</sup> See *id.* at 173–74. Professor David Schneider described the American family during the middle of the twentieth century as contrasting vividly with the mid-twentieth-century world of work and money. DAVID M. SCHNEIDER, *AMERICAN KINSHIP* 48–49 (2d ed. 1980). Schneider summarized the “distinctive features” of the domains of home and work, respectively, by referring to “[t]he contrast between love and money in American culture.” *Id.* at 48.

<sup>29</sup> LUKER, *supra* note 23, at 183–84.

<sup>30</sup> See, e.g., BRUCE J. SHULMAN, *THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE AND POLITICS* 163–76 (2001) (analyzing development of “women’s liberation movement” and feminist movement of 1970s).

<sup>31</sup> See, e.g., KAY S. HYMOWITZ, *READY OR NOT: WHY TREATING CHILDREN AS SMALL ADULTS ENDANGERS THEIR FUTURE—AND OURS* 42–43, 68 (1999) (analyzing link between feminism and new views of parent-child relationships).

<sup>32</sup> See *Embryonic Discourse*, *supra* note 10, at 101, 121–34 (considering abortion debate as “text” and as “pretext”).

<sup>33</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>34</sup> See *id.* at 120, 129 (*Roe*’s claim was based on her individual “right of personal privacy”), 163, 166 (decision to terminate pregnancy can be made by the woman and her doctor).

<sup>35</sup> *Id.* The acceptance of individualist understandings of adults within families was symbolized (and strengthened) by the Court’s 1972 decision that declared a state law unconstitutional on equal protection grounds for limiting the distribution of contraception to unmarried people. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972). Justice Brennan, writing for the Court, assumed family members to be autonomous individuals rather than participants in a hierarchically structured whole.

nineteenth and early twentieth-century understandings of family, personhood in general, and women in particular.<sup>36</sup>

By the last decades of the twentieth century, the pro-life movement enjoyed significant success in challenging the understandings of family and gender implicit in *Roe*.<sup>37</sup> But as a practical and strategic matter, the movement framed the battle against abortion in terms of fetal personhood. The movement's stress on fetal personhood displaced public discourse about more far-reaching questions involving gender, status within families, and personhood broadly. Moreover, the image of the fetus-as-person proved remarkably powerful in furthering the interests of those opposed to abortion.<sup>38</sup>

In short, for several decades after *Roe*, public rhetoric of the pro-life movement shifted away from praise for woman-as-wife and mother and, correlatively, from condemnation of autonomous individuality and bargained choices within family settings.<sup>39</sup> In place of those concerns, the movement focused increasingly on the fetus-as-person.<sup>40</sup> As strategy, the shift proved effective.<sup>41</sup> Even pro-choice feminists had difficulty responding to claims about the personhood of fetal life.<sup>42</sup> One commentator referred to a "taboo in the feminist movement against discussing the fetus."<sup>43</sup>

Thus, in the first two and a half decades after *Roe*,<sup>44</sup> pro-life advocates broadly refashioned the rhetoric of debate about abortion. An underlying concern with the meaning of family and gender was displaced, at least in public debate, with a focus on the ontological

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... [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453.

<sup>36</sup> *Roe*, 410 U.S. 113 (1973).

<sup>37</sup> *Id.*

<sup>38</sup> See *Embryonic Discourse*, *supra* note 10, at 150–60.

<sup>39</sup> *Id.* at 128.

<sup>40</sup> *Id.*

<sup>41</sup> See *infra* notes 42–43.

<sup>42</sup> See, e.g., MARSHA SAXTON, *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 390 (Rickie Solinger ed., 1998) [hereinafter *ABORTION WARS*].

<sup>43</sup> *Id.*

<sup>44</sup> *Roe*, 410 U.S. 113 (1973)



status of fetuses and embryos.<sup>45</sup> That reconstruction allowed pro-life adherents to elide debate about family and women. That was important as a strategic matter because by the 1970s and 1980s, the larger society and the law had generally accepted new understandings of gender and family.<sup>46</sup> Moreover, the image of the fetus-as-child proved powerful in public debate. So, pro-life activists talked less about abortion as a desecration of traditional family life and of woman's basic purpose, and more about abortion as the murder of children. For several decades, this focus served to further the pro-life movement's goals.<sup>47</sup>

## B. Embryos, Stem Cells, and the Shifting Debate About Abortion

The pro-life movement's focus on the ontological status of fetuses and embryos began to prove less useful after the isolation of embryonic stem cells in 1998.<sup>48</sup> That development shaped a new vision of embryos.<sup>49</sup> In public debate about abortion, images of fetuses, and, by extension, of embryos, as children-to-be (or as "children"), proved important for the pro-life movement. In the context of stem-cell research, embryos began to represent a stunning medical promise, but one that involved embryonic destruction.<sup>50</sup>

Even some committed pro-life adherents reevaluated the significance of embryos in this new context.<sup>51</sup> For instance, Senator Or-

<sup>45</sup> See *supra* note 34 and accompanying text.

<sup>46</sup> See *supra* notes 29–33 and accompanying text.

<sup>47</sup> See *Embryonic Discourse*, *supra* note 10, at 128–34 (considering in greater detail significance of this shift in the debate about abortion in the United States).

<sup>48</sup> See Thomson, *supra* note 1. In the same year, scientists at Johns Hopkins University reported that they had isolated human germ cells from fetal tissue. See Shamblott, *supra* note 1 (describing isolation of human germ cells from fetal tissue).

<sup>49</sup> Clive Cookson, *Mother of All Cells*, 293 SCI. AM., July 2005, at A6 (2005) (part of Special Report with *Financial Times*) ("[W]ithin a few years it will be possible, through some still obscure combination of stem cells, cloning and genetic engineering, to create new cells and eventually whole organs to replace those that fail through disease, accident or old age."). Ian Wilmut, responsible for cloning the first mammal, explained the promise of embryonic stem-cell research to include, among other things, repair of spinal cord injury, revelation of the "molecular mechanisms" responsible for inherited diseases such as motor neuron disease, and the possibility of curing children with serious genetic diseases such as the absence of the immune response. Ian Wilmut, *The Search for Cells that Heal*, 293 SCI. AM., July 2005, at A35 (2005) (part of Special Report with *Financial Times*).

<sup>50</sup> See Cookson, *supra* note 49, at A6.

