

The Schiavo Case:
Jurisprudence, Biopower, and Privacy as Singularity

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OVERVIEW

The Terri Schiavo case, the latest high-profile “right-to-die” case in the United States, whose denouement saturated the US mediasphere at the end of March 2005, is a particularly complex problem in the Deleuzean sense. Its solution, which took more than 15 years, actualized lines from legal, medical, biological, political ... multiplicities. The ellipses indicate the impossibility of completely delimiting the forces at work in any case (the virtual as endless differentiation) just as it indicates the necessity of cutting through them in making any one solution work (actualization as differentiation). Thus that actualization, a creative resolution of the problem, brought some aspects of the virtual into distinctness, while others faded into momentary obscurity.¹ The elements functioning most intensely in the Schiavo case cut across the fields of right, medical discipline and biopower, hence at the intersection of sexuality and racism, as Foucault explains.² The turn to a liberal notion of the right to privacy as the right to die is never simple, for we remain trapped at the intersection of discipline and biopower if we ground that right in sovereign rights of personal autonomy and bodily integrity. The challenge to a Deleuzean jurisprudence is to creatively transform that right to show its basis in de-personalization. In other words, only in an extraordinary, ethical, situation, living along the fault line

between organic – bare – life and personhood,³ does one feel the intensities pulsing through a person and revealing the impersonal individuations and pre-individual singularities that the person actualizes and that allow for a judgment as to the medical treatment appropriate for him or her, whether that judgment is rendered by him or herself or by proxy. Here it is not a matter of a “judgment of God,” that is, the application by a disembodied mind of a transcendent standard to the “facts” of a case, but judgment as felt intensity at a singular point, allowing lines of a virtual multiplicity to be actualized as the solution of a problem. Judgment as felt intensity of that which surpasses a person, de-personalizing him or her, rather than the exercise of a sovereign will.

DELEUZEAN JURISPRUDENCE

Paul Patton⁴ and Dan Smith⁵ call attention to Deleuze’s remarks on jurisprudence: “Codes and pronouncements are not what creates rights [*ce qui est créateur de droit*] but jurisprudence does. Jurisprudence is the philosophy of right [*du droit*], and proceeds by singularity, by prolonging of singularities [*procède par singularité, prolongement de singularités*]” (*Negotiations* 209-10 / 153, translation modified). Also, of particular interest to the Schiavo case: “People are already thinking about establishing a system of right for modern biology [*le droit de la biologie moderne*]; but everything in modern biology and the new situations it creates, the new course of events it makes possible, is a matter for jurisprudence. We don’t need an ethical committee of supposedly well-qualified wise men, but user-groups [*groupes d’usagers*]. This is where we move from right into politics [*du droit à la politique*]” (*Negotiations*, 229-230 / 169-170; translation modified).

Deleuzian jurisprudence (as practice of law, and reflection on that practice, rather than a theoretical inquiry into legal concepts and principles) is the “philosophy of right” in the sense that it counter-effectuates the actual legal system [*les lois*] by moving to the virtual multiplicity of rights [*le droit*] and proceeding back down in novel creations. Each precedent is a singularity that is “prolonged” to cover a series of ordinary decisions that fall under its control. Now of course there are profound differences from the French system with its codes, rooted in Roman law, and the American system, rooted in British common law but constrained by a constitution articulating abstract principles of justice⁶ as well as requiring federalism and separation of powers. But as we will see, certain aspects of American jurisprudence relevant to this case accord well with Deleuze’s notion of creative differentiation – something bitterly hated by those who decry “judicial activism,” a hatred which has led some to go even so far as to attack the very principle of judicial review.

The ruling precedent in the Schiavo case⁷ is *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1990), in which the Justices “assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition” (497 US at 279). This right can be exercised by proxy, given certain standards of evidence. The court notes that lower courts have grounded this right in the common law right to informed consent, or in both that right and in a constitutional right to privacy developed in the modern substantive due process tradition.⁸

Justice Souter's concurrence in *Washington v. Glucksberg* 521 US 702 (1997) is a good primer in the substantive due process tradition, which accords well with a Deleuzean notion of jurisprudence. According to Souter's reading of the post-*Poe* dissent tradition, "the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people" (521 US at 764). Except for the "perhaps" modifying "unconscious" (Deleuze would I think prefer "always") we see here the necessity of moving from the actual (the resolution) to the virtual (the clash of principles) as that virtual realm of principles changes in relation to the series of actualization (the history of our values as a people).⁹ Souter's next formulation stresses the need for concrete appraisal rather than abstract reasoning: "It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise" (521 US at 764).

So we see that in the view of one of the members of the Supreme Court, American jurisprudence in the substantive due process tradition insists on concreteness and singularity as creative resolutions of the Idea of liberal society, or "ordered liberty." Souter goes on: "the process of substantive review by reasoned judgment ... is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value" (521 US at 769). This puts this tradition firmly in line with common law method, which, again, insists on concreteness and singularity in making creative resolutions to complex problems involving virtual principles: "Common law method tends to pay respect ... to detail,

seeking to understand old principles afresh by new examples and new counterexamples” (521 US at 770).

Now of course I am not claiming that the actual practice of American jurisprudence in the substantive due process tradition has always worked in the way Souter claims it should in the ideal case. Souter himself points out the problems in the Dred Scott decision and the Lochner era economic decisions. But we do see how it might work. Let us now move to the right to privacy in a biopolitical era with advanced medical technology.

BIOPOWER

Substantive due process liberty interests, no matter how singular the case and detailed the argumentation, are not absolute and must be weighed against countervailing State interests. The court ruled in *Cruzan* that Missouri was allowed to impose a clear and convincing evidence standard in determining a patient’s wishes in order to protect a countervailing State interest in “the protection and preservation of human life” (497 US at 280). The court expanded on this by saying that “a State may properly decline to make a judgment about the ‘quality’ of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual” (497 US at 282).

