

Inside the Terri Schiavo case: And why it matters now

By Anita Crane
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People still talk about the Terri Schiavo case. But in thinking of her death sentence, often someone says, "I wouldn't want to live like that!" Well, no one longs for a brain injury, yet it could come upon anybody. No matter where you stand on the issue, this eyewitness account will help you understand what happened to Terri Schiavo and why it was a tragic violation of her constitutional rights.

Attorney Robert Destro represented Florida Governor Jeb Bush (R) as well as Terri Schiavo's parents, Bob and Mary Schindler, in the legal case. From 1983 to 1989, he served as a commissioner on the U.S. Civil Rights Commission and led its discussions regarding discrimination on the basis of disability, national origin and religion. Now he's a professor at the Catholic University of America's Columbus School of Law in Washington, D.C. Destro joined Terri's case as advisor to Kenneth Connor, lead counsel in *Bush v. Schiavo*. While the governor's office paid his travel expenses to the Florida Supreme Court, all Destro's work on behalf of Terri was done pro bono.

"The degree of disconnect between the description of the Terri Schiavo case in the media, and the reality of the case, is pretty profound," said Destro. "The laws of Florida were perfectly adequate, but the courts construed them in ways that cut away most of the protection they offer to incompetent patients like Terri. The Schindlers are wonderful people who have endured a trauma that nobody should ever have to endure. They and Terri were victims of a great injustice and needed help."

Never mind the law

"Judges are supposed to determine clear and convincing evidence in light of the whole, but the problem with Terri's case was that the evidence was only as good as the judges," said Destro. "Our task in the U.S. Supreme Court was not to re-litigate the underlying case about her condition. It was to convince them that the case in which her condition was established should be reconsidered with a new trial because of the procedural and substantive flaws that led to the conclusions reached by Judge George Greer."

In *Bush v. Schiavo* petitions to the Florida and U.S. Supreme Courts, Destro emphasized what he referred to as Greer's illegal position of simultaneously acting as Terri's judge and surrogate guardian. "It was absolutely forbidden," Destro stressed. "A judge is a fact-finder and decision-maker. His job is to identify the law, hear the facts and decide the case. A surrogate stands in the shoes of the incompetent person and makes decisions on his or her behalf. A guardian ad litem is the legal representative of the incompetent person. This person bears the responsibility to argue on behalf of the client alone — without regard to the wishes or needs of others."

Destro added, "Florida law expressly requires probate judges to see the incompetent patients whose cases are pending before them, but Greer never went to see Terri."

How did this go unchecked? According to Destro, "The appeals court does not look at the full record. They only look to see if the judge made any obvious mistakes. And if he hasn't made any obvious mistakes, any clear errors, then they let it go. That standard of reviewing cases on appeal makes it very important that the process be absolutely perfect. All the parties, the attorneys and the guardians and everybody, have got to be doing exactly everything just right."

Even so, Barbara Weller of the Gibbs Law Firm (currently representing the Schindlers) said Greer's breaches took place under 2nd District Court of Appeal Judge Christopher Altenbernd starting with his Jan. 24, 2001 ruling on *In re: Guardianship Theresa Marie Schiavo; Robert and Mary Schindler v. Michael Schiavo*. Then during his tenure as chief judge, Altenbernd's opinions show persistence in ordering Greer's abuse of power (*In re: Guardianship Schiavo*, June 6, 2003 and March 16, 2005).

Furthermore, the Destro-Connor petitions indicate that the judges' ethical and legal violations were so numerous and intertwined; it would take volumes to spell out the details.

Destro explained, "You can't really make up facts of this case — I felt like I was caught in Wonderland or Neverland. Terri never got a fair hearing and [she] was entitled to at least as much due process as a convicted murderer; Gov. Bush is obliged, as chief executive of the state of Florida, to protect the weak and vulnerable; Terri's Law [H.B. 35 E] was designed to ensure that she got a fair hearing at which the actual substance of her condition could be litigated; and the federal courts were obliged to review the procedural and substantive fairness of the Florida proceedings."