<sup>51</sup> See Ceci Connolly, *Waging the Battle for Stem Cell Research; As Senate Vote Approaches, Coalition Intensifies Year-Long Lobbying Effort*, WASH. POST, June 9, 2002, at A6; ASSOC. PRESS, *Frist Backs Increased Federal Stem Cell Funding: Senate Majority Leader Breaks with Bush on*

rin Hatch (R.-Kan.), a firm abortion opponent, re-contextualized embryos in contemplating a bill that would provide for non-reproductive cloning to produce embryos to be used in stem-cell research.<sup>52</sup> In explaining his willingness to support embryonic stem-cell research, Hatch reconstructed the terms of debate about embryos. Embryonic stem-cell research, explained Hatch, is "pro-life and pro-family."<sup>53</sup> Similarly, Senate majority leader Bill Frist (R.-Tenn.) had strongly supported President Bush's decision to allow federal funding for embryonic stem-cell research only on stem-cell lines created before August 2001.<sup>54</sup> He shifted course in July 2005 and announced his support for broader funding of embryonic stem-cell work.<sup>55</sup> Frist explained his change in position: "Cure today may be just a theory, a hope, a dream. But the promise is powerful enough that I believe this research deserves our increased energy and focus. Embryonic stem-cell research must be supported."<sup>56</sup>

The promise of embryonic stem-cell research (sometimes referred to as regenerative medicine) has convinced some pro-life adherents, including Senators Hatch and Frist, to see embryos through two lenses.<sup>57</sup> Through one lens, embryos are children-in-waiting. Through a second lens, embryos are viewed as tissue essential to furthering research that promises a set of startling new medical discoveries and cures. Senator Frist's explanation of his decision to shift positions and support funding for embryonic stem-cell re-

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*Issue*, July 29, 2005, available at <http://www.cnn.com/2005/POLITICS/07/29/frist.stem.cells.ap/index.html> (last visited Apr. 25, 2006).

<sup>52</sup> Adriel Bettelheim, *Divided Senate Examining Research Value, Moral Issues as It Ponders Vote on Cloning*, CQ WKLY, May 4, 2002, at 1154.

<sup>53</sup> See Connolly, *supra* note 51.

<sup>54</sup> On August 9, 2001, President Bush announced that his administration would fund embryonic stem-cell research only on stem-cell lines that existed as of the day of his announcement. *Press Release, White House Office of the Press Secretary, President's Embryonic Stem Cell Research Policy* (Aug. 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html#> (last visited July 17, 2006), reprinted in LORI B. ANDREWS ET AL., *GENETICS: ETHICS, LAW AND POLICY* 141 (2002).

<sup>55</sup> See ASSOC. PRESS, *supra* note 51. When Congress reconvened in the fall of 2005, Sen. Frist suggested that a Senate vote on federal funding for embryonic stem cell research would be postponed. Supporters of the bill (passed by the House) agreed that at least in part, the delay resulted from a full calendar in the wake of Hurricane Katrina, budget discussions, and consideration of President Bush's nominees to the Supreme Court. *Nation/Politics, Frist Suggests Delay in Vote on Expanded Federal Funding*, WASH. TIMES, Oct. 19, 2005, available at <http://washingtontimes.com/national/20051018-115143-5514r.htm> (last visited July 17, 2006).

<sup>56</sup> *Pluripotent*, THE NEW REPUBLIC, Aug. 15, 2005, at 7 (describing Frist's change-of-heart as comparable to "[a] flat-worlder conceding that the world is round!").

<sup>57</sup> See *supra* notes 48-49, 51-52, and accompanying text.

search was filtered through both lenses.<sup>58</sup> Looking through one lens, Frist reconfirmed his belief that the "embryo is a human life at its earliest stage of development."<sup>59</sup> Frist explained: "I am pro-life. I believe human life begins at conception. It's at this moment that the organism is complete; yes, immature but complete. An embryo is nascent human life. It's genetically distinct. It's biologically human. It's living."<sup>60</sup> Then, looking through the second lens, Frist explained—his pro-life position notwithstanding—that "embryonic stem cell research should be encouraged and supported."<sup>61</sup> He added:

If your daughter has diabetes or your dad has Parkinson's, . . . if your sister has a spinal cord injury, your views will be swayed more powerfully than you can imagine by the hope that cure will be found in these magnificent cells recently discovered that today only originate in an embryo.<sup>62</sup>

Such rhetoric from a very public pro-life adherent suggests a startling transformation in the terms of the debate about abortion in the United States. Frist attempted to mediate the gap between his pro-life stance and his support for embryonic stem-cell research by fractionalizing understandings of embryos—envisioning embryos for reproduction through one lens and embryos for research through another. Despite that sort of effort to mediate ideologically discordant positions, a political platform or social agenda dependent on the presumption of embryonic personhood is unlikely to thrive in a universe ready to provide public support for embryonic stem-cell research. Understandings of embryos as people are inevitably challenged and displaced as embryos are successfully associated in public discussion with research that promises to cure heart disease, cancer, Parkinson's disease, spinal cord injuries, and other serious bodily conditions.<sup>63</sup>

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<sup>58</sup> See Eric Cohen & William Kristol, Editorial, *Frist's Stem Cell Capitulation*, 10 THE WEEKLY STANDARD, Aug. 8, 2005 (available in Lexis, News Library) (quoting Frist on his decision to support embryonic stem-cell research); Bill Frist, *Frist Comments on Stem Cell Research*, July 29, 2005, available at [http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech\\_id=257](http://frist.senate.gov/index.cfm?FuseAction=Speeches.Detail&Speech_id=257) (last visited July 16, 2006).

<sup>59</sup> See Cohen & Kristol, *supra* note 58.

<sup>60</sup> See Frist, *supra* note 58.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> At least some pro-life adherents might conclude that embryos can be understood and treated one way and fetuses another way. However, it is virtually impossible to identify a clear line of demarcation that distinguishes the first from the second. In addition, displacing the presumption of embryonic personhood suggests, though it certainly does not prove, that the notion of fetal personhood may also be undermined.

Insofar as the pro-life movement had constructed a platform that rested on claims about the ontological status of fetal and embryonic life, efforts to reconstruct the meaning of embryos generally or to fractionalize embryos into two (or more) classes—those intended for reproductive purposes and those intended for stem-cell research—pose a significant stumbling block for the movement. At least in public rhetoric, pro-life adherents depended on the power of fetal images to challenge pro-choice positions about abortion.<sup>64</sup> Even more, the debate about abortion has reflected more far-reaching questions about families, gender, and personhood.<sup>65</sup> Thus, a broad challenge—such as that presented by stem-cell research—to claims about embryonic (and thus, perhaps, fetal) sanctity, constitutes a serious challenge for those pro-life adherents concerned to safeguard tradition in familial settings.