Here is the important point in considering the modern reach of bio-power, the regulation of social order at the level of “bare life,” to use Agamben’s words. Modern biopower, as we know from Arendt and Foucault, is the entry into the purview of the State of a concern with the fostering of human life, rather than simply the right of the

state to decide to kill or let live.¹⁰ Instead of “make die and let live,” a biopolitical order will “make live and let die.”

I will discuss the biopower aspect of the Schiavo case using the concepts developed by DG in *ATP*, so that “bare life” is human being de-stratified below the subjectivity of the alloplastic stratum to that of the organism. A key difference here from Agamben’s analyses is that Terri Schiavo suffered a real, ontological, de-stratification, while Agamben is concerned with the “incorporeal transformation” or change in juridical status that reveals bare life.¹¹

Furthermore, it’s not just judgments as to inferior quality of life authorizing euthanasia that concerns us in biopower,¹² but also the construction of an inescapable State interest in fostering the life of the favored group. While Agamben is clear that biopolitics is focused on the determining the threshold beyond which bare life obtains, all of his analyses in *Homo Sacer* concern the way in which bare life is exposed, excluded from law, threatened. But in the Schiavo case we are concerned not with exclusion, but with inclusion, with a bare life that the law holds close. A total sphere of life, a biosphere, into which the out-group cannot penetrate and from which the in-group can never escape.¹³ “Life everlasting” never sounded so sinister. *Huis clos*. The limits that exclude the out-group – that create exposed bare life – are currently formed by the state of exception regarding Guantanamo,¹⁴ those of the in-group – trapped bare life – by the two versions of “Terri’s Law,” the October 21, 2003 Florida state law and the federal version passed March 20, 2005.¹⁵ (Technically speaking, the state of exception was not invoked in the Schiavo case, but it was called for. The state of exception occurs when sovereign power suspends law. This is what many called for when they asked either or both of the

Bush brothers to “send in the troops.” The two versions of “Terri’s Law” were rather what Schmitt would call crises of sovereignty, brought about by the principles of separation of powers in the Florida version and by both separation of powers and federalism in the federal version.)

The intersection of medical discipline of individual bodies and biopower regulation of the population, Foucault famously reminds us, occurs in sexuality and in racism. The Schiavo case confirms this. Her bulimia can be analyzed, following Sandra Bartky¹⁶ and Susan Bordo¹⁷ as a mode of governmentality, as self-discipline of female corporeality, the “tyranny of slenderness.”¹⁸ We need to note that the 1992 malpractice suit brought by Michael Schiavo was against the fertility doctors TS was consulting to help her get pregnant. They should have diagnosed her bulimia as being the cause of her having stopped menstruating, the jury ruled. This lapse in medical discipline regulating fertility led to Terri Schiavo’s breakdown and her body being caught in a medical assemblage with the feeding tube being only the most famous component. But a significant one, as it necessitates entry into the body. The right to refuse medical treatment is grounded in the common law right of informed consent, in turn grounded in sovereign control of bodily integrity. And with bodily integrity, we obviously touch upon central and profound gender issues. Who has entry to her body? Who has control over that entry?

The patriarchy evident in even posing these as questions is crossed with race when we remember that the people at the heart of the three most famous American “right to die” cases – Karen Quinlan, Nancy Cruzan, and Terri Schiavo – were all middle-class, white women who were childless at the times of their accidents. The culture of life

enveloped them, refusing to let them go. Potential givers of white life at a time the white race faces being out-bred by other races,¹⁹ they were in need of phallic domination: give her the tube of life, whether she wants it or not. We might need to go so far as to call an ugly thing by an ugly name: “tube-rape.”²⁰

The racism here can be overt: Sun Hudson, was, after all, black. (Sun Hudson was the first person to be taken off life support under a Texas law, signed by George W. Bush while governor, that allows hospitals to remove life support from indigent patients over family objections.²¹) But in the American case, it’s more often the “social racism” Foucault talks about (“*Society*” 261), directed against the economically unproductive. They can’t compete, they are weighing us down, their death purifies our body politic as we compete in the global market. Of course many of these economically unproductive are black, but many of them are white as well.²²

Strictly speaking, the law concerning assisted suicide that formed the basis of *Washington v Glucksberg* 521 US 702 [1997]²³ or hospital removal of life support in futile care, as in the Sun Hudson case, are tangential to Schiavo as they concern terminal cases. Of course, you could argue that Terri Schiavo was always terminal and the medical intervention in her case is only death-prolonging rather than life-sustaining. In all seriousness, we will have to rethink the horror movie cliché of the “undead.” But to understand that claim, we have to turn to the medical and biological issues.

PERSONALITY, PERSONHOOD, ORGANIC SYSTEM

Terri Schiavo suffered a heart stoppage in February 1990 brought on by drastically lowered potassium levels. The heart attack cut off oxygen to the brain. The cortex suffers

permanent damage after 6-7 minutes, but the brain stem can survive up to 20 minutes without oxygen. The paramedics summoned by a 911 call by Michael Schiavo arrived in that interval between cortex destruction and cessation of function of the brain stem.²⁴

The anoxia resulted in PVS (persistent vegetative state), a bizarre and frightening condition. Reflexive movements can be interpreted as indicating subjectivity. Here we see the Deleuzoguattarian concept of “faciality” at work (ATP 167-191). Faciality is the reterritorialization of the signifier on the face, behind the white walls and black holes of which subjectivity is projected. Many of you by now have seen the videos of TS’s face. The Schindlers looked at TS’s face and read subjectivity behind it. This sort of projection is well-placed in beginning a subjectivity loop between infant and care-giver.²⁵ But the infant will develop and TS never did. The infant is a potential person, the organic system that still bore the name TS would never again be a person.

