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Lifeline

A Legal Network in Support of Life

A PUBLICATION OF THE LIFE LEGAL DEFENSE FOUNDATION

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TERRI SCHIAVO:

ON TRIAL FOR HER LIFE

Terri Schiavo and her mother, Mary

On April 9, 2001, with only days left before their daughter would have her feeding tube removed on her husband's orders, Bob and Mary Schindler first met attorney Pat Anderson. There had already been a four-day trial (conducted by other counsel) in January of 2000. After that trial, Pinellas-Pasco Circuit Judge George Greer ruled that Theresa Marie Schiavo ("Terri") was in a persistent vegetative state (PVS), and that, based on vague oral statements made in her early twenties to her husband, Michael, she would not want to live dependent upon life support (which consists solely of a feeding tube), without the likelihood of recovery.

Terri's guardian ad litem disagreed with the conclusion, but was dismissed before trial, so, despite Florida law, Terri was deprived of this protection. Appeals to the Florida Second District Court of Appeal (Schiavo I), the Florida Supreme Court, and the U.S. Supreme Court were unsuccessful. At the time the Schindlers first consulted Pat Anderson, Terri was scheduled to have her feeding tube disconnected in two weeks, despite the fact that she responds to her mother by smiling joyfully, laughs at jokes told her by her parish priest, and tries to talk.

After meeting with the Schindlers, Pat initially undertook a series of unsuccessful attempts in the trial court and federal court to reverse the court's order. Despite these efforts, Terri's feedings were actually terminated on April 24, 2001. While the world waited for her to die, the Schindlers next sued husband Michael for intentional infliction of emotional distress, and convinced another circuit judge to enter an order to resume her feedings. Food and hydration were restored after about 60 hours. That resulted in a second appeal (Schiavo II), in which the Schindlers won the right to have their challenge to the original death order

Terri's attending physician was clearly startled by what he saw on the videotaped exams by the other doctors, given the fact that he never saw Terri in the presence of her mother or father.

(TERRI CONT. ON PAGE 10)

GENERAL RECAP & UPDATE

Planned Parenthood v. ACLA et al. (Portland, Ore.)—On rehearing in the 9th Circuit, an 11-member en banc panel voted 6-5 to reverse the prior panel's unanimous decision and reinstate a $107 million verdict against pro-lifers who exposed the identities of abortionists. LLDF filed an amicus brief in support of rehearing before the full 9th Circuit (denied) and an amicus brief in support of the defendants' petition for certiorari in the U.S. Supreme Court. The Supreme Court, in considering the petition, has invited the Solicitor General's office of the U.S. Dept. of Justice to submit its opinion about the meaning of the statutes at issue. The Solicitor General is not expected to act on the request for several months, so further consideration of the case will not take place until the Court convenes in October 2003.

(RECAP CONT. ON PAGE 2)

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Schiavo v. Schindler (Florida)—Michael Schiavo seeks court permission to kill 37-year-old wife, Terri, by withdrawing food. Terri's parents oppose the motion; several doctors have expressed the opinion that her condition could improve with appropriate treatment, which Michael has refused to allow. Trial court ordered withdrawal of food and fluids without any independent examination of Terri's condition. Court of appeal reversed the decision and remanded with instructions that Terri be examined by other physicians. After a seven-day trial in October, the court once again issued a decision to remove Terri's food and water, but stayed enforcement of the order pending appellate review. The court of appeal has set a briefing schedule and will hear argument on April 4. For updates, see www.terrisfight.org.

SOHL Network et al. v. Lockyer et al.—Constitutional challenge to California FACE law. Case dismissed from federal court for lack of federal jurisdiction. Refiling in state court is presently under consideration.

Foti v. Planned Parenthood/Planned Parenthood v. Foti (San Mateo)—This action and cross-action between sidewalk counselors and PP and its escorts is now stayed, pending the outcome of a new lawsuit filed by PP in which it seeks a declaration from the court that a speech-free zone injunction it obtained seven years ago against Operation Rescue of California actually applies against these sidewalk counselors *and* anyone else PP serves it on. On March 4, the court granted PP's motion for summary judgment, holding that Foti and two co-defendants "act in concert" with ORC, although they have no contact with ORC. However, Planned Parenthood's motion for more than $360,000 in attorney fees was denied. The Court of Appeal heard oral argument on January 16, at which time PP argued explicitly for a new and different application of the law in the case of abortion clinic protests. "Victory! Details next issue."

NOW v. Scheidler—On December 4, the U.S. Supreme Court heard oral arguments in the pro-life activists' appeal from a decision granting substantial damages and a purported nationwide injunction. LLDF filed amicus briefs in both the Seventh Circuit and the U.S. Supreme Court, as well as assisting the defendants with post-trial motions in the trial court. Victory! See sidebar p. 5.

(RECAP CONT. ON PAGE 3)

FROM THE EXECUTIVE DIRECTOR

Snatching Victory from the Jaws of Defeat

In past issues of *Lifeline* we informed you about Senate Bill 780—the bill authored by pro-death Senator Deborah Ortiz that expands the California Penal Code to include the California Freedom of Access to Clinic and Church Entrances Act (CAL FACE)[1] and the Reproductive Rights Law Enforcement Act (RRLEA).[2] CAL FACE mimics its federal counterpart, FACE,[3] and allows all levels of California law enforcement to compile dossiers on abortion opponents. LLDF challenged the constitutionality of SB780 by filing a complaint in the United States District Court, Eastern District, on behalf of Sanctity of Human Life Network (SOHLNET), and two of its members, seeking to preliminarily and permanently enjoin its enforcement. In response, Defendants, the Commission on Peace Officers Standards and Training (POST), Governor Gray Davis, and California Attorney General Bill Lockyer filed a Motion to Dismiss the complaint. On November 5, 2002, Judge Morrison C. England granted defendants' motion on jurisdictional grounds. The court ruled that the allegations of harm to the plaintiffs were too speculative at this time, particularly given the lack of any history of enforcement of the Act to date.

