

IS THE RIGHT TO PRIVATE PROPERTY MORE SACRED THAN THE RIGHT TO LIFE? THE CASE OF TERRI SCHIAVO

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INTRODUCTION

A. *Law and Philosophy*

Law is inextricably linked to philosophy. Despite this fact, legal practitioners and judges have perennially downplayed the importance of philosophy. Centuries ago, Cicero even observed that the legal practitioners of his day carried on their studies of the civil law “only far enough to accomplish their purpose of being *useful* to the people.”¹ Cicero, therefore, deemed it necessary to examine the civil law “along somewhat broader lines than the practice of the courts call[ed] for.”² In reflecting on the law, Cicero affirmed that it is not derived from the “praetor’s edict” or the “Twelve Tables,” but from “the deepest mysteries of philosophy.”³ Hence, although Cicero rightly observed that courts do not consider philosophy in an explicit manner when reaching a judicial decision,⁴ he would agree that at the heart of any law mandated by the judiciary is an underlying philosophy that justifies its existence.

Though our legal system has progressed since the time of Cicero, the importance of inquiring into the philosophical roots of the civil law is as important as ever. Carrying on in his spirit, therefore, this

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1. CICERO, LAWS, Book I, *in* THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 42, 43 (Clarence Morris ed., 1959) (emphasis added).

2. *Id.*

3. *Id.*

4. *See id.*

note will explore the “broader lines” of the law that often are not considered by today’s judges and legal practitioners. Specifically, the note will provide a philosophical critique of the law governing the well-known case involving a disabled Florida woman named Terri Schiavo.

B. *The Case of Terri Schiavo*

In 1990, for reasons that remain unknown, Terri collapsed in her Florida home, causing her to suffer from a profound cognitive disability.⁵ After her collapse, a long legal battle ensued between her guardian, who advocated for Terri’s so-called “right to die,” and her parents, who fought for her right to life.⁶ The law governing her case provided that if there was clear and convincing evidence that persons in her disabled condition would not want to continue living, they could be starved to death.⁷ In Terri’s case, her husband, whose motives were in question, offered evidence of casual conversations and indefinite statements that were accepted as clear and convincing evidence that Terri would not want to continue living.⁸ After over ten years of litigation, on March 31, 2005, her husband won and Terri expired via death-by-starvation.⁹

In considering the current state of the law and the facts of this case, it is perplexing that an individual can relinquish her right to *life* through casual conversation and indefinite statements, while that same individual must clear a much higher legal threshold in order to relinquish an interest in real *property*. This note considers this paradoxical enigma and concludes that it exists because of the philosophies that prevailed at the time the laws were created.

5. See *In re Guardianship of Schiavo*, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001). For a timeline and other information concerning the events of Terri’s life, see Terri Schindler-Schiavo Foundation, *A Comprehensive Timeline and Archive of the Terri Schindler-Schiavo Case* (2004), at <http://www.terrifight.org/timeline.html> (on file with the Ave Maria Law Review) [hereinafter Terri’s Foundation]. For a good summary of the procedural history of the Terri Schiavo case up to September 2004, see *Bush v. Schiavo*, 885 So. 2d 321, 324-28 (Fla. 2004).

6. See Terri’s Foundation, *supra* note 5.

7. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

8. See *Schiavo*, 780 So. 2d at 180 (holding that the trial judge had clear and convincing evidence). For a description of some of the evidence upon which the trial court based its decision, see Karla Dial, *What Terri’s Taught Us*, FOCUS ON THE FAMILY CITIZEN, Jan. 2004, at 23, available at <http://www.family.org/cforum/citizenmag/features/a0029484.cfm> (on file with the Ave Maria Law Review).

9. Terri’s Foundation, *supra* note 5.

Property law, rooted in the common law, arose out of a natural law jurisprudence, while the law governing end-of-life issues, such as those applicable to the *Schiavo* case, was the product of a rejection of the natural law in favor of a jurisprudence based upon modern philosophies such as relativism, "selfism,"¹⁰ and utilitarianism. Ultimately, the enigma exists because of the different ways that natural law philosophy and modern philosophies view the human person: the natural law views human life as highly valuable in itself and worthy of great protection, while many modern philosophies view human life as valuable only insofar as it is enjoyable and productive of personal fulfillment.

This note begins, in Part I, by explaining the facts of Terri's case and the legal battle that ensued after her collapse. It then demonstrates the problems inherent in the law governing her case. Part II details the steps necessary to formally relinquish a right in real property through the American settlement process. Part III examines the prevailing philosophies underlying the jurisprudences of property and end-of-life issues by explaining the natural law tradition upon which property laws are founded and contrasting the natural law tradition with the modern philosophies which undergird the laws pertaining to life issues. This section also closely examines *In re Guardianship of Browning*,¹¹ the case on which the *Schiavo* decision is based.¹² Part IV applies natural law principles to the case of Terri Schiavo and explains the reason for the legal enigma considered in this paper. Finally, Part V evaluates model legislation that has been proposed by the National Right to Life Committee for situations similar to the Schiavo case and concludes that, although the legislation would help to restore natural law thinking to the law when dealing with life issues, it does not go far enough in doing so.

10. See PAUL C. VITZ, *PSYCHOLOGY AS RELIGION: THE CULT OF SELF-WORSHIP* 32-33 (2d ed. 1994) (explaining that the term "selfism" describes the philosophy that exalts personal autonomy over the objective morality of an action).

11. 568 So. 2d 4 (Fla. 1990).

12. In this article, "Schiavo case" will denote Terri Schiavo's situation in general (not a court opinion). Please also note that there are many court opinions on which the ultimate decision to remove Terri's nutrition and hydration is based. When I refer to "the *Schiavo* decision" in this note, I incorporate all such opinions.

I. RELINQUISHING THE RIGHT TO LIFE: THE CASE OF TERRI SCHIAVO

Under Florida law, a disabled citizen like Terri Schiavo, who is unable to communicate her present intention, forfeits her legal right to life if her guardian can demonstrate by “clear and convincing” evidence that the disabled individual would have chosen to forfeit her right to life herself.¹³ In Terri’s case, the judge found that casual conversation occurring before 1990 between Terri and her husband (and guardian) Michael Schiavo was evidence clear and convincing enough to justify the removal of Terri’s nutrition and hydration.¹⁴ Terri’s plight was not uncommon; there are many disabled citizens unable to make their own medical decisions who are starved to death each year because courts are convinced by indefinite statements and casual conversations that a disabled citizen would approve the guardian’s decision to end her life. Terri’s case, in particular, has received the attention of the media because of the conflict within her family and the allegations that her guardian was placing his own interests before those of Terri. It is this alleged disloyalty that makes Terri’s case an illustration of the problems inherent in allowing such a low threshold of proof.

A. *Current Law Regarding Disabled Persons Unable to Make Their Own Medical Decisions*

The decision to remove nutrition and hydration from Terri Schiavo essentially rests on two points of law: 1) pursuant to an individual’s right to privacy, as provided under the Florida Constitution, an individual possesses the right to elect the removal of his nutrition and hydration;¹⁵ and 2) when an individual is “incompetent” and unable to make the decision whether or not to forego such sustenance, a proxy may make the decision on behalf of that individual if the proxy can demonstrate with clear and convincing evidence that the individual personally made that treatment decision prior to his incapacitation.¹⁶

13. See *In re Guardianship of Schiavo*, 800 So. 2d 640, 645 (Fla. Dist. Ct. App. 2001); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 284 (1990).

14. See *Dial*, *supra* note 8, at 24.

15. See *In re Guardianship of Schiavo*, 792 So. 2d 551, 554, 564 (Fla. Dist. Ct. App. 2001).

16. *Id.*; see also *Cruzan*, 497 U.S. at 284.