Segments of the pro-life movement have responded variously.<sup>66</sup> Among other things, the movement has focused attention on late-term abortions and has stressed the personhood of third-trimester fetuses, thereby eliding debate about scientific and medical use of embryos.<sup>67</sup> Beyond this, the larger debate about family life

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To some extent, pro-life adherents have responded to the redefinition of embryos in the context of embryonic stem-cell research by focusing on late-term fetuses. For instance, the pro-life movement has had significant success arguing against an abortion procedure that it has termed “partial-birth abortion.” In 2003, for instance, Congress passed a law prohibiting partial-birth abortion. 18 U.S.C.S. § 1531. The statute includes an exception to protect a pregnant woman’s life, *id.* at § 1531(a), but does not contain an exception to safeguard a pregnant woman’s health. The statute is being challenged. *See, e.g.,* Planned Parenthood Federation of America v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004). *See also* Stenberg v. Carhart, 530 U.S. 914 (2000) (invalidating Nebraska “partial-birth abortion” statute because it contained no exception to protect the health of the mother and because it placed an “undue burden” on a woman’s right to choose a dilation and evacuation abortion procedure).

<sup>64</sup> *See, e.g.,* SEXTON, *supra* note 42, at 390 (noting “taboo” even among feminists against talking about fetal status).

<sup>65</sup> *See* discussion *infra* Part II.A. *The Debate About Abortion in the First Twenty-Five Years After Roe*.

<sup>66</sup> The pro-life movement does not have a set constituency. Even more, people of faith, generally, and conservative Christians, more particularly, “are not of one mind, whether on specific issues . . . or the more general issue of how religion relates to politics.” John C. Danforth, *Onward, Modern Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27.

<sup>67</sup> *See generally* Partial-Birth Abortion Act of 2003, 18 U.S.C.S. § 1531 (LexisNexis 2005) (prohibiting “partial-birth abortions” that result in death of a human fetus and including an exception to save the life of a pregnant woman). The Act has been challenged in court. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a “partial-birth abortion” statute promulgated in Nebraska); *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) (granting permanent injunction against enforcement of Partial-Birth Abortion Act of 2003); *Planned Parenthood Fed’n of Am., Inc. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004).

and gender is increasingly voiced in a variety of discursive contexts that elide the debate about abortion.<sup>68</sup> That elision furthers the underlying debate about the parameters of family relationships and the scope of personhood while avoiding increasingly difficult questions about the status of embryonic life. In 2004 and 2005, many pro-life adherents and other traditionalists debated questions about family relationships, gender, and moral decency in the context of questions occasioned by the life and death of Terri Schiavo.<sup>69</sup>

The next Part summarizes the Schiavo story and describes the social debate occasioned by that story. More specifically, Part III suggests that for at least some traditionalists, Terri Schiavo's story has proved especially useful because it has facilitated debate about family values while avoiding debate about embryos.

### III. END-OF-LIFE DECISIONS, RELIGION, AND POLITICS: THE STORY OF TERRI SCHIAVO

Terri Schiavo entered a persistent vegetative state at the age of twenty-six and never recovered.<sup>70</sup> Yet, she did not die.<sup>71</sup> After suffering cardiac arrest and consequent oxygen deprivation in 1990, Schiavo<sup>72</sup> lost significant brain function.<sup>73</sup> Schiavo's story encouraged, or at least facilitated, widespread social disagreement about many of the issues at stake in the debate about abortion, including the scope of family life (e.g., who should have made decisions for Terri?), the comparative value of a presumptively earlier ("traditional") age (when, for instance, most people died at home in

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<sup>68</sup> This displacement has been possible insofar as social questions undergirding the debate about abortion in the United States also inform social deliberation about a broad set of issues, including same-sex marriage, traditional family life, and end-of-life care. See CARTER, *supra* note 32, at 43–45 (associating "conservative Christian politics" with set of "issues," including abortion, prayer in public schools, the "sexual revolution," and "the growing pressure on the traditional family").

<sup>69</sup> See *infra* Part III. *End-of-Life Decisions, Religion, and Politics: The Story of Terri Schiavo*.

<sup>70</sup> *In re Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001), *reh'g denied* (Feb. 22, 2001), *review denied*, 789 So. 2d 348 (Fla. 2001).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* The court reported Terri's age as twenty-seven at the time of her cardiac arrest. *Id.* However, a website set up by Terri's parents, Robert and Mary Schindler, and others, reported her age as twenty-six. See TERRI SCHINDLER SCHIAVO FOUND., <http://www.terris-fight.org> (last visited July 16, 2006). In fact, Terri (born on December 3, 1963, and married on November 10, 1984) was several weeks short of her twenty-seventh birthday when she collapsed. *Id.*

<sup>73</sup> *In re Schiavo*, 780 So. 2d at 177. The Florida Court of Appeals explained that Terri Schiavo "never regained consciousness." *Id.*

bed), and the meaning of personhood (e.g., how, if at all, could Terri's intentions be discerned and effected, and if they could not be discerned, what was her status as "person").<sup>74</sup>

For many pro-life adherents, Terri Schiavo's story supported a moral agenda, framed by a commitment to "life"<sup>75</sup> and thus echoed many of the central concerns of their movement's agenda. Yet, for pro-life adherents, debate about Schiavo, unlike debate about abortion, precluded the need to choose between a longstanding commitment to the notion of embryos-as-children and a newfound appreciation for the potential value of embryos to regenerative medicine.

### A. The Narrative

Terri (Theresa) Schiavo was born in 1963 to Robert and Mary Schindler.<sup>76</sup> In 1984, she married Michael Schiavo.<sup>77</sup> Six years later, Terri collapsed in the couple's Florida home. That event has been attributed to a potassium imbalance,<sup>78</sup> but controversy persists as to the cause of Terri's collapse.<sup>79</sup> Indeed, controversy has attended many aspects of Terri's medical history.<sup>80</sup> Most, but not all,<sup>81</sup> commentators concluded that once Terri emerged from coma, she entered a persistent vegetative state.<sup>82</sup> Between 1990, when Terri

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<sup>74</sup> Some theorists suggest personhood depends on "minimal intelligence." See, e.g., JOSEPH FLETCHER, *HUMANNESS IN HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS* 12 (Prometheus Books 1979) (stating that "mere biological life, before minimal intelligence is achieved or after it is lost irretrievably, is without personal status").

<sup>75</sup> See, e.g., Neal Conan, *Talk of the Nation: Evangelical Christians and the Political Stage* (NPR radio broadcast June 20, 2005) (referring to "Terri Schiavo and the 'culture of life'" as a conservative Christian issue).

<sup>76</sup> *In re Schiavo*, 780 So. 2d at 177.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> The website set up by Terri's parents describes Terri's collapse as "a yet unresolved cardio-respiratory event." See TERRI SCHINDLER SCHIAVO FOUND., *supra* note 72.

<sup>80</sup> See generally TERRI SCHINDLER SCHIAVO FOUND., *supra* note 72; see also MARK FUHRMAN, *SILENT WITNESS: THE UNTOLD STORY OF TERRI SCHIAVO'S DEATH* (2005). Fuhrman believes it is possible that Michael Schiavo may bear responsibility for Terri's collapse. *Id.* at 225.

<sup>81</sup> The website set up by Terri's parents and others describes the conclusion that Terri was in a persistent vegetative state as a "myth." See TERRI SCHINDLER SCHIAVO FOUND., *supra* note 72.