Contrary to the court's ruling, however, POST, as mandated by SB 780, has completed the law enforcement training video that will be used as mandatory instruction on "anti-reproductive rights crime." Additionally, the California Department of Justice has drafted a "data collection worksheet" and has distributed it to all Chiefs of Police and Sheriff Departments in the state.[4] While this seemingly harmless collection device does not identify "anti-reproductive rights crime suspects" by name, keep in mind that another provision of the bill mandates "a plan to prevent, apprehend, prosecute, and report anti-reproductive-rights crimes."[5] Last, the system is soon to be "automated" for ease of data collection and access. All this potentially adds up to dossiers on private citizens because of their viewpoint.

While we update you on the status of this case to keep you informed about the condition of civil rights of those in California who publicly oppose abortion, it is striking that despite repeated attempts to silence that opposition, LLDF's success in defending our degenerating civil rights has not been deterred. *NOW v. Scheidler* is still an open book. The Feminist Women's Health Center's recent attempt to impose a "bubble zone" in front of their Sacramento clinic failed. Planned Parenthood failed to collect monumental amounts in attorney fees from sidewalk counselors. Several individuals who have assaulted sidewalk counselors have been forced to pay monetary damages to their victims. Our list of victories goes on and on.

Based on LLDF's recent track record, one might even agree that perhaps Judge England was correct in his decision to dismiss SB 780 when he stated SOHLNET had not met its burden of proof in showing that its members would be irreparably injured by enforcement of SB 780. If LLDF can continue to have the success we've seen in recent cases, we anticipate the day when CAL FACE will be used to prosecute abortion supporters, just as FACE has been.[6]

LLDF has not and will not be deterred in its mission and purpose, even when civil authorities continue to investigate and document the activities of those who publicly support the right to life, leading to civil and criminal prosecution of the defenders of life.

We hope that you will continue to partner with LLDF as we attempt to make the words of Judge England a self-fulfilling prophecy. If he is wrong, we remain the defenders of the defenders of life. L

NOTES

1 California Penal Code sections 423, et seq.
2 California Penal Code sections 13775, et seq.
3 18 U.S.C. section 248, et seq.
4 California Penal Code sections 432.2 and 13777(a)(1)
5 California Penal Code section13777(a)(4)
6 See *Lifeline*, Winter 2001, Vol. X. No. 6, page 3

RTL-Australia Annual Conference

Mary Riley

"We Can't Lose Them All"

[Last summer, LLDF Administrative Director Mary Riley was invited to be the featured speaker at various pro-life functions throughout Australia. Reprinted here is a slightly edited version of one of the three talks she gave at the RTL-Australia Annual Conference in Melbourne, Victoria.—Ed.]

The first thing you have to know about Life Legal Defense Foundation is that it is an entity with an organic origin, by which I mean that it wasn't the result of some one genius's big idea, carried out perfectly to a logical conclusion that was in mind at LLDF's very inception. No: LLDF wasn't, in the strict sense of the word, made; it's like a living thing; it just grew. And just like every human life, Life Legal ended up in a way that no one foresaw at the beginning. Just look how it deposited me here in Australia!

Now what Life Legal Defense Foundation grew out of is something that doesn't exist anymore. LLDF grew out of the American pro-life rescue movement of the late 1980s and early '90s.

For those of you who need a definition or an explanation on this point, the rescue movement involved a very large number of people who tried to prevent the childkilling from taking place by sitting in front of the doors of abortion mills. And, of course, when they did this, they generally ended up in trouble with the law. And I was one of those people.

Now I know that there was also rescue movement in Australia, and that it never was allowed to reach the size of the one in the states, and that there were here, as over there, a lot of pro-lifers who didn't approve of all this rescue business. It's not my purpose to defend the rescue movement to those who didn't approve, but I will point out, as a matter of objective fact, that the rescue movement was part of a long American tradition of civil disobedience, and that it was the largest example of nonviolent direct action in U.S. history. Judged just according to the number of people who were willing to risk arrest for a cause, the rescue movement positively dwarfed the civil disobedience practiced by the civil rights movement or the anti-war movement. And, whatever mistakes may have been made, however flawed the movement may have been, that is something: it indicates the strengthof pro-life sentiment in the states at that time.

Judged just according to the number of people who were willing to risk arrest for a cause, the rescue movement positively dwarfed the civil disobedience practiced by the civil rights movement or the anti-war movement.

Anyhow, one result of the rescue movement was that there were a lot of pro-lifers, in jail or out on bail, who needed legal representation—and, on the other hand, there were a lot of pro-life attorneys who were willing to provide that representation.

Life Legal Defense Foundation was formed to bring pro-life activist and pro-life attorney together—and, in a sense, that is still what I'm doing when I'm in my office, talking incessantly on the telephone.

An important side note here is that Life Legal had some of its roots in pro-life factionalism—a phenomenon with which even you here in

(**RTL-AUSTRALIA** CONT. ON PAGE 6)

(**RECAP** CONT. FROM PAGE 2)

Spingola v. Village of Granville Ohio—City passed vague ordinance to apply as needed against pro-lifers at public events. Trial court denied preliminary injunction, holding the ordinance was facially constitutional, and the Sixth Circuit affirmed. Petition for rehearing denied, and case remanded to the trial court for further proceedings on the as-applied challenge. Discovery is under way.

People v. Stillson (Sacramento)—Picketers charged with resting sign on sidewalk. Defendants found guilty.

Reeves v. Rocklin United School District—Pro-lifers leafleting and holding signs were detained after high school administrators involved the local police; during a second visit to the same school, pro-lifers were forced to move off the campus after being refused visitor registration. They were also told that the public street adjacent to the school was off-limits. Despite clear California case and statutory authority allowing free speech on and near public school campuses, the trial court ruled that the administrators could permissibly exclude the pro-lifers in order to prevent "disruption" of school activities. Case on appeal.

Meyers v. Mathews (Athens, Ohio). Pro-lifers arrested for pro-life speech on college green. First Amendment claims were dismissed and injunctive relief denied. Court found that popular student gathering place was not a public forum. Case on appeal.