To support the first point of law, the *Schiavo* court¹⁷ relies on the Florida Supreme Court case of *In re Guardianship of Browning*, which permitted the removal of nutrition and hydration from an individual in a persistent vegetative state.¹⁸ The second point of law derives from *Cruzan v. Director, Missouri Department of Health*.¹⁹ Although the published *Schiavo* opinions do not mention their reliance on *Cruzan*, it is that case which gives the court the authority to decide for Terri that she would have elected to cease life-prolonging procedures. In *Cruzan*, the Supreme Court announced that a proxy could not decide to make such an election on behalf of an "incompetent" individual unless "clear and convincing" evidence existed to show that the individual would have personally chosen that same treatment decision.²⁰ In theory, it would seem this standard enunciated by the Court would create a high threshold of proof. On the contrary, in *Cruzan*, as in the *Schiavo* cases, this rule when applied by the trial courts proved to be a very low threshold indeed. After the Supreme Court announced its decision in *Cruzan* and the case was remanded to the trial court, the trial judge heard testimony of Nancy Cruzan's friends stating that before Cruzan became incompetent, Cruzan had "told them that if she was ever like Karen Ann Quinlan [a woman in a persistent vegetative state], she didn't want to be tube fed."²¹ The trial court ruled that this constituted clear and convincing evidence to justify the removal of hydration and nutrition and, ultimately, the termination of Cruzan's life.²² In a similar fashion, evidence of statements made by Terri prior to her

17. There is not one opinion that finally decides that Schiavo will die. They all contribute in one way or another and all of them rest on the presupposition that the removal of nutrition and hydration is a permissible choice to implement. *See supra* text accompanying note 9. Thus, the reference here is simply to the *Schiavo* court. All of the courts involved rely on *Browning* to some extent.

18. *Schiavo*, 792 So. 2d at 554 (citing *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990)). In the *Browning* case, because Mrs. Browning had made her wishes clear in writing, the only question for the court to resolve was whether her desire to have hydration and nutrition removed could be implemented under Florida law. Although Terri's case is different in that her wishes are not in writing and are unclear, the judge nevertheless relied on the *Browning* decision to support his conclusion that Terri's nutrition and hydration could be removed.

19. 497 U.S. 261 (1990).

20. *Id.* at 284.

21. George J. Annas, *The "Right to Die" in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875, 884 (1996).

22. *Id.*

collapse were decisive factors in the *Schiavo* courts' decision to remove Terri's sustenance.

1. *In re* Guardianship of Browning: *Facts*

Although the Florida courts relied upon *In re Guardianship of Browning* in their decision to remove Terri's nutrition and hydration in October 2003 and later in March 2005, the facts in the *Browning* case differ from the facts of the Schiavo situation insofar as Mrs. Browning's wish to die appeared to be clear, while Schiavo's wishes were contested.

In *Browning*, the issue presented before the court was "[w]hether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube."²³ The patient, Estelle Browning, had suffered a stroke when she was eighty-six years old.²⁴ In 1985, approximately one year prior to the stroke, Browning executed a declaration stating:

If at any time I should have a terminal condition and if my attending physician has determined that there can be no recovery from such condition and that my death is imminent, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying.²⁵

Mrs. Browning also declared in writing that she did not want to have nutrition and hydration provided artificially.²⁶

After suffering the stroke, Mrs. Browning, like Terri Schiavo, became cognitively disabled. Although she was non-communicative, she was not comatose. She "'appeared alert and would follow [a visitor] with her eyes.' . . . A nurse testified that Mrs. Browning had attempted to say a word on a few occasions, although she conceded that the words had not been clear and the speech was garbled."²⁷

23. *Browning*, 568 So. 2d. at 7-8.

24. *Id.* at 8.

25. *Id.* (quoting Estelle Browning's living will) (quotation marks omitted).

26. *Id.*

27. *Id.* at 9 (quoting the medical evidence).

Mrs. Browning did not require the assistance of life-support, but she did receive artificial hydration and nutrition.²⁸ Two years after her stroke, Doris Herbert, Browning's guardian and second cousin, initiated legal action to implement Browning's 1985 declaration, which expressed her desire to have nutrition and hydration removed if she was ever in her present disabled condition.²⁹ Initially, at the trial court level, the judge ruled that because Browning's death was not imminent, the statute authorizing the removal of nutrition and hydration did not apply and Browning's apparent wish to die would not be honored.³⁰ Ultimately, however, the Florida Supreme Court decided in favor of the guardian,³¹ and Mrs. Browning presumably died from starvation over the course of one to two weeks.

2. *In re* Guardianship of Browning: *Holding*

At the heart of the Florida Supreme Court's decision to honor Mrs. Browning's declaration is what the court called her constitutional right to "self-determination."³² The court found its authority for recognizing this right in Article I, Section 23 of the Florida State Constitution, claiming that this provides an "explicit textual foundation" for the right to privacy.³³ The court claimed that the right of "[p]rivacy" has been used interchangeably with the common understanding of the notion of 'liberty,' and both [privacy and liberty] imply a fundamental right of self-determination."³⁴ According to the court, "[t]hese components of privacy are the same as those encompassed in the concept of freedom, and . . . are deeply rooted in our nation's philosophical and political heritage."³⁵ Inherent in the right to self-determination is the premise that "everyone has a fundamental right to the sole control of his or her person."³⁶ This right, said the court, is so important to the exercise of human freedom

28. *Id.*

29. *Id.* at 8.

30. *Id.* at 9.

31. *Id.* at 17.

32. *Id.* at 9.

33. *Id.* at 10. According to the *Browning* court, the fundamental right of self-determination is commonly expressed as the right of privacy. *Id.* at 9-10.

34. *Id.* at 9.

35. *Id.* at 10 (citation omitted).

36. *Id.*

that a “competent individual has the constitutional right to refuse medical treatment *regardless of his or her medical condition.*”³⁷ It is on this premise that the *Browning* decision rested.

B. *Questions Raised by the Circumstances of the Schiavo Case*

The *Browning* case differs from the *Schiavo* case in that Mrs. Browning’s wish to die appears to be clear,³⁸ while Terri’s wishes are abundantly unclear. In addition, there are other details about Terri’s case that raise doubts about the wisdom of the *Schiavo* decision and the jurisprudential assumptions upon which the decision rests.

Critics of Michael Schiavo, Terri’s husband and guardian, question his activity in the litigation that ensued after Terri’s collapse. On behalf of himself and Terri, Mr. Schiavo filed a medical malpractice suit.³⁹ Throughout the lawsuit, Mr. Schiavo said “he would care for [Terri] for the rest of her life, which, assuming proper care, would be a normal lifespan. He also presented at trial a medical-rehabilitation expert who had developed a plan to provide support for Terri to maximize her ability to respond to her environment.”⁴⁰ Mr. Schiavo’s testimony proved fruitful as a jury awarded approximately \$1,300,000, of which \$750,000 was to be used to rehabilitate Terri.⁴¹ One commentator stated, “Clearly, [the money] would not have been awarded if she didn’t want treatment and they were going to discontinue it.”⁴² After the money was deposited in the bank, however, Mr. Schiavo “ordered a do-not-resuscitate order placed on Terri’s chart” and “repeatedly denied her other forms of medical care, such as treatment for infections.”⁴³ He further ordered that Terri be denied stimulation, ceased efforts to rehabilitate her, and

37. *Id.* at 10 (emphasis added).

38. *See id.* at 8-9. Browning, however, may have changed her mind once faced with the reality of her own mortality. In the *Browning* case, the state argued that the court “should not permit the enforcement of Mrs. Browning’s expressed wish because we can never know whether Mrs. Browning may have changed her mind.” *Id.* at 13.

39. Wesley J. Smith, *Schiavo’s Date with Death*, NAT’L REV. ONLINE (Sept. 5, 2003), at <http://www.nationalreview.com/script/printpage.p?ref=/comment/comment-smith090503.asp> (on file with the Ave Maria Law Review).

40. *Id.*

41. *Id.*

42. Dial, *supra* note 8 (quoting John Kilner, President of the Center for Bioethics and Human Dignity).

43. Smith, *supra* note 39.

moved her from a nursing home to a hospice facility even though she was not terminally ill.⁴⁴ Whereas initially Mr. Schiavo had zealously advocated that he be awarded money to rehabilitate his wife, in 1997 his story changed completely when he claimed to recall that

after watching a movie about Karen Ann Quinlan—whose parents had to fight the state of New Jersey for the right to take her off a ventilator after she fell into a drug-induced coma—Terri said she'd never want to be hooked up to a "machine" or become a "burden." There was no written record of the conversation, so he produced two witnesses: his brother, and his brother's wife.⁴⁵

Accordingly, Mr. Schiavo initiated an action in the Florida courts to have Terri's nutrition and hydration removed.⁴⁶

Mr. Schiavo's conduct during litigation raises questions about his intentions, and there is further evidence that suggests that he may be implementing not Terri's will, but his own will. Carla Sauer Iyer, one of the nurses who cared for Terri during her stay in Palm Garden of Largo Convalescent Center stated the following about her experience with Michael Schiavo:

Throughout my time at Palm Gardens Michael Schiavo was focused on Terri's death. Michael would say, "When is she going to die?", "Has she died yet?" and "When is that bitch gonna die?" These statements were common knowledge at Palm Gardens, as he would make them casually in passing, without regard even for who he was talking to, as long as it was a staff member. Other statements which I recall him making include, "Can't you do anything to accelerate her death—won't she ever die?" When she wouldn't die, Michael would be furious.⁴⁷

Additionally, a former girlfriend of Mr. Schiavo's claimed that he was lying regarding Terri's wishes to be put to death, but said she would not testify because she was afraid of him.⁴⁸ Finally, only two months after Mr. Schiavo filed the motion to remove nutrition and hydration,

44. *Id.*; see also Terri's Foundation, *supra* note 5.