<sup>82</sup> The Florida court explained:

The evidence is overwhelming that Theresa is in a permanent or persistent vegetative state. It is important to understand that a persistent vegetative state is not simply a coma. She is not asleep. She has cycles of apparent wakefulness and apparent sleep without any cognition or awareness. As she breathes, she often

collapsed, and 2005, when she died, she lived in nursing homes.<sup>83</sup> She was able to breathe on her own but was dependent on tubes for nutrition and hydration.<sup>84</sup>

Terri's husband, Michael Schiavo, and her parents, Mary and Robert Schindler, cooperated in her care for several years.<sup>85</sup> During that time, Michael commenced a malpractice action against doctors who had treated Terri before her collapse.<sup>86</sup> A jury found that Terri's gynecologist had failed to diagnose bulimia (an eating disorder that can result in a potassium imbalance).<sup>87</sup> Terri and Michael's combined award was somewhat more than \$1 million.<sup>88</sup> The funds ear-marked for Terri were put in a trust to be used for her medical care.<sup>89</sup> The funds for Michael represented the value of his loss of consortium.<sup>90</sup> Soon after the malpractice case was resolved, disagreements developed between Terri's husband and her parents.<sup>91</sup> The Schindlers commenced litigation to have Michael removed as

makes moaning sounds. Theresa has severe contractures of her hands, elbows, knees, and feet.

*In re Schiavo*, 780 So. 2d at 177.

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Report of Guardian Ad Litem at 6–7, *In re Schiavo*, No. 90-290BGD-003 (Fla. Cir. Ct., Private Div., 1998), available at [http://www.miami.edu/ethics/schiavo/pdf\\_files/122998\\_Schiavo\\_Richard\\_Pearse\\_GAL\\_report.pdf](http://www.miami.edu/ethics/schiavo/pdf_files/122998_Schiavo_Richard_Pearse_GAL_report.pdf) (last visited July 17, 2006).

<sup>86</sup> FUHRMAN, *supra* note 80, at 58–59. Michael Schiavo commenced the action on behalf of himself and Terri. *Id.*

<sup>87</sup> *Id.* at 59.

<sup>88</sup> *Id.* at 65. In addition, Terri's general practitioner entered into a settlement agreement for \$250,000 without liability. *Id.* at 59. See also Kathy Cerminara & Kenneth Goodman, *Key Events in the Case of Theresa Marie Schiavo*, [http://www.miami.edu/ethics/schiavo/terri\\_schiavo\\_timeline.html](http://www.miami.edu/ethics/schiavo/terri_schiavo_timeline.html) (last visited July 17, 2006) (reporting that Michael was awarded \$300,000 and \$750,000 was put in a trust to be used for Terri's care) [hereinafter *Schiavo Timeline*].

<sup>89</sup> FUHRMAN, *supra* note 80, at 65.

<sup>90</sup> *Id.* Fuhrman reports that Michael received \$400,000 for loss of consortium. Other sources report that he received about \$100,000 or less. See, e.g., *Schiavo Timeline*, *supra* note 88. A Florida guardian ad litem reported that Michael received \$300,000 for loss of consortium and that Terri received \$700,000 as damages. Report of Guardian Ad Litem, *supra* note 85, at 4.

<sup>91</sup> The money awarded to Terri was of some import in these disagreements because if Terri died still married to Michael, he stood to inherit her share of the malpractice award. If, however, he submitted to the Schindlers' request and divorced Terri, thereby allowing the Schindlers to attain guardianship status, the money would have gone to Terri's parents, as intestate heirs. It is not clear what part (if any) of the malpractice award was intact when Terri died in 2005. See, e.g., Lois Shepherd, *In Respect of People Living in a Permanent Vegetative State—and Allowing Them to Die*, *Public Law and Legal Theory*, FLA. ST. U. PUB. L. & LEGAL THEORY, Working Paper No. 153 2005, at 49.

their daughter's guardian and to be appointed in his place.<sup>92</sup> That litigation was unsuccessful.<sup>93</sup>

In 1998 Michael petitioned to have Terri's feeding tube removed.<sup>94</sup> He testified, to the trial court's satisfaction, that Terri, while still competent, had stated that she would not want to be kept alive in the sort of medical state that she had, in fact, entered.<sup>95</sup> The trial court thus granted Michael's petition for discontinuance of Terri's nutrition and hydration.<sup>96</sup> Following this decision, Terri Schiavo's legal story was, in one guise or another, entertained and shaped by state courts, federal courts, the Florida legislature, the United States Congress, Florida's governor Jeb Bush, and President George W. Bush.<sup>97</sup> Especially in the last year and a half of Terri's

<sup>92</sup> See Report of Guardian Ad Litem, *supra* note 85, at 5.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.* In the opinion of the guardian ad litem, the testimony presented by Michael and others, testifying on his behalf, did not satisfy the state's "clear and convincing evidence" standard. *Id.* The Florida evidentiary standard for such cases was established in *In re Guardianship of Estelle M. Browning*, 568 So. 2d 4 (Fla. 1990).

<sup>96</sup> *In re Schiavo*, No. 90-2908GD-003, 2000 WL 34546715 (Fla. Cir. Ct. 2000).

<sup>97</sup> The legal story has often been told. In brief, during several years of court responses to the 1998 trial court decision, Schiavo's food and water tubes were twice removed, once in 2001 and then in October 2003. *Schiavo Timeline*, *supra* note 88. Just before the second removal, a federal judge ruled that the federal court lacked jurisdiction to hear the case. *Id.* Soon after the feeding tube was ordered removed, the Florida legislature voted to give the governor (Jeb Bush) authority to have the tubes reinserted ("Terri's Law"). Thomas C. Marks, Jr., *Terri Schiavo and the Law*, 67 ALB. L. REV. 843, 844 (2004). The tubes were then reinserted per Governor Bush's order. Exec. Ord. No. 03-201, Fla. Governor's Office (Oct. 21, 2003). Michael Schiavo then moved to have the law declared unconstitutional. See *Schiavo v. Bush*, No. 03-008212-CI-20, 2004 WL 980028, at \*1 (Fla. Cir. Ct. May 5, 2004). Florida Circuit Court Judge Baird ruled that Terri's Law was unconstitutional. *Id.* The state supreme court affirmed the ruling. *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004). Governor Jeb Bush's petition for review in the United States Supreme Court was denied in January 2005. *Bush v. Schiavo*, 543 U.S. 1121 (2005). In February, Florida Circuit Court Judge Greer denied the Schindlers' motion for an indefinite stay of his earlier motion ordering removal of Terri's nutrition and hydration tubes. *Schiavo v. Schindler*, No. 90-2908-GD-003, 2005 WL 459634 (Fla. Cir. Ct. 2005). Judge Greer explained:

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

*Id.* Within three weeks of this order, the U.S. House of Representatives passed a bill, Protection of Incapacitated Persons Act of 2005, H.R. 1332, 109th Cong. (2005), allowing removal of cases such as Terri's to federal court; the Senate then passed a private bill that



life, her story also attracted widespread attention from news media, scholarly commentators, demonstrators, and the public broadly.<sup>98</sup> In the period between March 18, 2005, when the nutrition and hydration tubes supporting Terri Schiavo's life were removed, and her death less than two weeks later,<sup>99</sup> various pro-life and religious groups, as well as others concerned about Terri's situation, held prayer vigils and demonstrations outside the facility where Terri resided.<sup>100</sup>

## B. Social Responses to Terri's Story

By the time Terri Schiavo died in late March 2005, commentators were expressly framing her story in light of the politics of abortion.<sup>101</sup> The connection between abortion politics and Terri Schiavo's story became apparent in October 2003 when Robert and

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applied only to Terri Schiavo. S. 653, 109th Cong. (2005). The Senate bill allowed "any parent of Theresa Marie Schiavo" to "have standing to bring a suit under this Act." *Id.* The filing of such a suit would authorize the federal district court to stay a state court order providing for the withdrawal (or withholding) of nutrition and hydration tubes. *Id.* On the same day, the U.S. Supreme Court refused the Schindlers' petition for certiorari. Schindler v. Schiavo, 544 U.S. 957 (2005). The next day, Terri Schiavo's nutrition and hydration tubes were removed for the third time. *Schiavo Timeline*, *supra* note 88. Three days later, President Bush signed a law (Pub L. No. 109-3, 119 Stat. 15 (2005)) that gave Terri Schiavo's parents the right to bring a suit. The Act provided:

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 her life.

*Id.* The Florida District Court judge then denied the Schindlers' motion to have Terri moved and treated on the ground that the Schindlers had failed to show a "substantial likelihood of success on the merits." Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1379 (M.D. Fla. 2005). The 11th Circuit affirmed the decision. Schindler *ex. rel.* Schiavo v. Schiavo, 403 F.3d 1223, 1224 (11th Cir. 2005). Despite many attempts by the Schindlers to have the tubes reinserted, that did not happen.

<sup>98</sup> See, e.g., Abby Goodnough, *Strange Brews are Created in Melting Pot That is Florida*, N.Y. TIMES, Apr. 3, 2005, at § 1.

<sup>99</sup> *Schiavo Timeline*, *supra* note 88.

<sup>100</sup> *Judy Woodruff's Inside Politics: Life and Death Issues in the Case of Terry Schiavo* (CNN television broadcast Mar. 18, 2005) [hereinafter *Woodruff*]. Moreover, pro-life and disability rights groups had supported the Schindlers in the struggle to prevent the removal of Terri's hydration and nutrition tubes. See Lois Shepherd, *supra* note 91.

<sup>101</sup> Jeffrey Toobin, reporting for CNN, commented:

[T]he larger context for all of this is, is abortion politics. That is really what's the very clear undercurrent here. The right to life movement feels very strongly in what President Bush calls a culture of life. And they begin—that matters at the beginning of life, in abortion, and the end of life, in a situation like this. The people supporting the removal of the feeding

Mary Schindler accepted assistance from Randall Terry.<sup>102</sup> In 1988 Terry had founded Operation Rescue, an activist pro-life group<sup>103</sup> known for its readiness to break the law.<sup>104</sup> Randall Terry helped shape the strategy that brought Terri Schiavo's story to national attention.<sup>105</sup> He suggested both prayer-vigils outside the hospice where Terri Schiavo resided and the public release of video clips featuring Terri Schiavo's responses to her environment and to visiting family members.<sup>106</sup>

Randall Terry's involvement made it clear that the Schiavo narrative implicated matters extending well beyond end-of-life decision-making.<sup>107</sup> In particular, Terri Schiavo's story facilitated public debate about concerns long associated with the debate about abortion. These include, among other matters, the scope of family life and the nature of personhood.<sup>108</sup> In addition, the Schiavo story, like the debate about abortion, raised questions about the reach of the judiciary. Each of these issues will be considered in turn.

### 1. *Terri's Story, Abortion, and the Scope of Family Life*

At the center of Terri Schiavo's public story were increasingly bitter disagreements between her husband and her parents.<sup>109</sup> The

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tube feel very strongly about the autonomy of the person. But that's the subtext here and that is, I think, what's really driving a lot of the partisans on both sides.

Woodruff, *supra* note 100.

<sup>102</sup> Wes Allison, *New Life for the Right-to-Life Movement*, ST. PETERSBURG TIMES, Oct. 25, 2003, at 1A.

<sup>103</sup> See Faye Ginsburg, *Rescuing the Nation: Operation Rescue and the Rise of Anti-Abortion Militance in ABORTION WARS*, *supra* note 42, at 127, 127–242.

David Smolin reports that under Randall Terry, Operation Rescue aimed broadly to return the U.S. to its Christian beginnings. David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness* 47 BAYLOR L. REV. 119, 146 (1995). Under Terry's leadership, Operation Rescue is said to have shaped the unofficial slogan: "If you think abortion is murder, act like it!" Marcy J. Wilder, *The Rule of Law, the Rise of Violence, and the Role of Morality: Reframing America's Abortion Debate in ABORTION WARS*, *supra* note 42, at 73, 81 (citing Stephen J. Hedges et al., *Abortion: Who's Behind the Violence?*, U.S. NEWS & WORLD REP., Nov. 14, 1994, at 55). Some commentators linked that slogan to the murder of physicians who performed abortions. *Id.* at 81.

<sup>104</sup> Ginsburg, *supra* note 103, at 231–34.

<sup>105</sup> See Allison, *supra* note 102.

<sup>106</sup> *Id.* Allison quotes Terry to have explained: "Efforts in court had failed. . . . We wanted to bring this to the court of public opinion." *Id.*

<sup>107</sup> Abby Goodnough, *Victory in Florida Feeding Case Emboldens the Religious Right*, N.Y. TIMES, Oct. 24, 2003, at A1.

<sup>108</sup> LUKER, *supra* note 23, at 112, 201–02.