Estavilla v. Romo and West (Yolo County)—Fetal homicide suit for injury and constitutional violations includes two issues: 1) wrongful death statute is unconstitutional because it denies equal protection to babies killed in utero; and 2) interference with the right to privacy and reproductive rights includes interference with the right to carry a pregnancy to term, not just to have an abortion.

Dym v. White (San Diego)—First Amendment/Due Process case, involving a judgment against ORC (Operation Rescue of Calif.) after a kangaroo court judge/trial, without the right to cross-examine witnesses. Appellate court reversed judgment and case remanded for a third trial.

(**RECAP** CONT. ON PAGE 4)

(RECAP CONT. FROM PAGE 3)

Mason et al. v. University of Denver (Denver)—Picketers and leafletters arrested at University of Denver, charges not filed. Civil action pending.

People v. Gabriel (Wisconsin)—Pro-life activist confronts abortionist at golf course. Abortionist strikes pro-lifer with golf club. Pro-lifer is arrested next at abortion mill for disorderly conduct. Charges dismissed four weeks before trial.

Locatel v. City of Monrovia—Civil rights suit for violation of pro-lifer's rights while leafletting at a high school.

Feminist Women's Health Center v. Blythe, et al. (Sacramento)—This thirteen-year old lawsuit recently was resurrected by the plaintiff abortion clinic, which attempted to "modify" a speech-restrictive injunction to apply to the clinic's new location, thereby placing sidewalk counselors more than 30 feet from persons entering the clinic. The court granted the motion insofar as it prohibited illegal activity, but declined to impose any speech-free zone.

McCullough v. Long Beach—Pro-life activist arrested for handing out literature on public sidewalk in front of a public high school. Police also conducted a warrantless seizure of a videotape of the incident, threatening the videographer with arrest if he didn't hand over the tape. No charges were filed on the arrest. A claim for damages against the city has been filed.

Citrus College v. Rader—Pro-life activists arrested for carrying signs on campus of public college. Charges not filed.

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DUPLICATES

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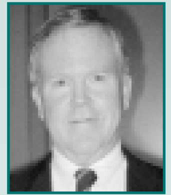
THE 2002 LLDF BANQUET

Anthony Wynne



PROF. DENNEHY AT LARGE

Q. What do you have when you get a bunch of lawyers together in a room?

A. A good time.

You do, that is, if the lawyers are pro-life attorneys, joined by their spouses, friends and supporters, and the room is the banquet room at the Bellevue Club in Oakland.

LLDF held its 9th Annual Banquet on November 9, 2002. The venue—the same as that of the past five years—was the classic clubhouse in Oakland overlooking the shimmering waters of Lake Merritt. Built in 1926 as a women's club, the Bellevue Club maintains the look and feel of that era, and is both elegant and comfortable.

LLDF President John Streett was gracious and witty as master of ceremonies. Following an invocation by Jeff White, founder of Survivors, and a pledge of allegiance to the flag led by Lt. Col. Ron Maxson, Army (Ret.), LLDF Executive Director Dana Cody gave a brief report on some selected cases. She chose cases which illustrate LLDF's continued adherence to its "no case is too small" motto, and its increasing involvement in end-of-life issues.

LLDF Legal Director Katie Short presented the Attorney of the Year Award to La Mesa, California, attorney Michael Kumeta in recognition of his work in *Wilkerson v. Sullivan* in which he won a dismissal of a $2.5 million lawsuit against Sylvia Sullivan. Mrs. Short ad libbed that the award might also be called "The Pound of Flesh Award", a reference to the fact that Mr. Kumeta won not only a judgment for his client, but also an unprecedented award of attorneys fees against Planned Parenthood.

The dinner speaker was Dr. Raymond Dennehy, a professor of philosophy at the University of San Francisco, as well as author of several books. His latest book, *Anti-Abortionist at Large* was published earlier this year. The theme of Prof. Dennehy's talk was "the language of abortion".

> *This is not the first time that a democracy has been corrupted through language, that is, through the use of fuzzy, inaccurate and misleading words. A human being becomes something other than a "person", an issue of life becomes an issue of "choice" or "privacy", and eventually people find acceptable that which they previously found abhorrent.*

Citing the abolitionists of the mid-19th century, Prof. Dennehy noted that this is not the first time in history that a democracy has been corrupted through language, that is, through the use of fuzzy, inaccurate and misleading words. A human being becomes something other than a "person", an issue of life becomes an issue of "choice" or "privacy", and eventually people find acceptable that which they previously found abhorrent. George Orwell spelled it out in his 1948 novel, *1984*: the state seeks to control people's thoughts by controlling their language.

Speaker Dr. Raymond Dennehy

LLDF Attorney of the Year, Michael Kumeta and clients Sylvia and Royce Sullivan

Executive Director Dana and Doug Cody

Andrew Zepeda, Jeff White, and Cheryl Conrad

Bonnie and Greg Labarthe

Dr. Dennehy and family

Attorneys Penny Preovolos and Rich Katerndahl

LLDF Admin. Michelle Smedley and John Hamlon

Who exactly is seeking this control? The mainstream media, the primary spokesmen for the popular culture, clearly are. Certainly the politicians are. But Prof. Dennehy observed that even "scientists say absurd things to justify ideology." For example, despite incontrovertible evidence that a woman's baby *in utero* is a human being, scientists (and consequently now many others) refer to it as a fetus, a term equally applicable to unborn mice, pigs, horses, etc.

Lawyers and judges are not above using language to countenance the most absurd inconsistencies. Prof. Dennehy cited the 1994 California Supreme Court case of *People v. Davis*, which held that a third party who killed a "fetus" (including a pre-viable fetus) can be charged with murder, but at the same time provides that such a holding does not erode a "woman's right to privacy". "It all depends on who is doing the killing," noted Prof. Dennehy.

Prof. Dennehy does not spare members of his own discipline, the philosophers. Some of them (e.g., Peter Singer, Michael Tooley) have taken the logical step from approval of abortion to approval of infanticide, and done so boldly and unapologetically. "If we can kill in the womb, we can kill outside the womb."

We cannot, said Prof. Dennehy, stop them—the media, the politicians, the scientists, the lawyers and judges, the philosophers—from using vague, misleading and inaccurate language. We can, however, stop using it ourselves. This is our weapon: plain speaking.