45. Dial, *supra* note 8.

46. See Terri's Foundation, *supra* note 5.

47. Affidavit of Carla Sauer Iyer ¶ 9, Schiavo v. Bush, No. 03-008212-CI-20 (Fla. Cir. Ct. Ded. 15, 2003) (on file with the Ave Maria Law Review).

48. Terri's Foundation, *supra* note 5.

still married to Terri, he announced his engagement to another woman with whom he has subsequently fathered two children.⁴⁹

From 2000 through August 2003, the litigation process had stalled the removal of Terri's nutrition and hydration. In early 2000, despite testimony from three doctors stating that Terri was able to swallow and from five doctors stating that she was not in a persistent vegetative state, the trial judge, Judge Greer, ruled Terri was in a persistent vegetative state and ordered that her nutrition and hydration be removed.⁵⁰ On appeal, the Florida Appeals Court affirmed the decision, while the Florida Supreme Court, a United States Federal District Court, and the United States Supreme Court all refused to review the decision further.⁵¹ In September 2003, Judge Greer finally scheduled the removal of Terri's hydration and nutrition for October 15, 2003.⁵²

Beginning in September 2003, motivated by the questions surrounding Michael Schiavo's loyalty to Terri and with the help of groups advocating against the starvation of the disabled, Terri's supporters inundated Florida Governor Jeb Bush with more than 160,000 letters and emails urging him to take action in defense of Terri.⁵³ At first, however, these pleas fell on deaf ears, as on October 15, 2003, nurses and doctors removed Terri's food and water, and the process of starvation commenced.⁵⁴ Finally, in response to the outpouring of support on Terri's behalf, on October 20, 2003,

49. *Id.*; see Smith, *supra* note 39.

50. Terri's Foundation, *supra* note 5.

51. *Id.*

52. *Id.*

53. Steve Bousquet, *How Terri's Law Came to Pass*, ST. PETERSBURG TIMES, Nov. 2, 2003, at 1B, http://www.sptimes.com/2003/11/02/State/How_Terri_s_Law_came.shtml (on file with the Ave Maria Law Review).

54. Terri's Foundation, *supra* note 5. Wesley J. Smith gives a neurologist's description of the starvation process:

A conscious person would feel it [dehydration] just as you or I would. They will go into seizures. Their skin cracks, their tongue cracks, their lips crack. They may have nosebleeds because of the drying of the mucus membranes, and heaving and vomiting might ensue because of the drying out of the stomach lining. They feel the pangs of hunger and thirst. Imagine going one day without a glass of water. Death by dehydration takes ten to fourteen days. It is an extremely agonizing death.

WESLEY J. SMITH, FORCED EXIT: THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER 59 (2003) (quoting Interview by Wesley J. Smith with Dr. William Burke (1996)).

Governor Bush introduced to the Florida Legislature “Terri’s Law,”⁵⁵ a law specifically tailored to Terri’s situation that would put a moratorium on starvation and dehydration deaths.⁵⁶ The bill passed on October 21, 2003, and Terri’s nutrition and hydration were restored.⁵⁷ That same day, Michael Schiavo initiated an action in a Florida circuit court challenging the constitutionality of Terri’s Law.⁵⁸ The circuit court found the law unconstitutional on a variety of grounds.⁵⁹ In October 2004, on appeal, the Florida Supreme Court held that the law violated the Separation of Powers Clause in the Florida Constitution and accordingly struck it down as “an

55. Terri’s Foundation, *supra* note 5.

56. The language of the act, chapter 2003-418, is as follows:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

- (a) That patient has no written advance directive;
- (b) The court has found that patient to be in a persistent vegetative state;
- (c) That patient has had nutrition and hydration withheld; and
- (d) A member of that patient’s family has challenged the withholding of nutrition and hydration.

(2) The Governor’s authority to issue the stay expires 15 days after the effective date of this act, and the expiration of the authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

Bush v. Schiavo, 885 So. 2d 321, 328-29 (Fla. 2004), *reh’g denied*, *Bush v. Schiavo*, 2004 Fla. LEXIS 1918 (Fla. Oct. 21, 2004) (finding the act unconstitutional).

57. NBC 6 News Team, *Lawyer Challenges Constitutionality of ‘Terri’s Law’: Husband, Father Trade Charges of Greed, Abuse*, Oct. 30, 2003, at <http://www.nbc6.net/health/2595672/detail.html> (on file with the Ave Maria Law Review).

58. *Schiavo*, 885 So. 2d at 328.

59. The circuit court found that Terri’s Law “was unconstitutional on its face as an unlawful delegation of legislative authority and as a violation of the right to privacy, and unconstitutional as applied because it allowed the Governor to encroach upon the judicial power and to retroactively abolish Theresa’s vested right to privacy.” *Id.*

unconstitutional delegation of legislative authority.”⁶⁰ The final removal, however, of Terri’s nutrition and hydration was stayed in order to allow attorneys to seek review of the case on appeal.⁶¹ After numerous appeals on Terri’s behalf, her attorneys eventually exhausted all possible options and in March 2005, the order to remove Terri’s feeding tube was enforced.⁶² Terri died on March 31, 2005.⁶³

The case of Terri Schiavo is indeed fraught with questions regarding whether Terri would have wanted to die and whether Michael Schiavo truly represented his wife’s interests. His activities raise the more important question of whether the law affords sufficient protection to the sacred right to life when it permits the relinquishment of that right through casual conversation attested to by an inconsistent, if not untrustworthy and unreliable, source. These difficulties have also brought to the forefront the question of whether society should ever passively euthanize an individual. These questions should give lawmakers pause and encourage them to consider why the law affords greater protection to a citizen’s stake in property than it does to the very lives of its citizens.

II. RELINQUISHING A LEGAL RIGHT IN PROPERTY: THE SETTLEMENT PROCESS

Unlike the right to life in the *Schiavo* case, a right in real property cannot be relinquished so easily. When a landowner contracts with a buyer for the sale of the property, before the transaction is complete, the parties must engage in a formal closing process. The closing of title is a process that takes several hours and involves “the execution and delivery of papers, the computation of the various adjustments, and the payment of the final balance due from one party to the other.”⁶⁴ Preparation for closing begins as soon as the contract of sale is signed by the respective parties. The first step in the process is to

60. *Id.* at 336. Because the Florida Supreme Court decided the case on the separation of powers issue, it did not reach the other constitutional issues that the circuit court had addressed, such as the right to privacy. *Id.* at 328.

61. Terri’s Foundation, *supra* note 5.

62. *Terri Schiavo Has Died*, at <http://www.cnn.com/2005/LAW/03/31/schiavo/index.html> (Mar. 31, 2005) (on file with the Ave Maria Law Review).