A lot of sad affect was generated from saying “they are starving a person to death.” But this comes from applying the proper name of a person, “Terri Schiavo,” to an organic system. It’s neglecting the drastic destratification suffered in this case, an irreversible move from the subjective or alloplastic to the organic. The key in understanding this destratification is to consider the behavior pattern of the system and to distinguish personality, personhood, and organic system.

On one level, considering the organic system in the hospice bed, there is no personality as singular pattern of subjective interaction. Singular behavior patterns (unique mannerisms and sense of humor and so on) are a marker of “personality,” that which distinguishes persons from each other. As the organic system in the hospital bed only offers generic physiological behavior (heart beats, lung movements, reflex muscular

withdrawals of limbs from positions in which cell damage occurs – not movement in reaction to “pain” if pain is properly held to be subjective synthesis of nerve signals traveling in other pathways than reflex withdrawals), in that sense, there's no personality in the hospice bed, but that's only an *a fortiori* conclusion from the claim there's no person there.

Now if you want to distinguish personhood from the state of being an organic system, what you want are generic responses in the social, rational and hedonic domains, for a person is a generic member of society, a generic rational being, a generic pleasure seeker. Here we must distinguish between legal personhood and legal competence, however. A legal person is an entity recognized by the state as belonging to the category of person, while a legally competent person is a subset of that category. A child is a legal person, but not a legally competent person; the same is true for people who for one reason or another cannot meet the criteria for legal competence. A legally competent person will display consistent repetition of generic response in social, rational, and hedonic interaction (the person can answer to their name just like everyone else, can reason like everyone else [cf. the “reasonable man” legal standard], can pursue and / or defer pleasure like everyone else).

The question is whether to treat a PVS case, which clearly doesn't meet the criteria of legal competence, as a person, or whether we should propose another category for them. In PVS, we see only singular production of endogenously generated activity or singular reaction to subsocial stimuli (sounds or noise rather than social signals). The pattern of blinks and smiles and other reactions displayed by an organic system in PVS is utterly singular, unique to that system and its degree of damage and length of time from

injury, and so on. Now given enough time, these blinks and smiles will coincide now and again with the production of social signals, leading to the faciality machine we describe above, the projection of subjectivity. A reading of the medical report of one of the doctors supporting an MCS (minimally conscious state) rather than PVS diagnosis reveals such projection.²⁶

The problem with the distinction between legal competence and legal personhood, and the retention of personhood by PVS cases, is that the damage suffered in PVS destroys all that we want to protect by the concept of “person”: what Kant called rational humanity, what the utilitarians call the potential for pleasure.²⁷ (We can argue that extending the category of person to children or those adults with temporary disruptions of legal competence is done to protect their potential for competence.) Now I certainly do not want to indulge in any abjection of the material and argue that the PVS material system surviving the end of legal competence is unworthy of any legal and moral protection, but simply that such protection need not be that extended to “persons.” Here is where we have to think the category of the “undead,” if we want to avoid the dualistic notion of an immaterial person whose interests survive the disabling or death of the body (or the person as a bundle of immaterial interests which were formerly incarnated in a now disabled or dead body). As a materialist, then, I would say personhood is an emergent property of a body displaying generic social, rational and hedonic behavior, and that surviving interests consist of a social agreement to honor those wishes. I would further claim that the material system in PVS is neither a person nor a corpse, but “undead”; what we are struggling to do is to rethink the categories bequeathed us by

thousands of years of medical impotence in the face of death, categories now useless in PVS and coma cases.

While a material system in PVS is alive, and not a corpse, we might look to our treatment of corpses for hints as to how to regulate the bodies of those who once were persons, but are now “undead.” If we temporarily bracket the notion of surviving interests, we legally regulate the treatment of corpses either for Kantian reasons, to protect the humanity of those that handle corpses, or for utilitarian reasons, to protect the chance for happiness of those who might suffer from those who have been coarsened by maltreatment of corpses. Furthermore, we legally regulate the treatment of animals, for those reasons, as well as to prevent useless suffering. But the latter is irrelevant to PVS as the synthetic functions necessary for registering pain are quite complex and beyond the capacity of PVS systems. To repeat, the experience of pain is a cognitive function to be distinguished from the reflex withdrawal of body parts from sites of cell damage.

Thus we have only a homonymic relation between "Terri Schiavo" the (legally competent) person, who ceased to exist when the system bearing her name slipped past a threshold of oxygen deprivation that destroyed her cortex but spared her brain stem, and "Terri Schiavo" the material system, the assemblage of body and tube, in the Florida hospice. You could translate it in the following manner, but it's the sort of dualistic language the material systems perspective seeks to avoid: what was in the hospice bed was only the body that used to support the (legally competent) person of Terri Schiavo. Thus all the emotion generated by the trope of "starving a person to death" is a category mistake: what is being done is ceasing to support autonomic processes that at one time supported a (legally competent) person but now only support themselves. More precisely,

and less dualistically, we have a material system which once displayed generic social, rational and hedonic behaviors, but now only displays the behaviors of bare organic function.