It is Prof. Dennehy's plain speaking which makes him such an effective "anti-abortionist" (a more plain-spoken term than "pro-life"?). Cool, rational, informed and plain-spoken, he is a role model for all advocates of innocent human life. So the answer to the opening question about the room full of pro-life lawyers might be, not just "a good time", but an instructive and inspiring one as well. L

VICTORY!

After years of costly legal battles, the pro-abortion RICO case against Joe Scheidler and others has ended in the United States Supreme Court. In an 8-1 decision, a large majority of the Justices of the Nation's high court held that RICO, the federal anti-racketeering law, does not apply, and was never meant to apply to Mr. Scheidler and others who engaged in civil disobedience to stop abortion.

NOW had argued successfully in the lower courts that, by engaging in rescue blockades of clinics, the defendants were guilty of extortion, i.e., the "obtaining" of "property" through force or threat of force, and that multiple acts of "extortion" made the defendants liable under RICO.

The Court ruled, however, that while the defendants' activities might meet the legal definition of coercion, they did not rise to the level of extortion, as no property had been obtained by the defendants. On that basis, the Court reversed the $250,000 jury verdict against the defendants, as well as dissolving a nationwide injunction imposed by the trial court.

Stunned by the decision, the National Organization for Women vowed to continue to abuse the legal process by seeking to silence the pro-life message using federal law, such as the USA Patriot Act. Dana Cody, Executive Director of the Life Legal Defense Foundation, one of the organizations which filed an amicus curiae brief in *Scheidler*, stated "The National Organization for *some* Women, not this woman, is obviously reeling from this decision. Neither RICO, nor The Patriot Act was ever meant to silence the message of citizens who oppose abortion. The staff of our organization is all women, and we are thrilled with yesterday's decision." Cecilia Cody, Executive Director of California Right to Life echoes these sentiments and applauds the court for its decision.

[The Court handed down its decision just as *Lifeline* was going to press. More next issue.–Ed.]

(RTL-AUSTRALIA CONT. FROM PAGE 3)

Australia might have some acquaintance. For the rescue movement was not all of one mind: it contained people who professed to be practicing civil disobedience, and others who strenuously denied that they were practicing civil disobedience; some who would walk meekly along with arresting police officers, and others who would link themselves together at the neck to avoid being carried off; Protestants, Catholics, and Jews; Vietnam veterans and peaceniks; laity and clergy; people who would disagree about principles and tactics at the drop of a pro-life baseball cap.

And it also contained activists and lawyers: now there was a difference it was nearly impossible to reconcile. Hardcore activists wanted to stick with their principles and strategy even if they had to spend the rest of their lives in solitary confinement. I know—because Colonel Ron Maxson, my dad, was among the hardest core of the hard core. And attorneys generally wanted to deal with the law as they had learned in order to minimize consequences for their clients. LLDF was formed—at least in part—in order to mediate these differences.

But it wasn't long before the pro-life rescue movement simply dried up.

There's some dispute about why this happened—but I was there, so I know. The fact is that the price for nonviolent direct action that involved breaking the positive law simply became too high. Initially, rescuers were charged with the same thing that other sit-in participants, in other causes, had been charged with: trespass for sitting in and resisting for going limp on arrest. And even if these charges had remained the only ones, it is likely that the accumulation of them, over the years, would have worn down the most determined middle-class pro-life mom.

But city, state, and federal governments didn't want to wait for that to happen. They got tougher and tougher on pro-life sit-ins, almost by the week—perhaps for the practical reason that pro-life sit-ins were bigger and more persistent than other sit-ins.

This process reached its high point—or low point—early in the Clinton administration, when the 'Freedom of Access to Clinic Entrances Act' was signed into federal law. But this action was largely redundant by the time it came: the price had become too high for most people long before "FACE."

That's when a strange thing happened. LLDF—which had its origins in the rescue movement, and indeed in the most obstreperous, disagreeable segments of the rescue movement—found that its mission went far beyond sticking up for the rescuers who were no longer even risking arrest in the first place. When rescue ended, pro-life activism—in the form of legally protected pro-life free speech—continued. In some ways, these new forms of pro-life activism were more widespread and effective than rescue had ever had a chance to be. And so, of course, they too were targeted by the pro-aborts for termination. And LLDF had plenty besides rescue that it had to defend.

The ACLU had long recognized abortion as a civil liberty in itself, and thus its officers professed to find a conflict in defending the free speech rights of pro-lifers that they didn't find in defending, say, the free speech rights of neo-Nazis.

As far back as I can remember, I can hear pro-life spokesmen saying that the right to life is the most fundamental of rights, without which the rest are meaningless. If your life is taken, the argument would go, then you can't exercise any of your other rights. And if your life happens not to be taken, but others' lives are arbitrarily taken instead, then you hold all your effective liberties by sufferance, and they're not actually rights at all.

This argument has been repeated so many times that it has become a sort of truism—but it's a truism, as Chesterton might say, because it's true. I don't think anyone would disagree with it in principle—which is why you get all sorts of dishonest fudging from the other side on the human status of the unborn child.

But LLDF's experience shows that this formula is true in another way—one less profound, perhaps, but more practical. The right to life is indeed the most fundamental of rights in that, as soon as it is undermined, the other rights will start crumbling, not in theory only but in plain hard fact. What we've found at LLDF is that, as soon as the right to life is nullified, the right to free speech is nullified as well—at least if it is not vigorously defended by LLDF.

Now I'm aware that Australians may have a slightly different take on the American bill of rights than I do. I know that my country rebelled whereas yours remained loyal. But surely, at their roots, our nations share a common source of values. The revolutionaries who founded the polity of the states—the rebels, if you prefer—protested chiefly that they had been deprived of the rights of Englishmen. The rights enumerated in the U.S. Constitution are really universal human rights—and the same ones traditionally accorded Australians. If the enumeration is peculiar to my country, the essence behind that enumeration—the requirement that the government recognize human dignity—remains the same.

And it's that essence that collapses, in due time, once the right to life has been compromised.