63. *Id.*

64. NELSON L. NORTH & DEWITT VAN BUREN, *REAL ESTATE TITLES AND CONVEYANCING* 261 (rev. ed. 1940).

order a title report in order to verify that the seller is the owner of record and to determine if there are any encumbrances on the property, such as judgments or liens, which need to be resolved before the sale is complete.⁶⁵ This is to ensure that the buyer of the property receives the property free and clear of impediments that could potentially threaten his legal claim to the property. In order to ensure that such impediments do not later arise, buyers normally purchase title insurance to protect against subsequent claims to the title or unknown encumbrances that may be later discovered.⁶⁶

Before the parties close, the property also must be inspected to ensure that anyone in possession of the property does not have a claim upon some right or interest in the property.⁶⁷ The inspection also ensures that the “premises are in the same condition on or about the date of closing title as they were at the time the contract was made.”⁶⁸ At the actual closing of title, a battery of formal documents must be executed, such as a deed, mortgage, bond, and insurance papers.⁶⁹

Additionally, the Statute of Frauds requires that contracts for the sale of land must be in writing, and that certain elements must be included in the writing.⁷⁰ First, the writing must include a legal description of the property being transferred.⁷¹ If necessary, a survey of the property is conducted to make absolutely certain that there is clarity as to what property the transfer encompasses.⁷² Second, the parties to the transaction must be described.⁷³ Third, there must be granting language or words demonstrating an intent to transfer the property.⁷⁴ Finally, the respective parties must sign the writing.⁷⁵

65. *See id.* at 262-64.

66. *See* EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 1073-75 (4th ed. 2000).

67. *See* NORTH & VAN BUREN, *supra* note 64, at 263.

68. *Id.*

69. *See id.* at 266.

70. *See* ROGER BERNHARDT & ANN M. BURKHART, *REAL PROPERTY IN A NUTSHELL* 271 (4th ed. 2000).

71. *Id.*

72. *See id.* at 401.

73. *Id.* at 271.

74. *Id.*

75. *Id.*

After closing is complete, the deed must be delivered.⁷⁶ Historically, manually handing over the signed deed to the grantee was necessary to complete the real estate transaction.⁷⁷ Currently, however, recording the deed in county land records constitutes legal delivery and completes the transaction.⁷⁸ After the closing, a memorandum called a closing statement is often created indicating exactly what took place at the closing. It includes “the date and place at which the title is closed,” “the names of the persons present at the closing,” “a detailed memorandum of all instruments delivered, and the disposition of fire insurance policies as well as the computation of [any] adjustments.”⁷⁹

The preceding is a general overview of what is required to sell a legal right in property to another party through the closing process. The specific requirements of the process, however, vary depending on the laws of the jurisdiction in which the property is located. Some jurisdictions require even more formalities to the closing process. For instance, in at least one state, it is necessary for certain settlement documents to be written in a specific size of font in order to ensure that the document can still be clearly read when faxed to a party.⁸⁰ The next section will examine the philosophy underlying these procedures.

III. THE PHILOSOPHICAL UNDERPINNINGS OF PROPERTY AND END-OF-LIFE JURISPRUDENCES

It is indeed enigmatic that one American citizen can relinquish her right to life by engaging in casual conversation, yet another American citizen cannot voluntarily relinquish a right in property without fulfilling the numerous formal requirements described above. The reason for this inconsistency in the law is due to the differing philosophies that reigned at the times the laws regarding these two issues were formulated. This section will analyze the philosophies that prevailed at the time of the formation of property laws, which are deeply embedded in the common law tradition. It will also analyze *In*

76. *See id.* at 270.

77. *See* RABIN ET AL., *supra* note 66, at 891.

78. *See id.* at 891-92.

79. NORTH & VAN BUREN, *supra* note 64, at 267-68.

80. *See* CAL. FIN. CODE § 4973(k)(1) (West 2004) (requiring a disclosure written in 12-point font or larger).

*re Guardianship of Browning*⁸¹ and unveil the philosophies behind the law justifying the removal of Terri's nutrition and hydration.

A. *The Natural Law*

The precepts of natural law philosophy are at the root of property law, whereas the law regarding end-of-life issues is derived from philosophies that seem hostile to the very idea of the natural law. A proper understanding of the natural law, then, is essential to an understanding of the difference between the jurisprudential foundations of property and end-of-life issues. Natural law philosophy maintains that there is an objective standard of right and wrong, which is knowable to man through reason.⁸² At the heart of natural law thinking is the notion that not only is man created by God, but that he is created in God's likeness. As a consequence, God has stamped, within man's nature, His eternal law, which is made manifest to man through his faculty of reason.⁸³

St. Thomas Aquinas made monumental contributions to natural law thinking in his *Summa Theologica* and the "Treatise on Law" contained therein.⁸⁴ Aquinas's work has become foundational to natural law philosophy. Professor Charles E. Rice, author of *50 Questions on the Natural Law*, summarizes Aquinas's definition of natural law as: "a rule of reason, promulgated by God in man's nature, whereby man can discern how he should act."⁸⁵ The natural law philosopher believes that through right reason man can enact laws that are in accord with his nature and with the Divine Law of God.⁸⁶

Aquinas describes how to apply reason in order to ascertain the objective "rightness" or "wrongness" of an action. He begins by describing the natural law as the light of natural reason, which allows man to discern good and evil.⁸⁷ He concludes that the first precept of

81. 568 So. 2d. 4 (Fla. 1990).

82. See CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 30-32 (rev. ed. 1999).

83. See *id.* at 51, 189.

84. THOMAS AQUINAS, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter *SUMMA THEOLOGICA*]. The "Treatise on Law" constitutes Part I-II, Questions 90-105 of the *Summa Theologica*.

85. RICE, *supra* note 82, at 51.

86. See *id.* at 33, 40.

87. See *SUMMA THEOLOGICA*, *supra* note 84, Part I-II, Question 94, Article 2.

the natural law is that “*good is to be done and pursued, and evil is to be avoided.*”⁸⁸ This rule is self-evident and is the rule upon which all other precepts are based, “so that whatever the practical reason naturally apprehends as man’s good (or evil) belongs to the precepts of the natural law as something to be done or avoided.”⁸⁹ Professor Rice explains the analysis provided by Aquinas in this way:

Because the good is to be sought and evil is to be avoided, and because the good is that which is in accord with the nature [of a thing], . . . the next question is: What is the nature of man? The essential nature of man is unalterable because it is a reflection of the unchanging divine essence. Saint Thomas says that “all those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.” The basic inclinations of man are five:

1. To seek the good
2. To preserve himself in existence.
3. To preserve the species
4. To live in community
5. To use his intellect and will—that is, to know the truth and to make his own decisions.

. . . From these inclinations we apply the natural law by deduction: Good should be done; this action is good; this action should therefore be done.⁹⁰

Aquinas thus provides a general framework from which one may ascertain whether an action is in accord with man’s nature, and thus, whether an action is good for man. William E. May says the following of these natural inclinations:

88. *Id.* (emphasis added).

89. *Id.*

90. RICE, *supra* note 82, at 52-53 (footnotes omitted).

[T]hey function as dynamic sources of our cognitive struggle to come to know what we are to do . . . if we are to act rightly. . . . These judgments of the practical reason are self-evidently true and are articulated in propositions or precepts that serve as starting points or principles for intelligent deliberation about human action.⁹¹

In applying Aquinas's framework to the right to own private property, one could deduce that the right is good for man because it assists him in seeking the good, specifically, in preserving himself in existence, in living in community, and in making his own decisions. Aquinas would conclude, therefore, that ownership of private property would be in accord with right reason.

B. *Property Jurisprudence*

1. *Common Law Rooted in Natural Law Principles*

Almost the whole of American property law has its roots in the English common law, which developed over hundreds of years and has *its* roots in a variety of sources. While its origin cannot rightly be attributed to a single person or place, there is a common source that pervades its development and history: natural law philosophy.⁹² Though there is not one common author of the common law, there is a common natural law philosophy that underpins it.

Natural law philosophy was prevalent throughout the period during which the English common law developed.⁹³ Many of the individuals throughout history who have written of the English common law and assisted in its development have spoken of its natural law roots.⁹⁴ Perhaps the most renowned of these writers is the English jurist William Blackstone. In his famous work, *Commentaries on the Laws of England*,⁹⁵ Blackstone compiles the common law into a readable and usable format. The popularity of the *Commentaries* in

91. William E. May, *The Natural Law and Objective Morality: A Thomistic Perspective*, in *PRINCIPLES OF CATHOLIC MORAL LIFE* 151, 166 (William E. May ed., 1981) (footnote omitted).

92. See RICE, *supra* note 82, at 36 ("Natural law ideas found later expression in the common law.").

93. See *id.* at 36-38.

94. See *id.*

95. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (William S. Hein & Co. 1992) (1765).

colonial America was largely responsible for the establishment of the common law in America today.⁹⁶ Within the *Commentaries*, Blackstone discusses the connection between the common law and natural law philosophy.