Nevertheless, on May 6, 2004 the governor lost *Michael Schiavo v. Jeb Bush* when Pinellas Circuit Judge W. Douglas Baird ruled Terri's Law unconstitutional.

Therefore the governor appealed to the Florida Supreme Court with *Bush v. Schiavo*, but Destro was ambushed in trial on Aug. 31, 2004 as Chief Justice Barbara Pariente set the stage: "And before you get into your argument, the court would appreciate it if, in your order, that you would address the separation of powers argument first, before the privacy argument, and then with whatever remaining time, you're free to argue the other issues."

Destro replied: "Thank you, Your Honor. May it please the court. Terri Schiavo did not have the benefit of an independent advocate in any relevant time before or during the [indiscernible upon interruption by Justice Charles Wells]."

And so it went. The imperiled person was irrelevant; thus Destro was banned from stating the case. After all, judges possess the power to stifle testimony.

The trial video and Pariente's opinion are online.¹ On the false premises of reclaiming Terri's so-called rights to privacy and self-determination from the clutches of an unfettered governor, the chief justice followed her predecessors with the full court's consent. In her Sept. 23, 2004 "Corrected Opinion," Pariente quotes Altenbernd: "Since 1990... [Theresa] has had numerous health problems, but none have been life threatening" (*In re: Guardianship Schiavo*, Jan. 24,

¹ http://www.FloridaSupremeCourt.org/pub_info/Schiavo/index.shtml

2001). Then Pariente brings it to a dramatic climax stating: "Our hearts can fully comprehend the grief demonstrated by Theresa's family members on this record. But our hearts are not the law. What is in the Constitution always must prevail over emotion."

If only the Florida Constitution had prevailed over their hearts. But all was not lost because, as Destro and Connor wrote, the U.S. Constitution's 14th Amendment obliges Gov. Bush and the federal powers to protect innocent citizens like Terri Schiavo.

Trials and tribulation

After the Florida justice system failed Terri, Destro and Connor filed *Bush v. Schiavo* at the U.S. Supreme Court on Dec. 1, 2004. It was distributed for a full-court review Jan. 5, 2005 and was denied without comment on Jan. 24. Destro then joined David Gibbs in representing the Schindlers.

"The more unique a case is, the less likely it is the court will hear it and we knew we needed to have a tool. About the middle of January, one of my colleagues called and said 'I think we need to get Congress to pass a statute. And so we'll have a meeting in early February.' And we all sat around in a very little dinky conference room and everybody agreed and of course the next question was, 'Who's gonna volunteer to write it?' And nobody said anything, and they all just looked at me. So I wrote the original draft."

Destro wrote the bill as an amendment to federal habeas corpus law, which says a writ may be issued to bring a party before a court or judge, thus having as its function the release of the party from unlawful restraint. However, that brought up death-penalty politics and some lawmakers feared it could result in too many appeals by convicted murderers. Therefore, S. 686 was written more broadly; but still there were clashes in Washington.

"The thing that saved us was the influence and intervention of the disability rights groups," said Destro. Consequently, some unlikely allies worked behind the scenes to save Terri. Destro believes that the bill wouldn't have passed without support from Senators Tom Harkin (D-Iowa), Ted Kennedy (D-Mass.) and Arlen Specter (R-Pa.).

"My experience in civil rights teaches me that it makes no difference that some civil rights advocates are pro-choice," said Destro. "If our goal is to protect and preserve the rights of vulnerable persons, we must put those vulnerable persons first and try as best we can to understand the needs and wants of those whom we are trying to protect. [But sometimes] we fail in our duty to the extent that we are unwilling or unable, for whatever reason, to work with our political opponents on behalf of those whose lives society does not value. Terri Schiavo was one of those persons. There are many, many more like her."

As lawmakers debated, Destro and Gibbs filed the emergency petition *Schindler v. Schiavo* at the U.S. Supreme Court on March 17, 2005. Within hours, the full court reviewed and denied it without comment, thus Terri's nutrition and hydration were withdrawn on March 18.