You probably know as well as I do that in the states there are any number of legal-aid organizations designed to protect civil liberties and especially free speech rights. The best known, of course, is the ACLU or American Civil Liberties Union. What we found out very quickly at LLDF is that it was a very rare thing—rare to the point of being unknown—for the ACLU or any of these other organizations to come to the aid of pro-lifers, even if the case quite clearly involved just the sort of free speech issues that the ACLU specializes in. The ACLU had long recognized abortion as a civil liberty in itself, and thus its officers professed to find a conflict in defending the free speech rights of pro-lifers that they didn't find in defending, say,

the free speech rights of neo-Nazis. I always wondered why the conflict was consistently decided in favor of abortion over free speech. But whatever the reason, LLDF ended up becoming, in a way, the ACLU for pro-lifers.

I can illustrate a lot about LLDF's work, and what it means for the pro-life movement everywhere, by telling you just briefly about one case, *Foti v. Menlo Park*, which I'm proud to say we won before the Ninth Circuit Court of Appeals in the spring of 2000.

The only thing truly atypical about this case is that we won it—but you have to remember that our unofficial motto is *non possumus semper vinci*: "we can't lose them all."

Ross Foti is a pro-life activist who demonstrates regularly at various abortion mills in the San Francisco bay area—including at a Planned Parenthood mill in Menlo Park. Ross does sidewalk counseling—which means that he tries to talk abortion-bound mothers out of the procedure on site. The fact is, Ross often succeeds—and has a long list of babies who have been born as a result of his efforts. Part of Ross's method involves the display of large pro-life signs of the sort that many people don't want to see; in other words, Ross isn't above showing the notorious dead-baby pictures.

So way back in 1996, the city of Menlo Park, under pressure from the abortionists and maybe from some other members of the public, passed an ordinance that targeted Ross just as directly as the city thought it couldget away with. The people in charge there knew they couldn't legally target Ross by name, and they knew that they couldn't explicitly outlaw the content of his signs, so they wrote an ordinance that limited the size of signs to three square feet. It was necessary, of course, for them to make all sorts of exceptions in this ordinance, for real estate agents and such, or they never would have got it passed.

Now it was clear from public meetings, it wasn't any secret, that the city was targeting Ross and nobody else. But the ACLU didn't volunteer to defend his free speech rights. That was up to LLDF.

And, as with most of LLDF's cases, this one was a long time in the courts, almost four years because we lost in the trial court and had to go up on appeal. Not only LLDF attorneys but LLDF's grass-roots supporters had to contribute over those four years—because the appeals process in the states is not a cheap one. So a lot of people had to contribute to win this one victory, really for just one pro-lifer, whose only claim on their attention was that he had regularly saved lives from abortion over the years.

In the end, though, I think we won not because of any special virtue on our part, but because the city of Menlo Park went way too far in the first place. The people in charge there thought it was perfectly natural to silence pro-lifers while exempting others—and the glaring inconsistency was too much even for the typically pro-abortion appeals court to tolerate.

Once the right to life is abrogated and a whole class of human beings is excluded from the protection that society ought to give it, a lot of people outside the targeted group just aren't going to go along.

Now there are two lessons about the pro-life movement that I want to draw from this case.

The first has to do with what I've already pointed out—that the privation of the right to life leads to a general privation of all rights and does so very quickly. Or at least that it leads to an attempted privation of all rights that has to be resisted. My point is not just that this happens, but that it happens for a definable reason. Once the right to life is abrogated and a whole class of human beings is excluded from the protection that society ought to give it, a lot of people outside the targeted group just aren't going to go along. To varying degrees, whether it's me or you or Ross Foti, those people are going to use their own lives and liberty and property, whatever rights and abilities they can bring to bear, to come to the aid of that targeted group—and they aren't always going to be pleasant about it because it is not in itself a pleasant thing. The fact is that Ross Foti's signs are very disturbing: they show abortion as it really is. And people shouldn't have to look at such things—except when by their action or inaction they are causing such things to happen. Then they should look at such things—and people like Ross Foti are going to show them. And of course the powers that be in such places as Menlo Park, having made things abnormal, will devoutly wish that things were normal. They'll try to shut Ross Foti down in order to create the illusion that everything is normal. Hence, all rights have to be made optional in a society where the right to life has been abrogated.

And my other lesson is that we pro-lifers can win victories every day against the death culture—even if we don't overturn *Roe v. Wade* or restore laws protecting unborn human life throughout Australia. Next to what we would hope to do, it's clear, LLDF's victory in *Foti v. Menlo Park* is a very small thing, even if it represents a great effort on the part of a lot of different people. But its effect as a precedent may in the future be very profound. And its effect in the here and now—well, in the there and now—is more profound than the pro-aborts would care to admit. Thanks to *Foti v. Menlo Park*, Ross Foti can be back to his lifesaving work without hindrance and his list of infants saved from the Moloch of abortion can grow longer day by day. If that's not the kind of victory that and I and other pro-lifers should welcome, I don't know what is.

So if you and I and other pro-lifers remain faithful in the face of general discouragement and particular setbacks, we will win victories that we never expected—and maybe even some victories that we will never know anything about. It really is true that we can't lose them all. L

EDUCATION

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DOCTORS OF DEATH

Wesley J. Smith

Kaiser Solicits Its Doctors To Kill

When liberals ask me why they should oppose physician-assisted suicide (PAS), I always reply, "I can summarize a big reason in just three letters: HMO."

That always raises an eyebrow. Liberals hate HMOs.

Then I ask, "Do you know how much it costs for the drugs used in an assisted suicide?" They usually shake their heads, no.

Answering my own question, I say, "About forty bucks," adding, "Since HMOs make money by cutting costs, and it could cost $40,000 (or more) to provide suicidal patients with proper care so that they don't want assisted suicide, the economic force of gravity is obvious." More often than not, my liberal interlocutor will say, "Gee, I never thought about that before," and agree that the HMO factor is a very serious problem confronting the assisted-suicide movement.

Most people haven't yet made the money connection between assisted suicide and the increasing strains on health-care budgets.