As Professor Robert D. Stacey writes, “Blackstone summarizes the rights of Englishmen in three grand, absolute rights: the right of personal security (life), the right of personal liberty (liberty), and the right of private property (property).”⁹⁷ Blackstone believes, according to Stacey, that the right to private property is the “core right that renders all other common law rights meaningful—life and liberty hold little value in the absence of property.”⁹⁸ Blackstone comments, however, that while many realize the import of property rights, few “give themselves the trouble to consider the original foundation of this right.”⁹⁹ Blackstone continues:

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that . . . there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as a matter of practice, but also as a

96. Robert D. Stacey refers to the *Commentaries* as “among the foundational canon of America” and states that the work was so popular in America that Edmund Burke, in a speech before the English Parliament, remarked that nearly as many copies had been sold in America as in England. ROBERT D. STACEY, *SIR WILLIAM BLACKSTONE AND THE COMMON LAW* 78-79 (2003).

97. *Id.* at 70.

98. *Id.*

99. 2 BLACKSTONE, *supra* note 95, at 2.

rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.¹⁰⁰

For these reasons, Blackstone deems it necessary to offer commentary as to the origin of the right to private property.

Under the common law and natural law philosophy, the right to own private property is sacred. An analysis of Blackstone's *Commentaries* reveals that its sacred character can be accredited on two grounds under the natural law: first, that property is a gift of the Creator God, with which man is entrusted and given dominion, and second, that the right to own private property accords with right reason and the nature of man.

2. *Property is a Gift of the Creator*

Property is a gift of the Creator with which man is entrusted and given dominion. Turning to the book of Genesis, Blackstone says the right to own private property is rooted in man's relation to God and that this relation is the only true foundation of the right: "In the beginning of the world, . . . the all-bountiful creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.'"¹⁰¹ From this premise, Blackstone concludes that the earth was the "general property of all mankind, exclusive of other beings, from the immediate gift of the creator."¹⁰² Hence, the right to private property is sacred because it was entrusted to man by God.

3. *Property Rights Accord with Right Reason*

Property rights are also sacred because they accord with right reason. In extracting the natural law principles from common property law, Blackstone does not explicitly apply Aquinas's analytical framework of basic human inclinations; however, he does view man's right to *life* and *liberty* as self-evident rights, which are similar to Aquinas's emphasis on man's inclination to *preserve himself* and *choose freely*. Moreover, Blackstone holds the right to

100. *Id.*

101. *Id.* (quoting *Genesis* 1:28).

102. *Id.* at 3.

private property in such great esteem because it protects these other sacred rights, or, in Aquinas's terminology, because it preserves these natural inclinations of man. In his *Commentaries*, Blackstone explains how these other rights are protected through private property rights and implicitly demonstrates how property rights help man in fulfilling his basic inclinations to the good.

Reason teaches that "without private property the individual man would lose much of his individuality and his independence. . . . [H]e therefore lacks the capacity for freedom of action which is an essential part of the complete life."¹⁰³ Blackstone expounds further on how one can deduce, through reason, the importance of the right to private property and the manner in which it has developed to ensure the protection of life and liberty. He says that, at first, when society existed "in a state of primaeval simplicity," the law of nature and reason made it acceptable for the right of possession to last as long as the act of possession.¹⁰⁴ In other words, as long as one made use of the land, one had the *right* to make use of it. "Thus the ground was in common, and no part of it was the permanent property of any man in particular."¹⁰⁵

When few lived on the earth, it was reasonable that all was in common among its inhabitants, and that all "took from the public stock to his own use such things as his immediate necessities required."¹⁰⁶ With the increase of mankind, however, Blackstone says, it was proper "to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used."¹⁰⁷ Otherwise, Blackstone states, "innumerable tumults [would] have arisen."¹⁰⁸ For instance, without private property, man would "lose the incentive to work."¹⁰⁹ As long as the land was held in common, man would not bear the trouble of erecting "habitations for shelter and safety, and raiment for warmth and decency."¹¹⁰ Blackstone observed that even other animals in creation "maintained a kind of permanent property in their

103. ARTHUR L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 113 (1953).

104. 2 BLACKSTONE, *supra* note 95, at 3.

105. *Id.*

106. *Id.*

107. *Id.* at 4.

108. *Id.*

109. GOODHART, *supra* note 103, at 113.

110. 2 BLACKSTONE, *supra* note 95, at 4.

dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them."¹¹¹ Even a young child had the natural instinct to "distinguish between those things which have been given to it or which it has in some way made its own."¹¹² Blackstone thus concluded that it was in accord with reason and nature that private property "was soon established in every man's house and home-stall."¹¹³

Because life is a gift of the Creator, and in light of what man can surmise through the application of right reason, it becomes clear that the right to own private property is a sacred right indeed. Any right that is so sacred as the right to property deserves the utmost protection of the law. Hence, it makes sense that in order to relinquish such a sacred right, the law requires a formal process of transfer. Just as the man who holds the office of president is protected with the highest degree of security, so is the sacred right to private property protected by the formalities of the closing process. It accords with reason, it makes sense; if something (or someone) is of high value, the law takes extreme measures to protect it properly. As the following sections shall demonstrate, Terri Schiavo's life is not afforded the same protections as private property because the law governing her case is not rooted in natural law philosophy, but rather in modern philosophies that fail to recognize the inherent worth and dignity of the human person and that distort the meaning of human freedom.

C. *End-of-Life Jurisprudence*

Common modern philosophies underlie each of the end-of-life cases we have discussed (*Browning*, *Cruzan*, and *Schiavo*). Because these philosophies are expressed most clearly in the *Browning* decision, the reasoning of the *Browning* court is the lens through which this note will examine the effects these philosophies have had on the law. An analysis of the modern philosophies underlying that decision will explain the enigma of why Terri Schiavo can effectively

111. *Id.*

112. GOODHART, *supra* note 103, at 113.

113. 2 BLACKSTONE, *supra* note 95, at 4.

relinquish her legal right to life by engaging in casual conversation with her husband, although one cannot sell a real property right without engaging in a formal closing process. The philosophies underlying end-of-life jurisprudence arose during the Enlightenment period and are a vast departure from natural law thinking. An examination of the *Browning* decision will reveal how many judges today adopt the philosophies of relativism, selfism, and utilitarianism. While each of these philosophies has wrought much change in the law, no change has been more profound than the effect on what it means to be a human person. During the reign of natural law jurisprudence, the right to life, like the right to hold property, was viewed as a sacred gift from the Creator to be cherished and protected at all costs. Compared to this view, the status of the human person today has been drastically diminished. This change in the human person's status is discussed in light of the philosophies behind *Browning* and is ultimately the answer to the legal enigma considered in this note.

1. *Relativism*

Perhaps the most essential difference between natural law philosophy and the philosophies espoused in *Browning* is a fundamental disagreement as to what man can know. Philosophers have always disagreed as to whether man is capable of knowing universal truth. In ancient Greece, Aristotle and Plato were some of the first to consider this issue.¹¹⁴ During the medieval period, Aquinas asserted Aristotle's "moderate realist" perspective that universals exist in the sensible world and that through the use of the intellect and senses, man can abstract the essence of things and reach an understanding of what is objectively true.¹¹⁵ Though Aquinas's view gained prominence during this period, adherence to it declined during other historical periods in favor of a nominalist and subjectivist perspective.¹¹⁶

"Anti-realist" philosophers all agree that universal truth is unknowable to man, but each has a different explanation as to why

114. See *Nominalism, Realism, Conceptualism*, in NEW ADVENT CATHOLIC ENCYCLOPEDIA, at <http://www.newadvent.org/cathen/11090c.htm> (on file with the Ave Maria Law Review).

115. See RICE, *supra* note 82, at 135-37.

116. See *id.* at 125-27.

this is so. Descartes, an Enlightenment thinker, defined an idea as that which we know.¹¹⁷ From this definition, he concluded that we cannot know universal truth nor anything outside of ourselves, but that we can know only our subjective states of mind.¹¹⁸ William of Ockham likewise attacked realism because he reasoned that without a common reality existing at the same time in two members of a species, universals could not exist.¹¹⁹ For example, “one individual thing can be annihilated without the annihilation or destruction of another individual thing.”¹²⁰ He concluded, therefore, that only individual things exist, and not universals.¹²¹ According to David Hume and John Stuart Mill, “[t]he notion, to which we lend universality, is only a collection of individual perceptions, a collective sensation.”¹²² Kant held that universal representations had no contact with external things, since the universal representations were produced exclusively by the mind and its structural functions.¹²³ Generally, the modern society has adopted the view of “anti-realist” philosophers. If, as the “anti-realists” assert, universals are unknowable to man, then man is incapable of applying his reason to make objective moral judgments and, therefore, such judgments are reduced to relative “value” judgments. This “anti-realist” philosophy of moral relativism is manifested in the *Browning* decision.

