Heroes, Lawyers, and Writers - A Review of Two Schiavo Books

Lois Shepherd*
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FIGHTING FOR DEAR LIFE, BY DAVID GIBBS

Can a good lawyer also be a good person? Professors of legal ethics often challenge their students with this question. After all, lawyers successfully defend child predators and have the convictions of known killers thrown out. They persuade jurors to believe plausible stories that in their hearts the lawyers know are not true. There are also times when lawyers bring honorable witnesses on the stand to tears.

David Gibbs, the lawyer who assisted the parents of Terri Schiavo from 2003 to 2005 in achieving passage of special state and federal legislation aimed at preventing the removal of her feeding tube, wants readers to know that he is not only a good lawyer—he tells us that opposing counsel, George Felos, offered him the compliment: "[I]f I ever need to get something passed by the United States Congress, I'll know who to call."—but also that he is a good person. When he was a student at Duke University School of Law, a law professor once chided him about getting too passionate about his client's position in a mock trial exercise. The professor said he should be able to disconnect from the process, so that if he had to, he could "go to court and argue for the other side." But Gibbs tells us that he cannot do that because he has to believe he's "on the side of truth." In his view, God called him to try to save Terri Schiavo's life.

The fact that Gibbs sees himself as a hero in the Schiavo controversy is probably the book's central downfall. But it is also the reason that students of the Schiavo case might find the book worth taking a look at because it offers an insight into the motivations of the conservative forces that propelled the Schiavo case forward to become the most litigated and publicized end-of-life decision-making case in the United States, and probably in the world.

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1. DAVID GIBBS WITH BOB DEMOSS, FIGHTING FOR DEAR LIFE 153 (2006).
2. Id. at 70.
3. Id.
4. Id.
5. See id.
The *Schiavo* case revealed a country confused and divided about essential issues involving life, death, disability, family relationships, basic human care, dignity, and choice. Within the case, there are several central and troubling questions about: 1) the certainty of medical diagnosis—a trial court had determined on the basis of expert testimony that Terri was in a permanent vegetative state while others disputed that diagnosis; 6) 2) the rights of family members to weigh in on decisions about continuation or discontinuation of life support—Terri’s husband, Michael Schiavo, sought the removal of her feeding tube eight years after her collapse while Terri’s parents, Mary and Bob Schindler, fought its removal; 7) 3) whether feeding tubes should be understood differently than ventilators when their removal is considered; 8) and 4) how much weight should be given to oral, informal statements made by individuals about the kinds of existences they would find intolerable and worse than death. 9)

These and similar questions plague thoughtful judges, legislators, scholars, even—and especially—people facing their own difficult decisions regarding their own or family members’ lives, who search for, if not the “right” answers, the “better” answers.

David Gibbs stands in contrast to those who struggle with what is right and wrong. His “divine appointment”—in his own words—provides him with unwavering conviction that forces of evil were at work to remove Terri Schiavo’s feeding tube. 10 There is no doubt in his mind that Terri Schiavo was conscious—he tells us she kissed her parents, cried, attempted to talk and, in fact, “jabber[ed]” at him. 11 His associate, Barbara Weller, came before the media in the last days of Terri’s life, following removal of her feeding tube, claiming that Terri had said “Ahhhhhhh” and then “Waaaaaaaah” in answer to Weller’s plea to say she wanted to live in order to save her own life. 12 Gibbs reports that Weller told him on the phone that “you know, Terri can’t say consonants.” 13

Gibbs is unlikely to find many new believers of this version of the Schiavo story. The overwhelming evidence from well-known neurologists who examined Terri and from health care providers who cared for her on a daily basis for over many years supported the diagnosis of permanent vegeta—

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7. See id. at 56–58, 93, 144–46.
8. See id. at 105, 239–40.
9. See id. at 108–112.
10. Id. at 37–38.
12. Id. at 124–26
13. Id. at 125.
tive state; ultimately, her autopsy results were also consistent with that diagnosis. 14 Even if his claim at the beginning of the book that Terri “recognized people, enjoyed the company of her family and struggled to communicate” 15 might catch any reader’s attention—for it is true that only a few people actually got to spend time with her and observe her condition for themselves—his credibility is quickly lost as he reveals his bias about other issues.