LIFE, DESTRATIFICATION, SACRIFICE

If you define all organic processes that take place in us as “human” life, then you get a potential conflict between the wishes of a person and the self-valuing of an organism, and the resolution of that conflict through the refusal of hydration and nutrition in PVS is suicide, even when directed from before a collapse into legal incompetence, and thus must be considered assisted suicide.²⁸ From a Jonasian perspective, a conatus-like self-valuing, a production of sense, appears in all life, even unicellular organisms, via the restoration of homeostasis in response to environmental change.²⁹ But such self-valuing is not sufficient for personhood, though it may be worthy of respect in some cases. But surely the use of anti-bacterial agents to aid persons has to outweigh the consideration we might want to extend to their self-valuing.³⁰

The conatus of organic life can come into conflict with the surviving interests of a person due to the differential decay rates of organ function. In PVS cases, this comes from the assemblage character of the brain and the greater sensitivity to oxygen deprivation of the cortex relative to the brain stem. The organism as assemblage means death becomes scattered throughout the organism, as Foucault observes in reading Bichat, distinguishing between morbidity as death of the organism and mortification as death of organs.³¹ Here we have to recognize the organism as an emergent structure, as a homeostasis-conserving systematic relation of organic sub-systems, as in the theory of autopoiesis.³² But the key difference is that between the recursive epistemology of

Maturana and Varela and the stacked ontology here, as organs themselves are emergent structures of cells, so when organs die, component cells have differential death rates. If there is something “human” about an organism, why not about organs or cells? What makes a liver, say, something human? Only that it can be transplanted into another human organism and come to function therein. An organ is human only insofar as it is potentially a component of a human assemblage, only insofar as it can be subordinated to the sovereign unity of a somatic body politic.³³

A brain stem-controlled organic system in PVS is thus human only potentially, in the case it could be a subordinate part of a whole and hence support a person and perhaps a personality. Below the personal stratum it is no longer human, but precisely organic. The human qua personality, as belonging to the alloplastic stratum, can produce singular social behavior, even though it is recognized as a person via its generic social, rational and hedonic behaviors. Think of it in complexity system terms: the singularity we treasure as “personality” comes from the production of novel patterns, thresholds and triggers that form consistencies or positive affect producing assemblages in which each component is empowered to create new consistencies (here we see “power” as *puissance*). But an organic system can only return to homeostasis. It is locked onto species-wide norms.

The glory of a personality, and the reason it trumps the organic system from which it emerges, is that it is free from automatic self-valuing, and can value others, sometimes even to the extent of sacrificing its own organic system. Sacrificing. Making holy. In confronting biopower we have to preserve room for the sacrifice some might wish to make. Another confrontation with Agamben is necessary here. For Agamben bare

life is exposed by an incorporeal transformation, a change in juridical status, so that the bearer of bare life can be “killed, but not sacrificed.” That is, bare life is beyond both human and divine law and the killing can come from outside with impunity. But in PVS we see a real ontological destratification rather than an incorporeal transformation or change in status, and the killing is suicide, though assisted. Thus it’s a matter of self-sacrifice.³⁴

Should anyone say there is no evidence Terri Schiavo wanted to make such a sacrifice, I say there is no evidence she did not, and all the paternalistic speechifying about "Terri's best interests" robs her memory of the dignity of an other-directed motivation in not wanting to continue tubal feeding after the death of her person: not simply to prevent the horror of the MCS, insofar as that approaches a full-blown locked-in condition³⁵ (though that is horror indeed), but to allow some peace of mind, closure, and the ability to grieve, to come to her loved ones. We should not “err on the side of life” as the slogan would have it, but err on the side of saving room in this world for sacrifice, that is, freedom from the blind and automatic self-valuing of organic systems, when that self-valuing, supported by technology far beyond the imagination of the culture in which traditional moral intuitions are formed, would cause an irresolvable pain not to the organic system or any vestigial or minimal consciousness clinging to it, but to the others the person loves. Note I did not say "pain" *simpliciter* but "irresolvable pain," the pain of not being able to grieve, the sort of pain the inhabitants of Dante's Hell feel. I would even go so far along those lines as to say the default setting should be an opt-in position: only those people who specifically request extraordinary measures in futile situations as defined by current medical science and safeguarded by ethics boards should

get them. Thus only if you want to tie your family's hands and exhaust the family wealth in waiting for a miracle or in offering your body to quack "therapies" would you be able to subject them to that.

INTENSITY, SINGULARITY, PRIVACY

Of course, the turn to rights is never simple in the context of medical discipline and biopower, for their relations with sovereignty are not innocent, as Foucault reminds us in his great 1976 lecture course "*Society Must Be Defended*".³⁶ Sovereignty means control over a unit, whether geographical or corporeal.³⁷ The new right we search for in our Deleuzian jurisprudence cannot be founded on privacy as control, on the subject as unified person, but on singularity, as exposure to intensities that perform a de-personalization. The person not as a sovereign unit, within which he or she can decide on a state of exception that would expose his or her own bare life, but the person as negotiating the line between personality and organic system, and depersonalization as opening to the virtual via the intensity of affect. But just as this antidisciplinary right cannot be that of sovereignty, any right we would turn to against biopower cannot be that of a judicial system infiltrated by normalization procedures (HS 1, 144).³⁸

The second stricture, against normalized right, is relevant here, for Terri Schiavo's wishes not to receive tubal feeding in a severely compromised situation were subject to two tests, one explicit – were they her wishes? – and the other, implicit – were those wishes in accordance with American norms? Judge Greer notes in his February 11, 2000 ruling as to TS's wishes that "the testimony of Ms. Beverly Tyler, Executive Director of Georgia Health Discoveries, clearly establishes that the expressions made by

Terri Schiavo to these witnesses are those types of expressions made in those types of situations as would be expected by people in this country in that age group at that time.” Thus it’s the very normalized nature, the generic nature, of TS’s statements that made them plausible. The subject of law, the “person,” is the generic member of society, the one conforming to the norm of what “would be expected.” But that can’t be what we’re looking for in Deleuzian jurisprudence.

For Deleuze and Guattari in ATP, it’s the haecceity, not the person, which deserves a proper name. A person as subject is modeled on a substance with properties. It is fixed in the actual, it sits comfortably in those normalized habits that render it a generic member of society. But it’s only in extraordinary situations, singularizing situations, that we move from being a person as generic member of society to being a becoming, a haecceity or consistency, a person undergoing de-personalization by opening to the intensive processes at whose intersection the person appears as the line between personality and organic system. This intensification is marked by a primary “I feel,” or better, “there is a feeling in me.”