The *Browning* court cites the case of *Wons v. Public Health Trust*, in which Mrs. Wons, a Jehovah’s Witness, wished to refuse an emergency blood transfusion required to sustain her life.¹²⁴ The Florida District Court of Appeal in *Wons* concluded that Mrs. Wons had a right “to lead her private life according to her own *conscience*,” and so concluded that she could refuse this ordinary treatment and

117. *See id.* at 128-29.

118. *See id.*

119. *See* 3 FREDERICK COPLESTON, S.J., A HISTORY OF PHILOSOPHY 56 (1993).

120. *Id.*

121. *Id.* The “important point” for Ockham is that “no universal is anything existing in any way outside the soul; but everything which is predicable of many things is of its nature in the mind, whether subjectively or objectively; and no universal belongs to the essence or quiddity of any substance whatever.” *Id.* at 56-57 (quoting WILLIAM OF OCKHAM, I SUPER QUATTUOR LIBROS SENTENTIARUM SUBTILISSIMAE QUAESTIONES, 2, 8, Q (1495)).

122. *Nominalism, Realism, Conceptualism*, *supra* note 114.

123. *See id.*

124. *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990) (citing *Wons v. Pub. Health Trust*, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987)).

die.¹²⁵ According to Aquinas, the conscience is “an act of the faculty of the intellect” by which one can judge the moral rightness or wrongness of an action.¹²⁶ The conscience is developed by making “a practical judgment,” by reaching “a reasoned conclusion about [a person’s] duty.”¹²⁷ Under the natural law view, an examination of conscience would never have led to the outcome in *Wons*, because from the natural inclination to preserve oneself in existence, one can deduce that the blood transfusion would have been objectively good. Relativist thinking, however, produces a different outcome. Under such thinking, conscience is reduced to a mere act of the will. If man can only know his subjective state of mind, then there is no objective standard outside of himself that he can grasp or against which he can make sound moral judgments. As a consequence, everything is relative, including what man calls conscience, and one is bound by no moral law other than what man subjectively concludes for himself is moral.

Relativist philosophy is also revealed in the court’s failure to consider whether it is objectively right or wrong to grant Mrs. Browning’s wishes; instead, the court is solely concerned with ascertaining the *content* of her wishes, her subjective state of mind. The court states, “Because the only issue before the court is a determination of the patient’s wishes, challenges generally would be limited to that issue.”¹²⁸ Hence, the court premises its decision not on whether it is right or wrong to withdraw Mrs. Browning’s nutrition and hydration, but only on whether Mrs. Browning *thinks* it is right to cease such sustenance. This decision of the court not only indicates a pervasive relativistic philosophy, but it also demonstrates the *effects* of that philosophy: the exaltation of personal autonomy.

2. *Selfism and Modern Psychology*

When the Enlightenment view reduced *moral* judgments to *value* judgments, it thereby removed the objective quality of moral decision-making and replaced it with the individual’s own personal state of mind. When man is left to make moral decisions with no other device

125. *Wons*, 500 So. 2d at 687 (emphasis added).

126. PAUL J. GLENN, A TOUR OF THE SUMMA 66-67 (1960); see also SUMMA THEOLOGICA, *supra* note 84, Part I-II, Question 79, Article 13.

127. GLENN, *supra* note 126, at 66-67.

128. *Browning*, 568 So. 2d at 16.

but his own personal subjective state of mind, it makes sense that over time he comes to have an exalted view of himself. The *Browning* court's placement of the right of self-determination above the inherent value of human life is symptomatic of this exalted view of the self. The court goes to an extreme in expressing this view when it asserts, "The issue involves a patient's right of self-determination and does not involve what is thought to be in the patient's *best interests*."¹²⁹ The court reveals in this statement that it cares not for what in fact may be *best* for the patient, but is concerned only that Mrs. Browning's wishes be carried out regardless of whether they are in her best interest. The court would agree that to provide Mrs. Browning with what may be in her best interest would be an intolerant affront against her personal autonomy. Acting in such a manner would never happen in a modern court because, according to the prevailing view, one can never objectively ascertain what would be in one's best interest (relativism), and even if one could make such a determination, it would be improper to impose upon another's personal autonomy a moral judgment against the other's will (thus, the exaltation of personal autonomy).

While the roots of society's exalted view of personal autonomy may be traced to philosophical relativism, it is modern psychology that has marketed the idea and is responsible for its widespread acceptance in the culture. Paul Vitz, in his book *Psychology as Religion: The Cult of Self-Worship*, explains that this exalted view of personal autonomy became prevalent in America due to modern psychology's "general concern with the self found in so many psychological theories."¹³⁰ The aim of such theories is self-actualization, or the "fulfillment of one's full potential."¹³¹ Self-actualization involves "1) the [individual's] discovery and understanding of the archetypes (i.e., structures and desires) in his or her collective and personal unconscious and 2) the interpretation and expression of these archetypes in the [individual's] life."¹³² As a goal, Vitz says, "self-actualization cannot be scientifically justified; it is based on unexamined philosophical and moral assumptions."¹³³ Vitz

129. *Id.* at 10 (emphasis added).

130. VITZ, *supra* note 10, at 16.

131. *Id.*

132. *Id.* at 3.

133. *Id.* at 4.

credits Don S. Browning for expanding this idea in Browning's book, *Religious Thought and the Modern Psychologies*.¹³⁴ Vitz observes that Browning "notes that [the renowned psychologists Carl Rogers and Abraham Maslow] both transform self-actualization from a descriptive notion into a moral norm."¹³⁵ Vitz explains it in this way:

They [Rogers and Maslow] slide from the description of what self-actualization is to the proposal that self-actualization is good—that it should be sought after—and finally to the assertion that self-actualization provides a recipe for solving all our higher moral problems. Rogers writes that whoever relies on the principle of self-actualization will discover "that it is a suitable instrument for discovering the most satisfying behavior in each immediate situation." Later, Rogers said that those who rely on their tendency toward actualization will learn that "doing what 'feels right' proves to be a competent and trustworthy guide to behavior which is truly satisfying." In other words, self-actualization is a valid guide for making our moral decisions.¹³⁶

Modern psychology's answers to questions about the good vary greatly from natural law thinking. St. Thomas Aquinas defined the good as that which is in the nature of a thing.¹³⁷ Modern psychologists such as Maslow define the good as actualization and the bad as "anything that frustrates or denies the essential self-actualizing nature of humankind."¹³⁸ Modern culture has, in many respects, adopted the humanist definition of psychology and made it indistinguishable from ethics. It is not that today's courts do not enforce a morality as there is an underlying moral element to any law promulgated by the judiciary. The *Browning* opinion demonstrates that the law supports the moral opinion of the good of self-actualization. The law is no longer a product of right reason and objective morality; rather, in the quest to assist citizens in fully realizing themselves through the enforcement of their right to self-determination, law has become the embodiment of modern psychology's "cult of self."

134. DON S. BROWNING, *RELIGIOUS THOUGHT AND THE MODERN PSYCHOLOGIES* (1987).

135. VITZ, *supra* note 10, at 54.

136. *Id.* (footnote omitted).

137. See GLENN, *supra* note 126, at 8-9.

138. VITZ, *supra* note 10, at 54.

3. *Utilitarianism*

Another philosophy that underlies the *Browning* decision is utilitarianism. Utilitarian philosophy seeks to implement the greatest good for the greatest number.¹³⁹ The good is equated with happiness and consists in the maximization of pleasure and the avoidance of pain.¹⁴⁰ Under this view, the general purpose of law, therefore, is to augment the total happiness of the community by excluding everything that tends to subtract from that happiness.¹⁴¹ This understanding was at work in the *Browning* decision. Although the court does not engage in an explicit utilitarian analysis in reaching its conclusion, it nevertheless considers factors that would be relevant to such analysis.