One easily uncovered misrepresentation, for example, is his assertion that Michael Schiavo took advantage of a law passed by the Florida legislature in 1997 that made it possible to remove artificial nutrition and hydration. 16 Without passage of such a law, he implies, Terri’s feeding tube would have remained in place. 17 He tells us to “[k]eep in mind that Terri seemed to be the ‘test case’ for this new law . . . George Felos used it for the first time at [Michael’s trial in] 2000 to allow the court to condemn Terri to death.” 18 In fact, in 1990, in the well-known In re Browning 19 case, the Supreme Court of Florida established the right to refuse artificial nutrition and hydration. 20 At that time, the court’s opinion acknowledged the already existing consensus among courts nationwide on this issue, recognizing that “[c]ourts overwhelmingly have held that a person may refuse or remove artificial life-support, whether supplying oxygen by a mechanical respirator or supplying food and water through a feeding tube.” 21

As a lawyer involved in the Schiavo case, Gibbs has to know the Browning case backwards and forwards—yet he repeatedly misrepresents the law of Florida and, more generally, the law throughout the nation. Readers cannot know for sure what he saw in Terri’s hospital room or what transpired in conversations that Gibbs was privy to. However, we can read the Browning case and the Florida Statutes to check his descriptions of them. When a lawyer is bold as to misrepresent the law, he is clearly not trying to convince certain readers. His audience is narrow. He’s preaching, as they say, to the choir (and he does preach in the last twenty pages or so—just outright preaching, complete with Bible verse).

14. See id. at 20–24, 191–99. For an unbiased and accurate rendering of the facts of the Schiavo controversy, see WILLIAM H. COLBY, UNPLUGGED: RECLAIMING OUR RIGHT TO DIE IN AMERICA (2006), which is also reviewed in this article. Colby discusses the evidence of Terri’s medical condition on pages 14-25 and 47-53.
15. GIBBS, supra note 1, at 26.
16. Id. at 42.
17. See id.
18. Id.
20. Id. at 11–12 (recognizing state constitutional rights to refuse medical treatment on behalf of incompetent patients).
21. Id.
But as I said above, there's something to the Gibbs book that is of interest to a greater circle of readers. It is this "hero thing." The most telling part of the book is not in the slanting of facts, the innuendos about the wrongdoing of others, or even in his claim to altruism.22 (For example, Gibbs deliberately gives the impression that his law firm represented the Schindlers for no legal fee. This statement is disputed by Jon Eisenberg's book, which includes a tax return showing contributions to the Gibbs Law Firm of almost two million dollars during 2003 from the Christian Law Association.23 Eisenburg ties the contributions to representation in the Schiavo case.)24

Below is an excerpt from the passage that I find most incredible and most revealing. It is not enough for Gibbs to be a crusader; in order to be a true hero, he must be threatened by actual physical harm as he stands up for what is right. At this point in the book, he describes—with the moment-by-moment drama more often found in a "B" suspense novel—a courtroom drama scene in which a law enforcement officer approached his table before proceedings began, for reasons then unknown to Gibbs:

The officer appeared at my side. He placed his left hand on the table, palm down, and then leaned in close as if preparing to offer an insider stock tip. He cleared his throat. In a low, commanding tone he spoke three words.

"Don't turn around."

"Excuse me?" I said, matching his muted voice.

I noticed his eyes were focused somewhere over my shoulder on an unseen point of interest behind me. "Mr. Gibbs, I need to ask you to avoid making any sudden moves that would draw attention to us. Do you understand?"25

Following that, we get the play-by-play of Gibbs's learning that a suspicious man had entered the courtroom, was sitting in the last row, and appeared focused on his every move.26 Gibbs describes entering a reverie of sorts, wondering if his wife and children had come to court to watch him—were they safe?27 (They hadn't actually come.) He tells us, "Suddenly, I found myself fighting not only for Terri's life, but potentially for the lives of

22. See generally, GIBBS, supra note 1. Gibbs wonders whether Michael abused Terri, eventually resulting in her collapse. Id. at 196.