That may be because reporters, who are usually eager to expose potential financial conflicts of interest in other public-policy issues, tend to be blind to the economic stakes involved in the assisted-suicide controversy. They prefer to see it as a matter of "choice," or of "compassion," or of modernism-versus-religion. Yet, the realization that assisted suicide will, in the end, be largely about money, is becoming increasingly difficult to ignore.

Take Oregon, where assisted suicide is legal. While the assisted-suicide law does not compel any doctor or HMO to participate in the self-destruction of patients, only Catholic HMOs have said no.

Indeed, Kaiser/Permanente Northwest's doctors are known to have written lethal prescriptions under the Oregon law.

But now, Kaiser isn't merely permitting doctors to assist in patient suicides, it is *actively soliciting* its doctors to participate in the deadly practice. As revealed by the anti-assisted-suicide medical group Physicians for Compassionate Care, a Kaiser executive recently e-mailed a memo to more than 800 Kaiser doctors soliciting PAS-doctor volunteers.

The realization that assisted suicide will, in the end, be largely about money, is becoming increasingly difficult to ignore.

The memo reveals that to the apparent chagrin of Kaiser, to their credit, few plan doctors are willing to participate in the killing of their own patients. Hence, the executive urges any Kaiser doctor willing to "act as Attending Physician under the [assisted suicide] law for YOUR patients" and doctors "willing to act as "Attending Physician under the law for members who ARE NOT your patients" to contact "Marcia L. Liberson or Robert H. Richardson, MD, KPNW Ethics Services." (Emphasis in the memo.) Since "attending physicians" write the

lethal prescriptions under the Oregon law, Kaiser is apparently willing to permit its doctors to write lethal prescriptions for patients they have not treated.

For opponents of assisted suicide who are closely following events in Oregon, Robert Richardson is already notorious as the HMO administrator who green-lighted the assisted suicide of Kate Cheney.

Cheney, as reported by the *Oregonian*, was a terminal cancer patient who was probably suffering from dementia when she asked for a lethal prescription, raising serious and significant questions about her mental competence. Rather than prescribe lethal drugs, her doctor referred her to a psychiatrist who reported that "she does not seem to be explicitly pushing for this." He also determined that she did not have the "very high capacity required to weigh options about assisted suicide." Accordingly, the psychiatrist nixed the lethal prescription.

Advocates of legalized assisted suicide might, at this point, smile happily and say that this is the way the law is supposed to operate: a vulnerable and perhaps incompetent woman's life had been protected. But proving that "protective guidelines" don't really protect, that wasn't the end of Cheney's story. Her daughter insisted that Kaiser permit another psychiatric opinion. Kaiser agreed to the request.

This time, the consultation was a clinical psychologist rather than an M.D. psychiatrist. Like the first report, the psychologist found that Cheney had significant memory problems. For example, she could not recall when she had been diagnosed with terminal cancer. The psychologist also worried that Cheney decision to die "may be nfluenced by her family's wishes." Still, despite these reservations, the psychologist determined that Cheney was competent to commit suicide.

The final decision to approve the assisted suicide was made by Richardson. Despite two mental-health professionals significant concerns about Cheney's mental state and the potential that familial pressure was involved in her decision, after he interviewed Cheney, Richardson approved the writing of a lethal prescription.

It is worth noting that Cheney did not take the poison pills right away. Her assisted suicide took place *only* after she was sent to a nursing home for a week. Tellingly, she took the pills on the very day of her return home. No doctor was present. Nor was her mental status assessed at that time. That is because under the Oregon law, once the prescription is written, death doctors need have no more to do with the suicidal patient.

Now Kaiser isn't merely permitting doctors to assist in patient suicides; it is actively soliciting its *doctors to participate in the deadly practice.*

When the Cheney case became public, Richardson angrily claimed that his decision had nothing to do with money. And, to be fair, there is no doubt that if the relatively few people reported as committing assisted suicide so far in Oregon is correct, Kaiser and other participating HMOs have not yet saved a great deal of money by agreeing to facilitate the assisted suicides of their terminally ill members. But if the reluctance of good doctors such as those currently refusing to participate in-patient self-killing at Kaiser is ever overcome, the financial facts could change. Indeed, if assisted suicide ever became nationalized and a routine "medical treatment," significant money could be saved — and hence made — by the HMO industry from the hastened deaths of their patients.

This is the view of none other than assisted-suicide guru, Derek Humphry, cofounder of the Hemlock Society and a heavy lifter in support of the Oregon law. Humphry now claims that money is the "unspoken argument" in favor of legalizing assisted suicide. Specifically, in his most recent book *Freedom to Die*, co-authored with Mary Clement, the authors write that "the hastened demise of people with only a short time to left would free resources for others," an amount they predict could run into the "hundreds of billions of dollars." Moreover, the authors claim that "economic necessity" is the ultimate force driving the assisted-suicide movement, to the point that it "is the main answer to the question [about legalizing PAS], 'Why Now?'"

Logic is certainly on their side. With the advent of managed care, profits in health care increasingly come from cutting costs. With assisted suicides costing such little money, what "treatment" could be more cost effective than assisted suicide? And since it is a well-known human failing that our values often follow our pocketbooks, ignoring the significant financial stakes involved in the assisted-suicide debate is to overlook a crucial part of the story.

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[Wesley J. Smith is an attorney for the International Task Force on Euthanasia and Assisted Suicide and a senior fellow at the Discovery Institute. He is the coauthor of *Power Over Pain: How To Get The Pain Control You Need.* This article was originally published in *National Review Online* (www.nationalreview.com—8/19/2002), and is here reprinted kind permission of the author.]

(TERRI CONT. FROM PAGE 1)

heard. Judge Greer proceeded to rule on the motion without hearing, and in fact, without reading all of the affidavits submitted with the motion for relief from judgment. Again, an appeal followed (Schiavo III). This time the appellate court spelled out a procedure under which, for the first time in twelve years, the Schindlers could have Terri examined by doctors of their own choosing. They were permitted two doctors, Michael was permitted two, and the court was directed to appoint a fifth doctor as an independent expert. The examinations took place, and some, but not all, of the diagnostic tests the doctors requested were undertaken. An evidentiary hearing was finally held from October 11 to 22. In both Pat and the Schindler's view, the hearing, while exhausting, went very well, and made a powerful record for the appellate court.