First, in reaching its decision, the *Browning* court considers the *pain* endured by Mrs. Browning, which included “numerous episodes of vomiting; numerous bed sores, some of which evidenced profuse drainage; bruises and blisters on extremities; swelling of the hands, feet, and ankles; ingrown toenails; sporadic vaginal bleeding; and rectal discharge.”¹⁴² The medical evidence indicated that the damage to her brain was “major and permanent and that there was virtually no chance of recovery.”¹⁴³ Furthermore, the court includes in its decision the testimony of a doctor who “opined that she was in a persistent vegetative state, which he defined as the absence of cognitive behavior and inability to communicate or interact purposefully with the environment.”¹⁴⁴ The court also considers the “pain” of those *caring* for Mrs. Browning, including complications involving “drainage from the incision around the [feeding] tube; plugging of the catheter bulb, which required frequent replacement and insertion; and leakage from the catheter.”¹⁴⁵ Although the court says it is distressed to have to discuss the details of Mrs. Browning’s condition, it nevertheless acknowledges consideration of these factors

139. See SAMUEL ENOCH STUMPF, *SOCRATES TO SARTRE: A HISTORY OF PHILOSOPHY* 366-68 (5th rev. ed. 1993).

140. See *id.*

141. See *id.* at 367-69.

142. *In re Guardianship of Browning*, 568 So. 2d 4, 8 n.3 (Fla. 1990).

143. *Id.* at 9.

144. *Id.*

145. *Id.* at 8 n.3.

as necessary in reaching its conclusion.¹⁴⁶ The court considers not the inherent *value* of human life as a gift of the Creator, but views a life like Mrs. Browning's as having been "physically destroyed [with] its quality, dignity and purpose gone."¹⁴⁷ Accordingly, the court concludes that it makes no difference whether an individual like Mrs. Browning could live for "15 to 20 years, 15 to 20 months, or 15 to 20 days."¹⁴⁸ Because the overall pain that her living manifests far exceeds any pleasure derived therefrom, her life is accorded little value and the court finds no error in disposing of her.

The utilitarian philosophy manifested in the *Browning* decision as described above is an exposition of how such factors come into play in Mrs. Browning's specific case. There are, however, other overarching factors that are implicit in the decision as well. Specifically, there are economic considerations, which are the product of utilitarian philosophy, and which also underlie the court's decision. The stated goal of utilitarian philosophy is to bring about the greatest good for the greatest number.¹⁴⁹ The good is equated with happiness and consists in the maximization of pleasure and the avoidance of pain.¹⁵⁰ Because human beings as a whole derive much pleasure from economic prosperity, in implementing a utilitarian philosophy, society will avoid anything that has a tendency to subtract from such economic pleasure. Under this classical utilitarian view, individual preferences are not included as part of the "happiness" or "felicific" calculus; all that matters in such a calculus is whether a given action will bring about the greatest good for the greatest number, regardless of the moral soundness of the action.¹⁵¹ A human being is thus reduced to a piece of data to be plugged into the felicific calculus. As a result, if persons possess no economic value, they are of *no* value. A society that adopts this view of the human person brainwashes people into thinking that there is no value in just being a human being. "It makes people ashamed to be a 'drain' on the economic system. It makes people view human life as the ultimate consumer good, to be enjoyed for as long as possible, then destroyed when it is

146. *Id.*

147. *Id.* at 11 (quoting *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 305 (Ct. App. 1986)).

148. *Id.* at 10-11 (quoting *Bouvia*, 225 Cal. Rptr. at 305).

149. See STUMPF, *supra* note 139, at 366-68.

150. *See id.*

151. *See id.*

no longer pleasurable.”¹⁵² Because Mrs. Browning was incapable of contributing economically to the felicific calculus, she was a drain on the system and considered a liability to her brother and sister “assets.” This utilitarian philosophy is at work implicitly in the *Browning* decision.

IV. APPLYING THE NATURAL LAW TO THE *SCHIAVO* CASE

The *Schiavo* case would have been decided differently if natural law jurisprudence, rather than the modern philosophies described in the preceding section, had guided the courts. If end-of-life jurisprudence was rooted in the natural law as is property jurisprudence, the enigma regarding the contrast between the legal protections afforded to property interests and those afforded to the right to life would be resolved.

A. *The Proper View of the Human Person*

Modern philosophies subject the human person to a number of ideas that fail to recognize his innate dignity: the reduction of the person to an economic unit in the felicific calculus, the belief that a life without pleasure is not worth living, the use of feelings as a tool for moral decisions, and the belief that one should have within his power the right to terminate his life unnaturally. All of these factors undermine the inherent worth of the human person and combine to create the enigma considered in this paper. This enigma exists because the modern philosophies underlying the *Browning* decision devalue the inherent dignity and worth of the human person to such a great degree that human life is given less protection than property. These philosophies “rest on a view of man’s nature that makes man independent of his creator and hence the helpless prey of his fellow men.”¹⁵³ Conversely, natural law philosophy recognizes life as the sacred gift of the Creator.

152. Email from Michael McGonnigal, Clinical Attorney, Columbus Community Legal Services, Columbus School of Law, to Michael Offenheiser, student, Ave Maria School of Law (Sept. 5, 2003, 7:28 pm EST) (on file with the Ave Maria Law Review).

153. Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 531 (1942).

Francis Lucey explains how these competing philosophies, modern and natural law, view the human person. He writes that for natural law philosophers,

man is a being with a mind and a soul, and hence, superior to animals. He derives his dignity not from other men, but from God his creator. This question of God and morals in law is the real basic difference between Natural Law and other philosophies of law. If there is no God, man is only an animal. He has no innate dignity and no *de jure* independence. He is bound by no norm. Morals have no place in law. Man is subject to the law for animals, physical force. . . . If man is only an animal . . . Hitler [was] correct.¹⁵⁴

Lucey paints a dim picture, but unfortunately an accurate one. The law governing the *Schiavo* case treats the human person as nothing more than an animal that may be “put to sleep” when he is not functioning properly and becomes burdensome.

Under the natural law, man is more than just an animal; he is a creature of God of the highest order, having been created in His image and likeness, and exalted above all of creation by virtue of his faculty of reason. From a natural law perspective, citizens like Terri Schiavo should never be passively euthanized, but in their brokenness, should be given extra care and attention. Terri Schiavo did not cease to be a human life when she entered her weakened condition. She was a *fragile* human being, but still a human being. Under the natural law, her dignity as a human being was indelible and no circumstance could erase such dignity nor rob from her the gift of life given to her by God. The value of her life was so great that not even she had the right to end it prematurely. If the judge in Terri’s case had approached his decision from a natural law perspective, there would be no enigma. The property right would not be treated with greater deference than the right to life and Terri Schiavo would not be dead today.

B. *The Proper View of Human Freedom*

The legal enigma considered in this note exists because modern philosophies both undermine the inherent value of human life and

154. *Id.* at 531.

distort the meaning of self-determination. The *Schiavo* and *Browning* cases view the self-determining man, rather than God, as the ultimate arbiter of right and wrong. Under the natural law, however, man's power to self-determine does not give him the moral authority to terminate his life. As stated, the right to life is a gift from God. Life is sacred because man was created in the image and likeness of God. It should not be forgotten, however, that the right to self-determination is also a gift from God and also flows from man having been created in the image and likeness of God. Joseph Boyle explains that

it is through human self-determination that human beings are in the image of God. God himself is to be understood as a free agent; nothing determines God but God himself. If it did, he would not be the first principle of all reality. Moreover, creation proceeds from God not because of any inherent necessity of God's nature—this would be emanationism. God freely creates. Likewise human beings must also be in some way self-determining if they are to be God's images.¹⁵⁵

The freedom to self-determine does not mean that this freedom settles "what is right and wrong, but it makes it possible and necessary for human beings to be guided by moral norms."¹⁵⁶ To exalt one's freedom of self-determination to such a degree that one determines for oneself what is right and wrong is a distortion of the meaning of human freedom. In the natural law view, human freedom

is not license to do anything at all however evil it might be . . . but the ability to direct ourselves to the good with the help of both the moral and human laws. In this sense it is correct to say that true freedom is the right and power to do what we *ought*, and law shows us where the *ought* lies. But neither law nor freedom irresistibly compels us to choose as we *ought*; we are free to comply or not.¹⁵⁷

This view of freedom recognizes that, while as humans we are empowered with the freedom to choose, such freedom nevertheless has limitations. Just as our freedom is subject to the imposition of

155. Joseph Boyle, Jr., *Freedom, the Human Person, and Human Action*, in *PRINCIPLES OF CATHOLIC MORAL LIFE*, *supra* note 91, at 237, 241.