24. Id. at 103–04 (disputing Gibbs's statements to the media that he received nothing for work on the Schiavo case).

25. GIBBS, supra note 1, at 85.

26. Id. at 86.

27. Id. at 87.
those around me." While the scene is drawn out over a good five pages, it turns out that the man dressed too warmly for Florida in a heavy, black trench coat does nothing at all to threaten anyone. But Gibbs credits "the presence of the marshals and the power of prayer" for an afternoon in the courtroom that passes without incident.

In light of the many actual death threats received by Judge George Greer, who presided over the trial court proceedings relating to the feeding tube's removal, the passage is almost bizarre. In these later stages of the courtroom battle over Terri Schiavo, Judge Greer was under the protection of bodyguards. As bizarre as Gibbs's retelling of this part of the story is, it reveals something important about the perspectives and motivations of the people who sought or participated in achieving extraordinary special legislation to try to prevent removal of Terri's feeding tube.

In March 2005, over Palm Sunday weekend, the United States Senate and House of Representatives passed a bill to allow the Schindlers to seek federal review of the Schiavo case. An earlier attempt on the part of House committees to stop removal of Terri's feeding tube through the issuance of subpoenas for her testimony had failed when Judge Greer refused to allow the subpoenas to unseat his order for discontinuance of artificial nutrition and hydration. When it became clear that the congressional subpoenas had failed and Terri's feeding tube was removed, the Schindlers' bill was pushed forward. While many congressional representatives had already left town for the Easter break, many returned to cast their vote. President George W. Bush cut short a vacation in Crawford, Texas to return to Washington so that he could sign the bill immediately after it passed—which, because of rules of Congress, could not occur until a little after midnight on Sunday. The tactic ultimately failed when the federal court refused to order the reinsertion of Terri's feeding tube because it determined that the Schindlers were unlikely to succeed on the merits of their claim that Terri's case had received inadequate process in the state courts.

28. Id.
29. Id. at 88.
30. GIBBS, supra note 1, at 88.
31. See David Sommer & Adam Emerson, Judge Greer Evokes Admiration, Anger, TAMPA TRIB., Mar. 27, 2005, at 1.
32. Id.
33. See COLBY, supra note 14, at 37–41.
34. Id. at 38–39.
35. Id. at 39.
36. Id.
37. Id. at 39–40.
38. COLBY, supra note 14, at 40–41.
Conservative legislators would later take some heat for their involvement in a single individual’s case over the question of life support. Surveys of the American public revealed that a majority of Americans did not approve of the federal government’s actions in the case. According to one CBS News poll conducted in March 2005, 82% of those surveyed believed that Congress and President Bush should stay out of the Terri Schiavo dispute. Bill Frist, then majority leader in the Senate and also a Harvard-educated doctor, may have ruined his chances of a run for the White House in 2008 in part because of his diagnosis of Terri Schiavo on the floor of the Senate, for which he was widely criticized.

Did Republican politicians simply miscalculate the political gain to be made from championing Terri’s “right to life?” At the time, people generally perceived that political motivation drove the congressional and executive actions. A CBS News poll asked Americans about the motivations of Congress in passing the bill to require federal review of the case; 74% thought the bill was passed to advance a political agenda. Only 13% indicated that they believed Congress really cared about what happened in the case. There was some evidence to support this view, most prominently a “smoking gun” memo that was eventually traced to personnel in Senator Mel Martinez’s office. That memo identified the Schiavo case as one that will have the “pro-life base... excited that the Senate is debating this important issue” and is a “great political issue” that “is a tough issue for Democrats.”