It’s this intensity generated by concreteness behind the justification of privacy as singularity. It’s the “user-groups,” the parties to the case, who feel most intensely. The challenge is to articulate a principle of singularity at work in jurisprudence. It’s not abstract reasoning about “the sanctity of life” but the intensity of affect generated by exposure to the extraordinary. If you want to feel something of that intensity, you can try a substitution thought-experiment involving your own loved ones: how do you want them to react if you were in a PVS? (Please note that I’m not asking what you would do for a loved one in a PVS, but what you would want them to do if you were in a PVS.) Such a

thought experiment would be neither Heideggerian nor Levinasian, though it might be closer to the latter. It is not Heideggerian, for it doesn't concern the impact of the thought of your death on your actions; nor is it Levinasian, for it doesn't concern the effect the death of the other will have on your subjectivity. The thought experiment won't give you back to yourself in Heideggerian authenticity, but it will (we would expect) depersonalize you via the depersonalization undergone by your loved ones as they are exposed to a singular and intense situation.

The name of this mutual depersonalization, this intensive becoming, for Deleuze and Guattari? Love. "Every love is an exercise in depersonalization on a body without organs yet to be formed, and it is at the highest point of this depersonalization that someone can be named, receives his or her family name or first name, acquires the most intense discernibility in the instantaneous apprehension of the multiplicities belonging to him or her, and to which he or she belongs" (49; 35). One of the ways to the new right we search for must be through such love, the sacrificial love that Terri Schiavo had for her loved ones, for her husband and for her parents, a love that, obscenely, we glimpsed in the media spectacle to which they were subjected.

¹ For Deleuze, Ideas are not characterized by clarity and distinctness, but by distinctness and obscurity (DR 276 / 214). All Deleuze citations are to French text first, then English translation. James Williams has an excellent overall treatment of this and other points in his *Gilles Deleuze's Difference and Repetition: A Critical Introduction and Guide* (Edinburgh, 2003).

² *History of Sexuality, volume 1* (NY: Vintage, 1990) and "Society Must Be Defended" (NY: Picador, 2003). See also Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford UP, 1997).

³ See Rosi Braidotti, “The Ethics of Becoming Imperceptible,” a paper delivered at the Deleuze conference at the University of Trent (Ontario) in May 2004. Braidotti’s paper is excellent on ethics as the intensity of living along the zoe / bios line, or as I call it, the line between organic system and person. See also Ronald Dworkin, *Life’s Dominion* (New York: Knopf, 1993) for what he calls the natural and human contributions to life.

⁴ *Deleuze and the Political* (Routledge, 2000).

⁵ “Deleuze and the Liberal Tradition,” *Economy and Society* 32.2 (May 2003): 288-324.

⁶ For a discussion of this reading of the Constitution, contrasting it to the view of a “Constitution of detail” with a limited number of “enumerated rights,” see Ronald Dworkin, *Law’s Empire* (Cambridge MA: Belknap, 1988), and with regard to privacy rights concerning the right to die, *Life’s Dominion*. A particularly succinct encapsulation of that view, from an important dissent to which we will return, is that of Justice Harlan in *Poe v Ullman*, 367 US 497 (1961): we must approach the Constitution “not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government” (367 US at 540).

⁷ The Schiavo case was not a [jurisprudential] event in the full Deleuzean sense, or at least it was only an ordinary event, not an “emission of singularities,” that is, the establishment of a precedent. It may turn out to be an event in some other [cultural, political] sense, if it results in changes in state laws regulating “end of life issues.”

⁸ The right to privacy is established in the tradition of modern decisions on substantive due process, beginning with Justice Harlan’s dissent in *Poe v Ullman*, 367 US 497 (1961) and whose main decisions include *Griswold v Connecticut*, 381 U.S. 479 (1965) and *Roe v Wade*, 410 U.S. 113 (1973). Later important decisions concerning the right to privacy include *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), which reaffirmed its relevance to abortion, and *Washington v Glucksberg*, 521 US 702 (1997), which defeated a claimed right to assisted suicide.

⁹ Souter cites a particularly Deleuzean passage from Harlan’s *Poe* dissent: “Due process has not been reduced to any formula, its content cannot be determined by reference to any code. [Our social life is not governed by codes but regulated in territories which are realizations of an axiomatic.] The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. [The regulation of those territories comes about through the actualization as differentiating resolution {“balance”} of conflicting virtual principles. The term “balance” might not sound Deleuzean, but I think it can be distinguished from “reflective equilibrium,” which aims to justify by establishing coherence among intuitions and principles. In jurisprudence, we aim to establish a precedent as a creative resolution that will be open to revision in a living tradition.] If the supplying of content to this Constitutional concept has of necessity been a rational

process, it has certainly not been one where judges have felt free to roam where unguided speculation might take them. [Deleuze isn't against "reason," only against "reason" as deduction from first principles, which Souter and Harlan abjure as well. While "unguided speculation" might sound like absolute deterritorialization, we must remember that there's nothing wrong with relative deterritorialization accompanied by a reterritorialization that keeps open the occasion for further reterritorialization, which we will find in the last sentence of this passage in the evocation of a "living" tradition.] The balance of which I speak is that balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. [Differentiating actualizations, as resolutions of problems, change the virtual with which they are in mutual presupposition, so that each evolve and change in creative ways.]" (367 US at 542).

¹⁰ While Arendt and Foucault saw biopower as modern, Agamben shows in *Homo Sacer* that the exposure of bare life is bound up with the sovereign decision on the state of exception, and hence is the founding gesture of all politics. (He also extends the Arendtian and Foucaultian analyses to the era of German National Socialism and finds in the camp the modern biopolitical paradigm, in which the state of exception has become the rule and that we have all become [potentially] bearers of bare life.)