The Schindlers' burden of proof was to establish by a preponderance of the evidence, in the words of the Second District, "that new treatment offers sufficient promise of increased cognitive function in Mrs. Schiavo's cerebral cortex—significantly improving the quality of Mrs. Schiavo's life—so that she herself would elect to undergo this treatment and would reverse the prior decision to withdraw life-prolonging procedures." Other language in the opinion permits consideration of any other relevant factor that would cast doubt on the original judgment (Judge Greer's death order of February, 2000).

After opening statements, the seven-day trial started with Terri's attending physician, Dr. Gambone, who was clearly startled by what he saw on the videotaped exams by the other doctors, given the fact that he never saw Terri in the presence of her mother or father. Dr. Gambone helped establish the shocking neglect that Terri has suffered at the hands of the husband and his surrogates over the years. Gambone personally sees Terri for about ten minutes at a time every four months or so. He therefore spent more time on the witness stand than he has spent with Terri in the four years he has been her attending physician, including his initial one-hour examination. Although he expressed the opinion that Terri is in a persistent vegetative state and can't be helped, when pressed, he retreated into reliance on "the specialists," whose diagnosis of PVS he relied on (along with Michael's description of Terri's medical history).

The Schindlers' first witness was neurologist William Hammesfahr, who testified concerning recent research which describes insults to the brain as involving direct injury (and subsequent cellular death) to a much smaller area of the brain than was previously assumed, and the fact that such areas are surrounded by a much larger "penumbra" of neurons, which are deprived of sufficient blood flow and oxygen to prevent them from functioning, but still get sufficient circulation to survive for years after injury, in a state of "hibernation" or "idling." Dr. Hammesfahr's vasodilation therapy returns such "idling" neurons to full function by increasing blood flow and oxygenation to that area of the brain.

After elucidating the extensive research going on in the field (submitted into evidence by more than fifty journal articles related to brain injury research and vasodilation therapy) Dr. Hammesfahr then narrated his 3-1/4 hour examination of Terri, while the Court viewed it by video in its entirety.

Dr. Hammesfahr demonstrated a wide array of volitional behaviors which Terri displays, from the delighted smile she gets when greeted by her mother, to her reaction to piano music (she laughs when she recognizes *The Christmas Song* rendered in honky-tonk style), to opening and closing her eyes as well as moving her right leg in response to requests, and tracking a balloon with her eyes. He also demonstrated that she does not have "dolls-eye syndrome", and after gently massaging her left shoulder and arm for about forty minutes, succeeded in extending her previously contracted limb to about 160 degrees. Additionally, Dr. Hammesfahr demonstrated the abnormally stiff condition of Terri's cervical spine, raising her upper body off her pillows by lifting the back of her head without her chin touching her chest. He stated that he has never examined a patient whose neck feels like Terri's, with the exception of a patient who was a victim of an attempted strangulation. It is his opinion that Terri is not in a vegetative state, that she cooperated in his examination, that she understands much of what she hears, and is in fact attempting to speak. He has treated patients whose condition was worse than Terri's, and believes that she will significantly improve if given a combination of vasodilation therapy and hyperbaric oxygen therapy.

Michael's attorney's cross-examination centered primarily on his Nobel Prize nomination (Dr. Hammesfahr was nominated by local U.S. Congressman Michael Bilirakis in 1998), and whether or not he has admitting privileges at Edward White Hospital in St. Petersburg (Dr. Hammesfahr operates an out-patient practice and does not admit patients for hospitalization).

The Schindler's second witness was Dr. William Maxfield, who is an extremely well-qualified and experienced neuro-radiologist. In addition to reading diagnostic imaging, Dr. Maxfield treats brain injury patients with hyperbaric oxygen therapy. Dr. Maxfield compared Terri's current CT scan with one done in 1996 (upon which the original diagnosis of PVS was based) and stated his opinion that the current scan shows "a more normal" brain than the earlier one. During Dr. Maxfield's examination of Terri (also videotaped), her father Bob put a phone to Terri's ear, to let Terri hear her mother's voice, to which she clearly reacts. Bob did a subsequent demonstration of Terri tracking a balloon, as well as a light box. Finally, Bob shared with Terri a memory about how Terri used to let her lazy eye wander off, much to the consternation of her mother. Terri reacted very emotionally to this story, at first laughing at her dad's chiding tone in retelling, then becoming so sad that she needed to be comforted.

The neurologist appointed by Judge Greer, Dr. Peter Bambikidis, took the position that Terri is in a persistent vegetative state. Because of his status as the court's chosen "independent" expert, Pat was relatively easy on him during cross-examination, though she noted that it did seem strange for a supposedly independent expert to have had more contact with the husband's attorney than most of his own witnesses had. Dr. Bambikidis does not treat patients in PVS or have occasion to diagnose them. His examination of Terri was not taped, and took place in the evening the same day that

Dr. Cranford examined Terri. Dr. Bambikidis was not aware that Terri had a bad cold that day. His field is actually nerve conduction testing of the extremities, not even brain work. The Second District set guidelines for experts to testify in this case, which should be, if possible, doctors who diagnose and treat patients in PVS. Dr. Bambikidis was clearly not within those guidelines and admitted that fact.

Michael Schiavo's first witness, Dr. Melvin Greer (no relation to Judge Greer) is the former chairman of the Department of Neurology at the University of Florida. On direct examination he gave a forceful presentation, concluding that Terri was in PVS and that he knows of no therapies that can help "this unfortunate young woman." On cross-examination it became clear that without his voluminous notes, the aging Dr. Greer really had very little recollection of his examination of Terri despite the fact that he reviewed his notes that day (and testified from them on direct). Most of the journal articles he cited were dated. He was not familiar with vasodilation therapy, and only referred to hyperbaric oxygen therapy as a treatment for the bends (he didn't know that there are eleven approved therapies in the U.S. using HBOT). In doing his literature search for this case, he did not use either vasodilation or HBOT as search terms. Dr. Greer was factually wrong about a number of things. He related watching Dr. Maxfield's taped exam, and recalls it as being about a minute and a half long (it was actually 22 minutes long). He claims to have palpated Terri's neck, but noticed no abnormality (Dr. Hammesfahr reported a most unusual spinal exam). He states that Terri's contractures are permanent, but apparently didn't see Dr. Hammesfahr straighten her arm, despite testifying that he watched the tape in its entirety. Like Dr. Bambikidis, he doesn't treat patients in PVS, so his relevance as an expert witness was also in question.