<sup>109</sup> See generally O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 53–54, 59–69 (2005).

public story was constructed around the identification of the Schindlers (asking to have their daughter kept alive) with tradition and fixed authority, (especially religious authority)<sup>110</sup> and the identification of Michael Schiavo (asking that his wife be afforded the "right to die") with the right to autonomous choice.<sup>111</sup>

Pro-life adherents and religious conservatives inserted a twist into the family dispute.<sup>112</sup> By focusing on Michael Schiavo's infidelity<sup>113</sup> and intimating that he was motivated by an interest in inheriting whatever remained of Terri's malpractice award,<sup>114</sup> they were able to suggest that Michael, though "of-Terri's-family," represented the antithesis of values such as love, trust, and loyalty that render families special. In contrast, those favoring Michael's position characterized him as a husband and family member at odds with other family members.<sup>115</sup> Those favoring the Schindlers' position, however, characterized Michael as selfish, greedy, and living outside decent family life.<sup>116</sup>

In sum, the details of this family's story facilitated a broad social debate about the parameters of family life. Advocates of traditional family values pointed to Michael Schiavo's focus on autonomous decision-making and to his readiness to forge new

<sup>110</sup> A day before Judge Greer ordered Terri's tubes removed for the third time, Cardinal Renato Martino asserted on the Vatican Radio that a victory for Michael Schiavo would be "tragic in itself" and "a serious step toward legally approving euthanasia in the United States." Waveney Ann Moore, *Vatican Official Enters Schiavo Feeding Tube Fray*, ST. PETERSBURG TIMES, Feb. 26, 2005. A year earlier, Pope John Paul II announced that it is forbidden to fail to provide nutrition and hydration to patients in a persistent vegetative state. *Id.* In July 2004, the Schindlers relied on the Pope's statement in a motion filed in the Florida circuit court. Motion for Relief from Judgment and Motion to Reconsider at 3-5, *In re Schiavo*, No. 90-2908GD-003 (Fla. Cir. Ct. 2004), available at [http://www.miami.edu/ethics/schiavo/pdf\\_files/Filed\\_07-19-2004\\_ReliefFromJudgment.pdf](http://www.miami.edu/ethics/schiavo/pdf_files/Filed_07-19-2004_ReliefFromJudgment.pdf) (last visited July 17, 2006). They argued that the Pope's statement made it clear that depriving Terri of food and water would interfere with her "free exercise of her religious beliefs [and] her right to enjoy and defend her own life and, in fact, imperil her immortal soul." *Id.*

<sup>111</sup> Norman L. Cantor, *Déjà Vu All Over Again*, 35 STETSON L. REV. 81, 81-84 (2005).

<sup>112</sup> Wesley J. Smith, *Life, Death, and Silence*, DAILY STANDARD, Oct. 31, 2003 (available in Lexis, News Library).

<sup>113</sup> For about ten years before Terri died, Michael lived with another woman. *Id.* They had two children together. *Id.*

<sup>114</sup> Lois Shepherd, *Terri Schiavo: Unsettling the Settled*, 37 LOY. U. CHI. L.J. 297, 304 (2006) (noting the Schindlers' claim that Michael Schiavo was motivated by money).

<sup>115</sup> See, e.g., K. Pichon, Letter to Editor, *The Autopsy on Terri Schiavo*, N.Y. TIMES, June 17, 2005, at A26 (noting that in light of an autopsy report suggesting that Michael Schiavo had not abused Terri, those "who threatened Terri Schiavo's husband, Michael Schiavo, for supposedly abusing his wife should be ashamed").

<sup>116</sup> See Wesley J. Smith, *supra* note 112 (noting facts about the Schiavo story generally unnoted in "establishment media" favoring Michael Schiavo).

family bonds to define him as a paradigmatic “bad” family member.<sup>117</sup> Advocates of modern values within family settings (choice, autonomy, and individuality) also pointed to Michael’s choices, however, and concluded that honoring those choices (and the choices Michael attributed to Terri) embodied concern with safeguarding autonomous individuality and equality in familial settings.<sup>118</sup>

## 2. *Terri’s Story, Abortion, and the Meaning of Personhood*

Although some voices in the debate about abortion have recommended avoiding questions about fetal and embryonic personhood,<sup>119</sup> those questions have often been central to the debate, at least since *Roe*.<sup>120</sup> In particular, many, if not most, pro-life adherents have assumed that embryos enjoy the same ontological status as babies.<sup>121</sup> Moreover, many pro-lifers have portrayed embryos and fe-

<sup>117</sup> See, e.g., Margeryaz Eagan, *A Life and Death Battle*, BOSTON HERALD, Mar. 22, 2005, at 16.

<sup>118</sup> *Id.*

<sup>119</sup> Some commentators have argued that because presumptions about fetal and embryonic personhood resist proof, abortion should be permitted in the name of liberty and choice. See, e.g., Francis J. Beckwith, *Thomson’s “Equal Reasonableness” Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185, 196 (2004) (citing and quoting Judith Jarvis Thomson, *Abortion: Whose Right?*, 20 BOSTON REV. (1995), available at <http://bostonreview.net.edu/BR20.3/thomson.html> (last visited July 17, 2006)). Thomson explained:

One side says that the fetus has a right to life from the moment of conception, the other side denies this. Neither side is able to prove its case. . . . [W]hy should the deniers win? . . . The answer is that the situation is not symmetrical. What is in question here is not which of two values we should promote, the deniers’ or the supporters’. What the supporters want is a license to impose force; what the deniers want is a license to be free of it. It is the former that needs justification.

*Id.*

Similarly, Alison Jaggar argues that abortion should be allowed, but she largely elides conclusions about fetal or embryonic personhood. Alison M. Jaggar, *Regendering the U.S. Abortion Debate in ABORTION WARS*, *supra* note 42, at 339. She writes:

[Michael] Tooley [in his 1972 article, *Abortion and Infanticide*] focused on the fetus and its moral status, ignoring the pregnant woman; I focused on the pregnant woman, virtually ignoring the fetus except to assume that its right to life was not so strong that abortion was always morally prohibited.

*Id.* at 340 (citing Michael Tooley, *Abortion and Infanticide*, 2 PHILOS. & PUB. AFF. 37 (1972)).

<sup>120</sup> In deciding *Roe v. Wade*, the Court concluded that American law never viewed fetuses as people entitled to legal rights (noting that if the state of Texas was correct in asserting that the fetus is a person, then “the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Constitution]”). 410 U.S. at 156–57 (1973).

<sup>121</sup> See LUKER, *supra* note 23, at 228 (noting that pro-life “activism is premised on the deeply held belief that every embryo is a baby”). Since 1869, the Catholic Church has opined that ensoulment, and thus full personhood, commences at conception. See John T. Noonan, *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL*

tuses, at least in symbolic terms, as enjoying a special status because they are viewed as innocent and dependent.<sup>122</sup>

Pro-life advocates have attempted to sustain that vision in the context of the contemporary debate about embryonic stem-cell research.<sup>123</sup> So, for instance, when President Bush announced in May 2005 that he planned to veto a bill that would provide expanded federal funding for embryonic stem-cell research,<sup>124</sup> he appeared with over twenty families who had "adopted" embryos or provided embryos for "adoption" by others.<sup>125</sup> Bush declared: "Each of [these families] has answered the call to ensure that *our society's most vulnerable members* are protected and defended at every stage of life."<sup>126</sup> Bush's reference to embryos as "vulnerable members" of society was aimed at those compelled by the medical and scientific promise of embryonic stem-cell research. That promise had convinced even many pro-life adherents to support embryonic research.<sup>127</sup> And it was posing an increasingly significant obstacle to a pro-life agenda grounded in claims about fetal and embryonic personhood.