¹¹ We should also recall that Agamben clearly shows that Deleuze's notion of "a life" is not comparable to the Aristotelian notion of "nutritive life" that allows for the attribution of life to a subject and that would thus be congruent with the isolation of bare life upon which can be made the series of distinctions sought by biopolitics. See Agamben's "Absolute Immanence" in *Potentialities* (Stanford, 1999): 232-233, where he comments on Deleuze's last published essay, entitled "L'Immanence: Une Vie" in *Deux Régimes de Fous*, 359-363; English translation as "Immanence: A Life" in *Pure Immanence: Essays on A Life*, 25-33. We should note further that *Homo Sacer* conducts its analyses of current medical technology in the chapter on "politicizing death" in terms of coma, not PVS, and further, as if the bare life in question was located in a zone of indistinction between human and animal: "the comatose person has been defined as an intermediary being between man and an animal" (165), when precisely what is in question in PVS is the relation of human and "vegetative" life, or in my terms, the relations among personality, person, and organic system, when all three are seen as complex material systems.

¹² This was a red herring in the Schiavo case, in any event, as no one's judgment, other than TS herself, entered into a quality of life assessment relative to PVS or MCS.

¹³ In the 17 March 1976 lecture included in "*Society Must Be Defended*" Foucault mentions the Franco case in terms of the privatization of death in the era of biopower. Death is privatized because biopower reaches only the level of the population and its birth and death rates. With Franco (and in the US, the contemporaneous Quinlan case) we see the establishment of a disciplinary (and hence individualizing) medical power able to defer somatic death, and with which our sovereignty-based jurisprudence struggles. But

just as prison administration provides a “carceral supplement” to legal power in the criminal system, so does hospital administration, in the form of “palliative care,” enable the system to operate. Since the ruling distinction is active versus passive procedures, rather than the intent to “cause” death, hospital and hospice care can only aim to relieve pain rather than intend to hasten death. Of course there is sufficient gray area here for establishing dosage guidelines so that palliative care can have the “unintended” consequence of “hastening” death (as compared with a completely tendentious “natural” standard), as long as the intention was only pain relief. This day-by-day hospital work escapes legal and media attention except in the rare cases – like Schiavo – where a mediastorm occurs.

¹⁴ More precisely, the bodies of those in the out-group are excluded from the protection of law so that the bare life inherent therein is exposed. The relation of the state of exception itself to law is liminal rather than exclusionary: “In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other,” *State of Exception* (Chicago, 2005): 23. Later in the book Agamben notes that the charisma of authoritarian leaders stems from the suspension of law in the state of exception, so that authority “inheres immediately in the living person of the leader” (84) which thereby reveals that “law and life must be tightly implicated in a reciprocal grounding” (85). In this way both the biopolitical character of authority and the liminal structure relating law to the state of exception is starkly revealed: “The norm can be applied to the normal situation and can be suspended [in the state of exception] without totally annulling the juridical order because in the form of auctoritas, or sovereign decision, it refers immediately to life, it springs from life” (85). See also Judith Butler, *Precarious Life* (Verso, 2004).

¹⁵ It may be of interest to note that the Missouri AG at the time of *Cruzan* was John Ashcroft, who is also famously involved in the Guantanamo cases.

¹⁶ “Foucault, Femininity and the Modernization of Patriarchal Power,” in *Feminism and Foucault: Paths of Resistance*. Ed. Lee Quinby and Irene Diamond. (Northeastern Univ. Press, 1988), pp. 61-86.

¹⁷ “Anorexia Nervosa: Psychopathology as the Crystallization of Culture,” in *Unbearable Weight: Feminism, Western Culture, and the Body* (U California Press, 1993).

¹⁸ Kim Chernin, *The Obsession : Reflections on the Tyranny of Slenderness* (NY: Perennial, 1994 [1980]).

¹⁹ I am not claiming this racist aspect was ever directly expressed, just that it helped lend weight to the emotional charge of these cases.

²⁰ In the phrase of the blogger Majikthise on March 26, 2005, “Local Cops Thwart Tube-Rape Conspiracy.” majikthise.typepad.com/majikthise_/2005/03/local_cops_thwa.html.

The Louisiana State Senate is now considering SB 40, which would require a high level of detail in wording of advance medical directives. In fact, by making it State law that people are presumed to want feeding tubes, it inserts a highly objectionable barrier to the right of people to direct the course of their medical treatment. It would make the exercise of a constitutional right to privacy dependent upon having executed a certain document with State approval of the wording of that document.

²¹ Texas Health & Safety Code, Chapter 166: Advance Directives.
www.capitol.state.tx.us/statutes/docs/HS/content/htm/hs.002.00.000166.00.htm.

²² Foucault's analyses of neo-liberalism in *Naissance de la Biopolitique* are particularly revealing in highlighting the use of the notion of "human capital," which is now extended to the notion of "genetic capital." The "culture of poverty" is then linked to a variety of interlocking factors: poor genetic capital, poor self-entrepreneurship of personal capital, poor self-management of risks, poor control of satisfaction production/consumption ratios. Thus we see Agamben's concern with the rapprochement of the subjects of rights and life widened to include the subject of economic activity: the confluence of homo juridicus, homo vivens, and homo economicus. Indeed, the life George W. Bush seeks to protect is the "American way of life," the production and consumption of satisfactions in freedom under the rule of law.

²³ See the eloquent essay of Drucilla Cornell, "Who Bears the Right to Die," *Graduate Faculty Philosophy Journal* 26.1 (2005): 173-188. Cornell calls attention to the "Philosopher's Brief" of John Rawls, Ronald Dworkin, Judith Jarvis Thompson and others who also support assisted suicide, criticizing the reliance on the active / passive distinction rather than on intention relative to hastening death.