Finally, Dr. Ronald Cranford testified. His examination of Terri was taped, and was approximately 45 minutes long. Again Mary was shown interacting with Terri. Terri, of course, smiles at her mother as she does with no one else. Cranford conducted a somewhat brutal, rapid-fire neurological exam of Terri, but she responded surprisingly well despite that and the fact that she had a terrible cold. The evidentiary value of Dr. Cranford's videotape was compromised by the fact that the camera was tightly focused on Terri's face to the extent that you couldn't tell where his hands (or the balloon) were actually located at any given time.

Despite that limitation, it appeared that Terri did an excellent job of tracking, actually the best example of tracking the balloon the Schindlers or Pat had seen. Cranford made numerous admissions on the video regarding how responsive she was, but in his testimony stated that he lies to his patients in order to be encouraging. On cross-examination Cranford admitted his ties to the euthanasia movement and the Hemlock Society specifically. He also admitted that he was very critical of the California Supreme Court's handling of the Robert Wendland case. Demonstrating Dr. Cranford's bias and long-standing agenda was a simple matter, and he left the witness stand extremely agitated. Again, this doctor does not treat patients in PVS. Rather, he acts as an expert witness to help families dispose of such unfortunates.

"Terri has shown us her spirit and tried as hard as she can under the circumstances to say, 'I'M STILL HERE!' "

In his closing argument, Michael's attorney George Felos compared Terri Schiavo to a houseplant, equating her responses to "phototropism." He invited the court to use Terri's constitutional right to refuse treatment as a basis to ignore the protections of Florida's advance directive law or to declare it unconstitutional.

Pat's closing argument stressed Terri's personhood, her obvious voluntary reactions, and the fact that research supporting both vasodilation therapy and hyperbaric oxygen therapy in ischemic brain injury cases is being conducted at major institutions around the country. She pointed out that a judge does not need an expert's opinion to tell him what any layman can see—that Terri and her mother truly love each other. The experts speaking against Terri, she said, practiced an "intellectual disconnection" that filtered Terri's humanity through the sieve of what people with such disabilities are not expected to be able to do. "Is it fair or equitable to keep saying that we are not going to help you because 'you have brain damage'?" she asked the court.

"Terri has shown us her spirit and tried as hard as she can under the circumstances to say, 'I'M STILL HERE!' "

Despite the weight of credible evidence supporting the Schindlers' position that Terri was not PVS and that her condition could be significantly improved with therapy, on November 22, Judge Greer again ruled that Terri's food and fluids should be discontinued. In his ruling, in which he gratuitously disparaged Dr. Hammesfahr a "self-promoter," the judge held that the treatments proposed by Drs. Hammesfahr and Maxfield were merely experimental and thus did not support a finding by a preponderance of the evidence that they would significantly improve Terri's quality of life. However, the court of appeal ordered Judge Greer to determine whether there were untried treatments which offered sufficient promise such that *Terri herself* would elect to undergo these treatments. Judge Greer's ruling did not include any discussion of the burdens, if any, of such treatments, a factor which would certainly be relevant in attempting to determine whether Terri would want to receive them. Were Terri able to express her wishes, an "experimental" treatment offering some promise might certainly appear a more attractive option than death by starvation and dehydration.

Although Judge Greer initially set a date of January 3 for the termination of care, he later granted Pat's motion to stay the order indefinitely pending review by the court of appeal. Briefs are being filed, and argument is set for April 4.

In addition, the Schindlers have initiated an adversarial proceeding in the trial court to

(**TERRI** CONT. ON PAGE 12)

LIFELINE MISSION STATEMENT

The mission of Life Legal Defense Foundation is to give innocent and helpless human beings of any age, and particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the courtrooms of our nation.

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(**REASONABLE** CONT. FROM PAGE 11)

remove Michael as Terri's guardian. In addition to his deliberately cruel and inhumane orders keeping Terri in a condition of near isolation and sensory deprivation [see www.terris-fight.org for details which will make your blood boil — Ed.] the Schindlers believe they have now discovered evidence of physical abuse sufficient to force Judge Greer to remove Michael as guardian. Pat filed a Petition to Remove Guardian and to Appoint Successor Guardian, which the court has yet to rule on.

Each and every day that Terri is under Michael's control is fraught with danger, especially given the fact that she is under his Do Not Resuscitate (DNR) order. Recently the temperature in her room was set as low as 64 degrees. The thermometer is now in a locked enclosure and set at 75 degrees. Terri is seen by a family member every day. Hopefully there will be no Wendland ending to the Terri Schiavo story.

The clear agenda of Michael and those backing him, particularly George Felos and Ronald Cranford (who have been paid hundreds of thousands of dollars from a fund that was intended to provide Terri with the care she needs and would benefit from) is to expand the class of patients who can be disconnected from feeding tubes in Florida to include not just PVS patients, but "minimally conscious" ones also, and ultimately, any case where the courts determine that a patient's "best interest would be served" by death. They further hope to establish a constitutional right which would defeat the minimal protections wards are provided by Florida's advance directive law.

Fortunately not only for Terri and her parents, but for all the cognitively impaired who may now or in the future be threatened with death by starvation and dehydration, LLDF was there to provide crtical help. "Without the assistance of LLDF, we would have had to pull out of this case over a year ago. Terri would be long dead, cremated, and shipped to Pennsylvania, where her parents couldn't even visit her gravesite," says Pat. "Our sincere thanks to LLDF's supporters whose continued prayers and sacrifices have enabled us to keep fighting for Terri's life." L