For pro-lifers seeking to illustrate the sanctity of vulnerable lives, Terri Schiavo's saga provided a propitious alternative to images of fetuses and embryos. Images of Terri as an attractive young woman, as well as the many video clips of the disabled Terri—collected by Terri's parents and aired on public media for months—concretized the personhood of someone without apparent cognitive function.<sup>128</sup> These images suggested that Terri's life and Terri's death could be equated with the life and death (through abortion or embryonic and fetal research) of embryos and fetuses.

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PERSPECTIVES 39 (John T. Noonan, Jr. ed., 1970); see also LUKER, *supra* note 23, at 140–41 (reporting that for pro-life adherents, *Roe* was "bizarre and unreal" because it took something "both fundamental and obvious—that the embryo was a human life as valuable as any" and made it "one opinion among several").

<sup>122</sup> LUKER, *supra* note 23, at 141.

<sup>123</sup> See *infra* notes 125–138 and accompanying text.

<sup>124</sup> H.R. 810, 109th Cong. (2005). The bill had been passed by the House and was under consideration in the Senate.

<sup>125</sup> Sharon Schmickle, *House Passes Stem Cell Bill; President Bush Says He'll Veto the Bill, Which Would Lift Research Limits on Embryonic Stem Cells*, STAR TRIBUNE, May 25, 2005, at A1.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., TERRI SCHINDLER SCHIAVO FOUND., *supra* note 72. The site, run by the Terri Schindler-Schiavo Foundation, now sports photographs of Terri throughout her healthy life—from infancy until just before her collapse. See <http://www.sacramentolifechain.org/schiavo.html> (last visited July 17, 2006) for videotapes of Terri Schiavo, described as showing her "responding to music," "glad to see her mom," and "opening her eyes, apparently to show that she understands what someone is saying to her."

Some commentators expressly identified Terri's personhood after she entered into a persistent vegetative state with that of a fetus. The website of The Cause USA quotes a young boy to have said on hearing Terri's story, "This is just like abortion on adults. . . ." <sup>129</sup> The Cause USA, a pro-life Christian group, <sup>130</sup> elaborated on the child's analogy by identifying Terri with a fetus. From the perspective of both those favoring abortion and those favoring withdrawal of Terri's feeding and water tubes, the site argued, a fetus and Terri are similarly viewed as "'unworthy' of life." <sup>131</sup>

For many pro-lifers, society's willingness to provide for abortion resembles its willingness to label Terri as "vegetative" <sup>132</sup> and to withhold food and water from her. Both abortion and Terri's death from the withdrawal of food and water are viewed by many pro-life adherents as the murder of vulnerable innocents—a desecration of what they have referred to as the "culture of life." <sup>133</sup> In this regard, Terri's story became compelling to pro-life supporters facing a society that seemed increasingly willing to permit embryo destruction in order to further stem-cell research. <sup>134</sup> As compared with embryos which cannot easily be *imagined* as people, Terri Schiavo's personhood was hard to deny, and her story encouraged powerful religious analogies: Michael Schiavo was compared, for instance, to Herod who wanted to kill Jesus; <sup>135</sup> police officers preventing protesters from entering the hospice where Terri resided were compared to Nazis who justified themselves by explaining they were merely

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<sup>129</sup> THE CAUSE USA, URGENT CALL TO ACTION, <http://www.thecauseusa.com/articles/Urgent%20Call%20to%20Action.php> (last visited Feb. 20, 2006).

<sup>130</sup> The group's website defines the group as a "grassroots movement of prayer and fasting" devoted to Jesus. The group identified its aims to include the creation of a more conservative judiciary and the banning of abortion. THE CAUSE USA, <http://www.thecauseusa.com/about/index.php> (last visited Apr. 25, 2006).

<sup>131</sup> See THE CAUSE USA, *supra* note 129.

<sup>132</sup> Carrie Gordon Earll, Senior Policy Analyst for Bioethics at Focus on the Family, concluded that Terri's saga instructed people "that the dehumanizing word 'vegetable' should never be applied to a human being, regardless of her condition." Carrie Gordon Earll, *Lessons I Learned from Terri Schiavo*, Focus on Social Issues, Apr. 28, 2005, <http://www.family.org/forum/fosi/bioethics/eoli/a0036340.cfm> (last visited July 17, 2006).

<sup>133</sup> See, e.g., William Yardley, *For Those Keeping Vigil, Prayers, Tears and Talk of Transformation*, N.Y. TIMES, Apr. 1, 2005, at A18.

<sup>134</sup> Less than two months after Terri's death, the House passed a bill providing for expanded federal funding of stem-cell research on embryos produced (but not used) in the context of fertility treatments. H.R. 810, 109th Cong. (2005).

<sup>135</sup> Yardley, *supra* note 134.

taking orders;<sup>136</sup> and Terri, herself (who died within a week of Easter), was openly compared to Jesus.<sup>137</sup>

### 3. *Terri's Story, Abortion, and Views About the Judiciary*

Alongside debate about the meaning of family and the ontology of personhood, the Schiavo story facilitated the elaboration of debate about the structure of government and the scope of judicial authority. As the story unfolded, it served as a new context for claims, especially by conservative, pro-life adherents, that a liberal American judiciary had overstepped its constitutionally prescribed bounds.<sup>138</sup> These claims reflected widespread concern among pro-lifers and among political conservatives more generally that in entertaining cases about abortion, reproduction, and family relationships, federal courts were arrogating tasks that the Constitution assigned to the legislative branch.<sup>139</sup>

The case provoked angry rhetoric about the failure of the courts to understand the constitutional order.<sup>140</sup> Tony Perkins, president of Family Research Council (identified as a conservative Christian group)<sup>141</sup> said the case "show[ed] just how much power the courts have usurped from the legislative and executive branches. . . . [The courts] now hold within their hands the power of life and death."<sup>142</sup> Spokesman for the Schindler family, Randall Terry, announced in late 2003 after the Florida legislature passed

<sup>136</sup> *Id.*

<sup>137</sup> John-Thor Dahlburg, *The Terry Schiavo Case; Protesters Try to Keep Faith*, L.A. TIMES, Mar. 25, 2005, at A17. Msgr. Thaddeus F. Malanowski, identified as a Catholic priest and as Terri Schiavo's chaplain, compared Terri to Jesus. *Id.* "Terri," he explained, "like [Jesus], is dying unjustly." *Id.*

<sup>138</sup> See, e.g., Sheryl Gay Stolberg, *The Schiavo Case: The Legacy; A Collision of Disparate Forces May Be Reshaping American Law*, N.Y. TIMES, Apr. 1, 2005, at A18.