Gibbs sees the motivations differently. He thinks that rather than pursuing political agendas (and miscalculating), conservative political leaders sacrificed their political ambitions in order to do what was right:

Having spoken with so many of the legislators myself—both Democrat and Republican—during the heat of the floor debate, I could tell this was one of those decisions where political ambi-

41. Id.
42. See Spencer S. Hsu & Hamil R. Harris, Schiavo Vote Tied to Law, Religion, WASH. POST, Mar. 24, 2005, at B01; see also Espo, supra note 39.
44. Id.
45. EISENBERG, supra note 23, at app. fig. 4.
46. Id.
Gibbs’s own portrayal of himself as heroic crusader for Terri’s life, willing to work for free, (but not really) a potential target for delusional, angry protestors, (again, not really) and divinely appointed, (really?) makes this reader wonder if Gibbs is not right about the motivations of at least some of the political leaders he worked with in the Schiavo matter. Perhaps politicians were not just motivated by potential political gain when they jumped into the fray of the Schiavo case. Could a portion of them have been seeking redemption rather than votes? More importantly, which is more dangerous?

UNPLUGGED: RECLAIMING OUR RIGHT TO DIE IN AMERICA, BY WILLIAM H. COLBY

Attorney William Colby, the author of Unplugged, argued before the United States Supreme Court on behalf of Nancy Cruzan’s right to die in the famous 1990 case that is often credited with establishing a constitutional right to refuse life-sustaining treatment. He writes an entirely different kind of book than Gibbs. The difference goes deeper than the fact that Colby was not involved in the Schiavo case and, therefore, is more objective than Gibbs. The difference also goes deeper than the fact that in Cruzan v. Missouri Department of Health, Colby represented “the other side,” arguing in favor of the removal of a feeding tube from a patient in a permanent vegetative state.

The great difference, to Colby’s credit, is that in Unplugged, Colby recognizes the difficulty of knowing—as individuals and as a society—what is the right thing to do in these kinds of cases. At the very beginning of the book, he tells readers that when television producers, in preparation for his appearances as an expert in the Schiavo case, asked him, “Which side are you on?” He answered, to their perplexity, “Neither.” Moreover, he tells us that he has been on both sides of these kinds of disputes. Some of the
families he has represented have sought removal of treatment, while others have fought to keep it in place when medical professionals thought it futile.\footnote{52}

Gibbs actually figures briefly in the book, in an episode that highlights the difference between these two lawyers and writers. Colby tells us about a last-ditch federal court hearing that took place about a week after the third and final removal of Terri Schiavo’s feeding tube:

When the Schindlers’ lawyer, David Gibbs, who is also the President of the Christian Law Association, called Michael Schiavo a “murderer,” Judge Whittemore cut him off. “That’s the emotional aspect of this case, and the rhetoric that does not influence this court. We have to follow the rule of law and that’s what will be applied,” said the judge.\footnote{53}

Colby lets the exchange speak for itself.

This, to a large extent, is Colby’s way in Unplugged. He provides interesting detail, keeps the narrative lively, but is also accurate in his very useful presentation of the facts of the Schiavo case, especially its complicated legal history. Taking readers through that legal history is not an easy task. Between the time of Terri Schiavo’s collapse and the removal of her feeding tube, fifteen years elapsed. Except for the first two years, the remainder of that time involved some sort of legal dispute, including the medical malpractice case that Michael Schiavo brought against Terri’s doctors for failing to diagnose the condition that led to her cardiac arrest\footnote{54} (which a jury determined was bulimia, even though there was neither definitive physical proof that Terri was bulimic nor had anyone ever witnessed her engaging in the binge and purge cycle of bulimics); various attempts on the part of the Terri’s parents, Mary and Robert Schindler, to remove Michael as guardian for Terri;\footnote{55} and most importantly, Michael Schiavo’s petition to remove Terri’s feeding tube, and all of the subsequent legal repercussions of that successful petition.\footnote{56} The case went to the Florida District Court of Appeals four different times,\footnote{57} and the Supreme Court of Florida ultimately struck down as unconstitutional the statute known as “Terri’s Law,” the special Florida legislation allowing Governor Bush to order the reinsertion of her