156. *Id.* at 240.

157. MILTON A. GONSALVES, *FAGOTHEY'S RIGHT AND REASON: ETHICS IN THEORY AND PRACTICE* 164-65 (Prentice Hall, Inc., 9th ed. 1989) (1953).

physical restraints in time and space, so does a proper view of human freedom restrict itself to the moral restraints of the natural law. The purpose of the moral law, to which our freedom is subject, "is not to impose undue hardship or needless restriction on people but to protect and promote true liberty. The moral law tends to make people good, directing them to their last end and pointing out to them the means necessary to this end."¹⁵⁸ Accordingly, under the natural law, man's power to self-determine does not give him the right to terminate his life as he sees fit, but merely gives him the power to use his freedom as he ought.

V. THE MODEL STARVATION AND DEHYDRATION OF PERSONS WITH DISABILITIES ACT

The National Right to Life Committee has proposed model legislation that injects formalities into the law governing cases like Terri Schiavo and Estelle Browning. These formalities are an improvement in the law because, if enacted, an individual would no longer have the power to relinquish his right to life via casual conversation. Rather, the proposed legislation recognizes that life is sacred and demands formalities similar to those provided under the closing process for the relinquishment of a property right. It is not enough, however, for the right to life simply to be afforded the same protections as property rights. The natural law demands more. Under the natural law, there is no right that is more sacred than the right to life; it should, therefore, be afforded *greater* protections than the property right. Hence, while the proposed legislation is a step in the right direction, it does not put the problems of the *Schiavo* case to rest.

The purpose of the Model Starvation and Dehydration of Persons with Disabilities Prevention Act ("Starvation Prevention Act" or "Act")¹⁵⁹ is to protect citizens like Terri Schiavo from being denied food and water. The Act presumes "that every person legally incapable of making health care decisions has directed his or her health care providers to provide him or her with nutrition and

158. *Id.* at 164.

159. National Right to Life Committee, Model Starvation and Dehydration of Persons with Disabilities Act, <http://www.nrlc.org/euthanasia/modeln&hstateLaw.pdf> (on file with the Ave Maria Law Review) [hereinafter Starvation Prevention Act].

hydration to a degree that is sufficient to sustain life."¹⁶⁰ This presumption is overcome only when "a) the provision of nutrition and hydration is not medically possible, b) the provision of nutrition and hydration would hasten death," or c) if the person has a medical condition that makes him "incapable of digesting or absorbing the nutrition and hydration so that its provision would not contribute to sustaining the person's life."¹⁶¹ The presumption would also not apply if the person executed an advance directive "specifically authorizing the withholding or withdrawal of nutrition and/or hydration, to the extent the authorization applies."¹⁶² Finally, the presumption is overcome if there is "clear and convincing evidence that the person, when legally capable of making health care decisions, gave express and informed consent to withdrawing or withholding hydration or nutrition in the applicable circumstances."¹⁶³ The bill "carefully defines 'express and informed consent' to ensure that casual or uninformed statements cannot be used to meet the 'clear and convincing' evidence test."¹⁶⁴

Although the Starvation Prevention Act persists in allowing patients to be passively euthanized, it is an improvement on the current state of the law. The Act takes a number of steps to introduce much-needed formalities into the law governing food and fluid removal cases. The first formality it creates in the process is the presumption in favor of nutrition and hydration when there is a question as to the patient's wishes. By creating this presumption, the law recognizes that human life is more than just a piece of data to be entered into the felicific calculus. It helps to restore natural law philosophy by acknowledging that the right to life is such a sacred right that when a question arises, it deserves the presumption that the individual would not relinquish the right so easily.

A second formality the Starvation Prevention Act creates is the requirement that in order to overcome the presumption in favor of living, an individual may no longer relinquish her legal right to life by

160. *Id.* § 3(A).

161. *Id.* § 4(A)(a)-(c).

162. *Id.* § 4(B).

163. *Id.* § 4(C).

164. National Right to Life Committee, *Spurred by Schindler-Schiavo Case, Model State Law to Prevent Starvation and Dehydration Proposed*, <http://www.nrlc.org/euthanasia/ModelBillAnnouncement.html> (on file with the Ave Maria Law Review); see also Starvation Prevention Act, *supra* note 159, § 2(C) (defining "express and informed consent").

engaging in conversation in which she casually and only generally says she would not want to be “hooked up to machines” or would not want “to be a burden.”¹⁶⁵ In order to demonstrate that the patient would not want to go on living in her current condition, the patient, while competent, must have given express and informed consent to withdraw nutrition and hydration in the applicable circumstances.¹⁶⁶ Again, this requirement acknowledges the sacredness of the right to life such that it cannot be relinquished so easily through casual conversation.

This requirement of express and informed consent also protects the patient from being dependent on her guardian. Although a guardian is supposed to implement the wishes of the ward, guardians cannot always be trusted to do this. Also, at times it is difficult to determine exactly what the wishes of the patient would have been. For instance, consider the case of Terri Schiavo, who, apparently after watching a movie with her husband about a person on life support, said casually that she would never want to be “hooked up” to a machine.¹⁶⁷ As a society, do we really want to make judgments as to whether a person should live or die based on some sentiments felt after watching an emotional movie? The Starvation Prevention Act helps to correct this decision-making model by adding a more objective criterion to the process. It is presumed that if an individual goes to such measures as to execute documents that give her express and informed consent to withdraw nutrition and hydration, then the individual has put some care and thought into the decision, and it is the product of more than just a fleeting response to an emotional movie.

Although the Starvation Prevention Act does help to restore formalities to the law and thereby provides much needed protections in defense of human life, it does not go far enough. As stated above, under the natural law, the right to life is more sacred than the right to hold property and it should, therefore, be afforded greater protection than that of holding property. Even if an individual has given great consideration to important medical decisions such as these and has executed documents giving express and informed consent to withdraw nutrition and hydration in applicable cases, the Act still

165. See Starvation Prevention Act, *supra* note 159, §§ 3(A), 4(C).

166. *Id.* §§ 4(B), (C).

167. See Dial, *supra* note 8.

does not give proper deference to the objective morality of the patient's decision. The Act persists in identifying the subjective intent of the patient as the ultimate arbiter of right and wrong rather than considering whether such intent is *objectively* right or wrong. Though it places limitations on personal autonomy by making it more difficult to choose against life, it nevertheless continues to exalt the right of self-determination above the objective morality of the action itself. The proposed legislation still rests on a view that undermines the inherent value of the human person and implements an improper view of human freedom.¹⁶⁸ The Starvation Prevention Act begins to remove the enigma regarding why property rights are afforded more protection than the right to life. It falls short, however, in that it leaves unanswered the question of why the right to life is not afforded more protection than the right to property.

CONCLUSION

It is indeed perplexing that American law currently provides more protection to an individual's right in property than to his right to life. In analyzing the philosophies that underlie property law and the law governing the *Schiavo* case, however, this enigma is unraveled. The modern philosophies of relativism, selfism, and utilitarianism have muddied the waters of objective truth and tricked lawmakers into thinking they are incapable of distinguishing right from wrong. Judges and legislators are not philosopher kings, but these modern philosophies are so embedded in culture that few realize the existence of these philosophies behind legal decisions, let alone their effect. It is vitally important that judges and legislators begin to examine the philosophies that justify their legal decisions and take a hard look at the legal inconsistencies that exist as a result of the implementation of a natural law versus modern philosophy. The law is more than simply the will of the majority; it is an ordinance of

168. Although the Starvation Prevention Act exalts the right of an individual to withdraw nutrition and hydration over considerations of the objective morality of the action itself, the Act, nevertheless, should be adopted by state legislatures. In light of the Supreme Court's current interpretation of the Constitution as permitting the "right to die" in cases such as *Schiavo* and *Browning*, it is premature to propose legislation that completely abolishes such right. As a society, we must recognize the philosophies that underlie such decisions and slowly push ourselves back up the slippery slope.

reason rooted in a higher law.¹⁶⁹ Until lawmakers become cognizant of this fact, real estate brokers can rest contented, but disabled persons like Terri Schiavo are at risk.

169. See RICE, *supra* note 82, at 53-54.