²⁴ For those of you who have heard the "abuse" meme circulating as a possible explanation of the collapse, you should know that the homicide police called by the paramedics as a matter of course when an apparently healthy young woman collapses suddenly at home found no sign of struggle in the apartment or sign of trauma on Terri Schiavo's neck or face. Of course you can't conclude conclusively from a negative, so the abuse meme can live on, though probably in a more hostile overall environment, as its plausibility is damaged. It can thus only reproduce in the most favorable environments, the brains and blogs of the American far right wing. Given the fact that it has lived this long, even in the face of the police report as well as the utter implausibility of supposing that an allegedly abusive Michael Schiavo would then turn around and give Terri Schiavo's doctors a million dollars worth of motivation to discover that abuse, we can conclude that those environments are quite forgiving indeed to that meme!

²⁵ See Horst Hendriks-Jansen, *Catching Ourselves in the Act* (MIT, 1996). There might be some involvement with mirror neurons here as well.

²⁶ Especially the remarkable affidavit of Dr. William Cheshire to the Florida Department of Children and Families, March 23, 2005. www.dcf.state.fl.us/news/affidavit.pdf.

Cheshire was asked to investigate charges of possible abuse of Terri Schiavo. Although no such abuse was found, Cheshire goes on to say that he believed he had found reason to doubt the PVS diagnosis and to prefer a diagnosis of "minimally conscious state" or MCS. He begins by noting a study that showed a 40% misdiagnosis rate for PVS vs MCS. (Andrews K., Murphy L. Munday R., et al. Misdiagnosis of the vegetative state: retrospective study in rehabilitation unit. *British Medical Journal* 1996; 313:13-16.) He neglects to mention that only 3 of the 17 misdiagnoses (out of 40 total subjects) remained misdiagnosed after 4 years, and that the study called for, as a remedy to such misdiagnoses, diagnosis by a multi-disciplinary team of specialists experienced in PVS diagnosis, as well as assessment over a long period of team – precisely the sort of diagnostic assessment that Terri Schiavo received. Cheshire then cites a 2002 article to show that MCS as a diagnostic entity is of recent origin. Of note is that one of the authors of that article (The minimally conscious state: definition and diagnostic criteria. *Neurology* 2002; 58: 349-353) is Ronald Cranford, who, in his testimony in the 2002 trial on Terri Schiavo's medical condition, had rejected the MCS diagnosis in favor of re-affirming the PVS diagnosis which had stood for 12 years. Of further note is that in reviewing Terri Schiavo's medical records, Cheshire does not mention the EEG tests that had played a role in establishing and re-affirming the PVS diagnosis.

Cheshire visited TS five days after her feeding tube had been removed. His visit lasted 90 minutes and consisted only of visual observation, not a formal medical exam. In describing his visit, he does everything he can to interpret behavior as indicating consciousness. For instance, "although she does not seem to track or follow visual objects consistently or for long periods of time, she does fixate her gaze on colorful objects or human faces for some 15 seconds at a time and occasionally follows with her eyes at least briefly as these objects move from side to side." But this occasional and intermittent behavior is precisely consistent with PVS and should not count as evidence of consciousness. It's the intermittency and short duration that should be emphasized, not the occasional tracking. Cheshire goes so far as to interpret non-prompted "pain behavior" as evidence of consciousness rather than, more plausibly, its absence. In describing a videotape he observed, he notes that after a physician has told her parents that Terri will be moved: "She vocalizes a crying sound, 'Ugh, ha, ha, ha,' presses her eyebrows together, and sadly grimaces. It is important to note that, at that moment, no one is touching Terri or causing actual pain." One would ordinarily be expected to conclude that non-prompted "pain behavior" counts against a consciousness interpretation, and in favor of an interpretation of endogenous, random, production. Instead Cheshire advances the interpretation that "she appears to comprehend the meaning of Dr. Hammesfahr's comment and signals her *anticipation* of pain" (italics in original). This is surely remarkable, and indicates that for Cheshire anything can be interpreted as evidence of consciousness: intermittency is overlooked in favor of occasionality and absence of stimulus is interpreted as anticipation of stimulus.

Cheshire then cites what he calls "pain issues" in Terri Schiavo's treatment and argues that pain is indicative of an MCS rather than a PVS. He then argues that a diagnosis of MCS would make "an enormous difference in making ethical decisions on Terri's behalf," without mentioning that such third party judgments are irrelevant in privacy right cases. Furthermore, he neglects to argue against the view that such pain –

even if it were present – would produce a best interest argument – if one were to be made – against reinsertion of the feeding tube. (The unsupported interpretation of TS’s ability to feel “pleasure” inserted at the end of the document, is simply that, unsupported, and even if it could be supported would necessitate a utilitarian pleasure / pain calculus to determine best interests, that is, if one wanted to avoid an even more difficult argument about the “value” of “suffering.”)

The conclusion of Cheshire’s report is equally remarkable. “To enter the room of Terri Schiavo is nothing like entering the room of a patient who is comatose or brain-dead or in some neurological sense no longer there. [But no one ever claimed she was comatose or brain-dead. The diagnosis was PVS.] Although Terri did not demonstrate during our 90 minute visit compelling evidence of verbalization, conscious awareness, or volitional behavior [but these are the criteria for an MCS, even if they need only be intermittent], yet the visitor has the distinct sense of the presence of a living human being who seems at some level to be aware of some things around her.” After this paragraph, the pseudo-clinical language of “the visitor” is dropped (although if he were to have been consistent with this stance in the previous paragraph, “Terri” should have been “the patient”), and Cheshire personifies completely his narrative: “As I looked at Terri, and she gazed directly back at me, I asked myself whether, if I were her attending physician, I could in good conscience withdraw her feeding and hydration, No, I could not. I could not withdraw life support if I were asked. I could not withhold life-sustaining nutrition and hydration from this beautiful lady whose face brightens in the presence of others.” Here we see the complete overlooking of court findings that the removal of the tube was done in accordance with TS’s wishes. The story shifts from TS’s wishes to what Cheshire could or could not do in good conscience to this “beautiful lady.” If she were in an MCS, Cheshire concludes, his judgment is that “it would be wrong to bring about her death by withdrawing food and water.” But, assuming Cheshire had any standing to advance a best interests / quality of life argument, this presupposes that an MCS provides a better quality of life than a PVS, which is not at all evident – or even plausible, frankly, given the “pain issues” he describes, and to which we will return.