\footnote{52. \textit{Id.} at 4.}
\footnote{53. \textit{Id.} at 43.}
\footnote{54. \textit{Id.} at 49.}
\footnote{55. \textit{Id.} at 14.}
\footnote{56. \textit{Colby, supra} note 14, at 4.}
\footnote{57. \textit{Id.} at 31.}
feeding tube. The federal courts were eventually called in by special federal legislation, but swiftly got back out.

Colby explains this history in clear, objective terms, and is brief enough, leaving room to discuss some of the issues of the case, but is not so scaled back that readers feel uninformed about the legal mechanics of what went on. The book then discusses the technological advances that have brought us to the ethical and legal uncertainty in which we now live, and will likely face as we or our family members die. Here he provides useful historical details—how the living will was born from a law review article, how the criteria for diagnosing brain death emerged from the needs of human organ transplantation, and how the condition of permanent vegetative state is a result of “almost successful technology”, in the words of one doctor, because the patient’s breathing is restored, but the damaged brain cannot be healed. Colby is at his best in these explanations, as he successfully weaves together cultural history, personalities, and medical advances to reveal how we got to where we are, which he sums up neatly, stating: “[T]he time of nature taking its course for the seriously ill in America is over.”

For most readers, Unplugged will hit the right balance between description and analysis. Especially for those readers unfamiliar with the rich literature on end-of-life decision-making, the book will educate and challenge their thinking about the issues in the Schiavo case and other end-of-life controversies, like physician-assisted suicide. For scholars in the field, the book is somewhat less captivating, but still useful. Colby does not offer much in terms of in-depth analysis or new insights for the future direction of end-of-life law, ethics, or practice. His primary recommendation for individuals is that they talk to their family members about what they want. His primary recommendation for society is that we continue talking through these issues. He does champion the hospice movement, but then, it’s hard not to.

Yet, Colby does have a gift for pointing out or recalling details that even those of us in the field should ponder more closely—such as the fact that “[t]he public never saw a [photograph] of Karen Ann Quinlan after her accident.” Instead, the public saw—and we still see today when the case is discussed—her black and white high school yearbook photo. Sketch artists

58. Id. at 36–37.
59. Id. at 39–41.
60. Id. at 81.
61. See COLBY, supra note 14, at 74.
62. See id. at 66.
63. Id. at 103.
64. Id. at 71.
65. Id.
for newspapers at the time drew her as a “Sleeping Beauty.” In contrast, when the public saw pictures of Nancy Cruzan and Terri Schiavo, they saw the young women after their vegetative state had persisted for several years. It was only then that the public could truly begin to grapple with what the condition meant. To me, the reminder of this part of Karen’s story makes me think about the significance of the face in human relationships and wonder what more we might learn about it.

Colby also brings up the issue of hand-feeding and whether it might be rejected on the basis of autonomy. For example, what should caregivers do if someone’s living will states that, in the event of advanced dementia, caregivers are not to “place food or water in my mouth. Instead, place it on my bed table. If I feed myself, I live another day; if I do not, I will die and that is fine?” The issue of hand-feeding is ripe for serious consideration, not only for what it might reveal about patients’ rights to reject hand-feeding, but what it might reveal about tube feeding as well. Again, Colby does not tackle these issues because that is not the book’s aim; but he does raise them.

Generally, the book is a highly readable, informative distillation of the history and current status of end-of-life law and ethics, with a sharp eye on where the issues remain thorny and unresolved. Moreover, the book is compassionate. Colby writes with clear awareness of the anguish health care providers and families experience when faced with decisions at the end of life. Colby is no hero trying to ride in with all the answers, but he is a good lawyer and a good writer. It is those qualities that make this volume one well worth reading.

66. COLBY, supra note 14, at 71.
67. Id. at 135.