March 21, 2005, President Bush announced, "Today I signed into law a bill that will allow federal courts to hear a claim by or on behalf of Terri Schiavo for violation of her rights." The president

praised bipartisan cooperation in passing the bill and concluded, "I will continue to stand on the side of those defending life for all Americans, including those with disabilities."

"There were a lot of bad feelings as a result of the way [the bill] went through, I was just ecstatic that it went through," said Destro. "When we [had] filed the first case in habeas corpus, it was clear the judge didn't read the case because he said, 'She's not a person in custody.' And of course she was, under the relevant case laws. He [told us] you lost this case in the state courts, so you can't have a second bite at the apple."

After S. 686 was law, the Gibbs-Destro team opted for another judge. "When we showed up in federal court the day after, we expected it was gonna be a lot easier." In short, Judge James Whitmore said that Terri was already off the feeding tube, so he "cross examined" them asking how they would prove point after point. Destro said that's standard procedure for temporary restraining orders, but this was an emergency. "And," Destro stated, "we would say on each occasion, 'Well, we've got these witnesses right here and all we need to do is swear them and put them on the stand and they will testify.' And he said, well, I'm just getting a sense of the case — and six hours later, [we] get an opinion, [we] can't prove [the] case."

The Florida Supreme Court denied appeal and Gibbs made one last plea to the U.S. Supreme Court on March 30, 2005. Within hours, the court reviewed and denied the case without comment. Terri died the next day.

Destro credits Gov. Bush with initiating the state's noble efforts such as Terri's Law, *Bush v. Schiavo* and the rescue attempts by Florida's Department of Children and Families. On the latter he remarked, "Whatever the governor's office was planning to do was thwarted by the press conference and a series of mistakes by a number of otherwise well-meaning people." Destro also stated that opposing forces were "very powerful," but refused to comment further.

On May 24, 2005 Gov. Bush signed into law Florida H.B. 523. Effective July 1, it "repeals provisions relating to testimony of interested persons regarding oral communication with a deceased or mentally incompetent person; provides a hearsay exception in specified actions or proceedings for a statement made by a declarant who is unavailable due to death, illness or infirmity regarding the same subject matter as a statement made by the declarant that was previously offered by an adverse party and admitted."

This was news to Destro who hasn't had a chance to fully consider the law. He continues advising the Schindlers through the Gibbs Law Firm.

Good counsel

How can we prevent another Terri Schiavo tragedy? In addition to preparing a written advance directive such as American Life League's "Loving Will"² for yourself and family members (in Canada, see the Euthanasia Prevention Coalition's Power of Attorney for Personal Care³), consider Destro's public policy counsel.

² To obtain a free "Loving Will," visit www.ALL.org/LovingWill/.

³ <http://www.LifeSite.net/ldn/2005/mar/05033109.html>

Destro believes pro-lifers lost Terri's case in the court of public opinion because of "a very slick public relations campaign by the pro-death side and a very inept campaign on the pro-life side." He said, "The most important questions relate to the perceived insularity of pro-life advocates and this complicates our life enormously when it comes to important issues like the appointment of judges. We are, wrongly in my view, seen as 'anti-civil rights,' and that is our fault, not theirs."

Unlike those who discriminated against Terri, Destro said, "We need to come to grips with our own fears of mental disability, whether from trauma, old age, HIV/AIDS dementia or any other brain injury. The visibility of Terri's case is the exception, not the rule. Euthanasia is already being practiced, and withdrawal of food and fluids is a common practice. This is happening every day. We need to understand that families like the Schindlers exist all over this country and the system isn't designed to help them to care for their loved ones at home. Had that been possible, this case might have had a different outcome."

Destro recommends that pro-lifers form a broad-based coalition with disability rights groups. He said, "Pro-life groups are going to have to try to understand the perspectives of disability groups. Unless they do, there will be no conversation and no coalition. Pro-life groups should be more strategic in their thinking and more prudent in their public image. A little humility goes a long way. A lot of hubris will destroy a good case."

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