<sup>139</sup> The claim was voiced soon after *Roe* by the liberal constitutional-law scholar John Hart Ely. Ely argued in 1973 (the year of the *Roe* decision) that the Court had exceeded its constitutional authority in *Roe*. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). Ely wrote:

Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life. And at bottom *Roe* signals the Court's judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion—indeed it is one with which I agree—but ordinarily the Court claims no mandate to second-guess legislative balances, at least not when the Constitution has designated neither of the values in conflict as entitled to special protection.

*Id.* at 923.

<sup>140</sup> See, e.g., Stolberg, *supra* note 138.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

“Terri’s Law,”<sup>143</sup> giving the governor the authority to supercede the state court’s ruling and order reinsertion of Schiavo’s nutrition and hydration tubes: “Finally, a governor and legislature had the courage to stand up to judicial despots because of an overwhelming call by the public.”<sup>144</sup> Several months later, Randall Terry explained on public radio that the “radical left has a death grip on the judiciary.”<sup>145</sup> The same theme dominated the proceedings of an April 2005 conference sponsored by the Traditional Values Coalition, a conservative inter-denominational church organization.<sup>146</sup> The conference, “Confronting the Judicial War on Faith,” featured a number of speakers who linked the death of Terri Schiavo to an immoral judiciary.<sup>147</sup> House majority leader Tom DeLay (R.-Tex.), who had blamed federal court judges for failing to order the reinsertion of Schiavo’s nutrition and hydration tubes,<sup>148</sup> explained that a judiciary “run amok” also bore responsibility for inventing the right to abortion and for prohibiting prayer in public schools.<sup>149</sup> These are just a few of the many claims voiced in the context of Schiavo’s case about the judiciary’s failure to accede to its constitutionally prescribed borders.

Yet, the rhetoric that blamed liberal, activist courts for Terri Schiavo’s death—and thus, it seemed, for an encroaching “culture of death” more generally—was largely unsupported by the facts. On the whole, the judges involved in the case were not liberals,<sup>150</sup>

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<sup>143</sup> H.B. 35-E (Fla. 2003).

<sup>144</sup> Abby Goodnough, *Victory in Florida Feeding Case Emboldens the Religious Right*, N.Y. TIMES, Oct. 24, 2003, at A1. Terry was referring to the Florida legislature’s passage of Terri’s Law, *supra* note 144, and Governor Jeb Bush’s consequent executive order mandating reinsertion of Schiavo’s feeding tube (Oct. 2003), Exec. Ord. No. 03-201, Fla. Governor’s Office (Oct. 21, 2003) *supra* note 97.

<sup>145</sup> *All Things Considered: Struggle by Religious Conservatives to Overcome What They See as Judicial Tyranny Regarding Their Social Agendas* (NPR radio broadcast Dec. 23, 2003).

<sup>146</sup> TRADITIONAL VALUES COALITION, CONFRONTING THE JUDICIAL WAR ON FAITH, <http://www.traditionalvalues.org/modules.php?sid=2195> (last visited July 17, 2006).

<sup>147</sup> *Id.* The website listed speakers at the conference to include Congressman Tom DeLay, Senator Sam Brownback, Phyllis Schlafly, and former Alabama Chief Justice Roy Moore, among others. *Id.*

<sup>148</sup> Samantha Levine, *DeLay Charges Left Unduly Influences Supreme Court; House Majority Leader Keeps Heat on Federal Bench*, HOUS. CHRON., Aug. 15, 2005, at A4.

<sup>149</sup> Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21.

<sup>150</sup> See Dana Milbank, *GOP, Democrats Look for Symbolism in Schiavo Case*, WASH. POST, Apr. 1, 2005, at A12. For instance, Judge Greer, the Florida judge who ordered removal of Schiavo’s nutrition and hydration tubes, is identified as a “low-key conservative Christian, a Republican, a family man, a dog lover.” Cynthia Tucker, *Religious Extremists Aim to Put Their Own ‘Activist Judges’ on the Bench*, BALT. SUN, Apr. 4, 2005, at 13A. Moreover, Judge



and moreover, their decisions were not particularly activist.<sup>151</sup> That these judges were blamed by some pro-life adherents for Schiavo's death reflects the importation of assumptions from the abortion debate into the center of another debate about end-of-life decision-making for patients not able to make their own choices.

#### IV. CONCLUSION

Public response to Terri Schiavo's story facilitated construction of this new context within which society has been able to extend debate about questions that have long been central to the debate about abortion. This new context serves pro-life adherents in particular. As developments in molecular biology<sup>152</sup> have altered social understandings of the embryo, the ideological moorings of the pro-life agenda have begun to crumble.<sup>153</sup> The Schiavo story, focusing on the victimization of an incompetent dying woman (rather than a fetus or embryo), facilitates discourse about family morality and personhood. Yet, this focus elides the challenges that the promise of embryonic stem-cell research poses to pro-life assumptions about the ontological status of fetal and embryonic life. In short, the public development of Terri Schiavo's story has provided a new setting

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Birch, appointed to the Eleventh Circuit by the first President Bush and identified as a conservative judge, wrote a concurrence in *Schindler v. Schiavo*, 404 F.3d 1270, 1271 (11th Cir. 2005) (denial of rehearing *en banc*) in which he concluded that Congress violated the Constitution in providing for the Schindlers to appeal the Florida courts' decisions in federal court. Judge Birch wrote:

A popular epithet directed by some members of society, including some members of Congress, toward the judiciary involves the denunciation of "activist judges." Generally, the definition of an "activist judge" is one who decides the outcome of a controversy before him or her according to personal conviction, even one sincerely held, as opposed to the dictates of the law as constrained by legal precedent and, ultimately, our Constitution. In resolving the Schiavo controversy it is my judgment that, despite sincere and altruistic motivation, the legislative and executive branches of our government have acted in a manner demonstrably at odds with our Founding Fathers' blueprint for the governance of a free people—our Constitution. Since I have sworn, as have they, to uphold and defend that Covenant, I must respectfully concur in the denial of the request for rehearing *en banc*.

404 F.3d 1270, 1271 (11th Cir. 2005) (denial for rehearing *en banc*) (Birch, J., concurring).

<sup>151</sup> See Milbank, *supra* note 151.

<sup>152</sup> See *supra* notes 1–2, 49, and accompanying text.

<sup>153</sup> The promise of embryonic stem-cell research to devise cures for heart disease, cancer, spinal cord injuries, and other serious conditions has made it more complicated for pro-life adherents to sustain arguments about the sanctity of embryonic life in reproductive contexts. See discussion of the promise of embryonic stem-cell research, *supra* notes 51–59, 121–22 and accompanying text.

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that facilitates an old debate. Here, as in the abortion debate, society ponders, and then variously reinforces or reshapes, its deepest assumptions about Self, Other, and the relationships that join them.