²⁷ Note the way Cheshire tries to sneak in the potential for pleasure on the part of TS at the end of his affidavit.

²⁸ We should note the manner of Deleuze’s death here. Rosi Braidotti has insightful comments on this in her Trent conference paper.

²⁹ Hans Jonas, *The Phenomenon of Life* 2nd edition (Northwestern UP, 2003). We must avoid a dualism that comes from so sharply confining “mind” to humanity that other organisms are comparable to mechanical devices. Jonas’ point is not to ascribe “mind” as self-consciousness, etc., to organisms, but a notion of “sense” in its threefold nature: (1) sensibility (ability to sense / perceive difference in the environment), (2) signification (the ability to ‘meaningfully’ distinguish what is good for the organism from what is bad for it) and (3) directionality or orientating itself in the environment with regard to its ‘judgment’ as to good and bad. (There is an archaic English acceptance of “direction” for

"sense" as in "sense of the river." This is maintained in, for instance, the French "sens unique" for "one way street".)

³⁰ Noting of course the silly overuse of anti-biotics which has bred super bacteria.

³¹ *Birth of the Clinic*, p. 141: "Death is therefore multiple, and dispersed in time ... long after the death of the individual, miniscule, partial deaths continue to dissociate the islets of life that still subsist."

³² Humberto Maturana and Francisco Varela, *Autopoiesis and Cognition* (Boston: Riedel, 1980). DG's reading matches the autopoietic conception of the organism. Autopoietic theory distinguishes between the (virtual) organization and the (actual) structure of organisms. Organization is the set of all possible relationships of the autopoietic processes of an organism; it is hence equivalent to a virtual field or the Body without Organs of that organism (Maturana and Varela 1980: 88 mentions autopoietic 'space' [scare quotes in original]). Structure is that selection from the organizational set that is actually at work at any one moment (Maturana and Varela 1980: xx, 77, 137-38). Perturbation from the environment in 'structural coupling' leads to structural changes which either re-establish homeostasis or result in the destruction of the system qua living (Maturana and Varela 1980: 81). Homeostatic restoration thus results in conservation of autopoietic organization.

³³ The "body politic" implicit here has a long heritage. The body as tool of a soul (as *organon*) is enslaved, as Aristotle tells us. Under the rule of the soul, the body becomes unified, a single organ, *panta yar ta physika sômata tês psychês organa* (*De Anima* 2.4.415b18). Any formation of a unity is always that of ruler/ruled, and the unification of the animal body under the rule of the soul is masterly rather than political (*Politics* 1.5.1254a30). Thus psychic organization entails somatic enslavement. I detail this claim in "The Organism as the Judgment of God: Aristotle, Kant and Deleuze on Nature (that is, on Biology, Theology and Politics)," in Mary Bryden, ed., *Deleuze and Religion*. (London: Routledge, 2001). The notion of xenotransplantation will need to be thought in this register, as well as the non-transplantability of the brain, which establishes brain-death as the threshold beyond which organ "harvesting" is allowed. On these points, see Agamben's relatively rushed analyses in *Homo Sacer*, 160-165. Agamben earlier discusses Aristotelian potentiality, but in the context of sovereign power, not organismic unity – though as I have argued, the two are indissociable: *Homo Sacer*, 44-48.

³⁴ Again, Braidotti's paper is excellent here on ethics as the intensity of living along the zoe / bios line, or as I call it, the line between organic system and person. See also Dworkin, *Life's Dominion*, for what he calls the natural and human contributions to life.

³⁵ An MCS and a "locked-in condition" are two entirely separate medical conditions. In an MCS, severe cortical damage has occurred, but some, "minimal," cognitive function remains. A catatonic "locked-in condition" occurs with full cognitive function, hence no cortical damage, but with a closing off of motor control. I would speculate that most

people fear a “locked-in condition” when they don’t want tubal feeding, though the only reason to believe an MCS is any better than being locked in would be the lowered cognitive function.

³⁶ “And it is precisely in the expansion of medicine that we are seeing ... a perpetual exchange or confrontation between the mechanics of discipline and the principle of right... The only existing and apparently solid recourse we have against the usurpations of disciplinary mechanisms and against the rise of a power that is bound up with scientific knowledge is precisely a recourse or a return to a right that is organized around sovereignty.... [A]t this point we are in a sort of bottleneck ... having recourse to sovereignty against discipline will not enable us to limit the effects of disciplinary power.... We should be looking for a new right that is both antidisciplinary and emancipated from the principle of sovereignty” (39-40).

³⁷ The home plays a particularly important role in American jurisprudence on privacy, starting with the Bill of Rights strictures against forced quartering of soldiers and against unreasonable searches.

³⁸ In *History of Sexuality, volume 1*, Foucault tells us that the initial recourse to the new found intersection of discipline and biopower was the right to life: “Against this power that was still new in the nineteenth century, the forces that resisted relied for support on the very thing it invested, that is, on life and man as a living being.... What was demanded and what served as an objective was life ... The ‘right’ to life, to one’s body, to health, to happiness ... this ‘right’ ... was the political response to all these new procedures of power” (144/145).