

THE TERRI SCHIAVO CASE:  
BIOPOLITICS AND BIOPOWER: AGAMBEN AND FOUCAULT

John Protevi  
Department of French Studies  
Louisiana State University  
March 7, 2006

Presented at the 6<sup>th</sup> Annual Foucault Circle conference, University of Memphis.

DRAFT: Please do not cite for publication w/o permission.

INTRODUCTION

The Terri Schiavo case offers the opportunity to establish some differences between Agamben and Foucault concerning biopower, biopolitics, sovereignty, law, and medical discipline.

To understand these differences, we must distinguish biopower and biopolitics. For Foucault, *biopower* is modern and productive, "fostering life or letting die"; this affirmative productivity distinguishes it from sovereign power, with which it today co-exists, whose negativity is expressed in the formula "kill or let live."

While Agamben acknowledges the Arendtian and Foucaultian thesis of the modernity of *biopower*, he will claim that sovereignty and *biopolitics* are equally ancient and essentially intertwined in the originary gesture of all politics; sovereignty is the power to decide the state of exception whereby bare life or *zoe* is exposed "underneath" political life or *bios*. Agamben then finds in the concentration camp the modern biopolitical paradigm, in which the state of exception has become the rule and we have all become [potentially] bearers of exposed bare life in that we are all subject to what I will call a "de-politicizing predication": to use the current American jargon, being named an "enemy combatant."

The converse of that de-politicizing predication is a politicizing predication, often implicit or assumed, existing only by the grace of not being de-politicized: the retention of the rights of a citizen. Let's call this complex concept "(de-)politicizing predication."

Finally, let us note that Agamben also sees the camp as a *biopower* experiment, producing the bare life of the *Muselmann*. We will interrogate the relation of biopolitics and biopower in Agamben's writing on the camp.

We can also note a difference of method. Agamben reveals the political logic of the originary imbrication of sovereignty and biopower via a reading that is something like a Heideggerian gesture of locating an originary decision founding

an epoch that is now exhausted and flattened out into totalitarian management, a complete revelation that hides the very condition of its appearance, albeit with a Derridean emphasis on imbrication and "zones of indistinction." Foucault, on the other hand, provides a materialist genealogy of modern State techniques of medical discipline and population management operating at the intersection of sexuality and racism.

I will argue that Agamben's concept of (de-)politicizing predication, despite its considerable utility in thinking biopolitics, cannot handle biopower, either in the case of the Muselmann nor in the Schiavo case and other similar cases of "end of life issues," because of its lack of purchase on real material change as opposed to the "incorporeal transformation," or the change in juridical status effected by (de-)politicizing predication. What we need is Foucault's materialist genealogy of biopower's investment in real bodies. An analysis of biopolitics is not enough; we need an analysis of biopower.

Now Agamben accepts Foucault's materialist genealogy into his system, but Agamben's own contribution, the concept of (de-)politicizing predication, does not help in understanding what happened to Terri Schiavo's body, nor does it help us think how we should transform our jurisprudence to change the dualist ontology behind the phrase "Terri Schiavo's body." I will conclude, therefore, time permitting, with some ways to think a transformed right to privacy using the Deleuzoguattarian notions of singularity and depersonalization.

## AMERICAN JURISPRUDENCE ON THE RIGHT TO PRIVACY AND THE RIGHT TO DIE

In legal terms the Schiavo case was not the establishment of a precedent, though it may turn out to be important if it results in changes in state laws regulating "end of life issues." The ruling precedent in the Schiavo case is *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1990), in which the Supreme Court 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 establishing the wishes of the person, or it can be exercised by a guardian acting in his or judgment as to the best interests of the ward. (This latter option was NOT relevant to the Schiavo case, despite widespread misinformation spread by the parents' supporters: the judge ruled as to Terri's wishes and Michael Schiavo's judgment as to what was in the best interests of his wife was completely irrelevant.) 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.

This tradition has four major aspects, in roughly historical order: (1) **contraception**, beginning with Justice Harlan's dissent in *Poe v Ullman* (1961), and continuing with *Griswold v Connecticut* (1965) and *Eisenstadt v Baird* (1972); (2) **abortion**, most notably in *Roe v Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992); (3) **homosexuality**, in *Bowers v Hardwick* (1986) and *Lawrence v Texas* (2003); and (4) **"end of life issues,"** including *Cruzan*, *Washington v Glucksberg* (1997), which defeated a claimed right to assisted suicide, and the recent decided *Gonzales v Oregon* (2006; formerly *Oregon v Ashcroft*) which affirmed that right. (There's an interesting question as to what, if anything, unites the field, other than some overly broad notion of "biological issues." But maybe it's a differential multiplicity with no unity: "not that there's anything wrong with that"!)

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). (In the American system, "clear and convincing evidence" is intermediate between the highest standard, "beyond a reasonable doubt," and the lowest, "preponderance of evidence.") 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).

### TAKING ISSUE WITH AGAMBEN AND BIOPOLITICS

I see one key problem in thinking the Schiavo case with Agamben's concepts: corporeal vs incorporeal materialism. In addition, Agamben underemphasizes trapped bare life in favor of a near-exclusive focus on exposed bare life.

(1) To understand the Schiavo case, we need a notion of ontological destratification, while Agamben gives us only a notion of what DG would call in *ATP* an "incorporeal transformation" or change in juridical status that exposes or protects bare life, what I'm calling "(de-)politicizing predication."

We might also here refer to what Foucault calls in *L'Ordre du discours* an "incorporeal materialism," in which "the event is not of the order of bodies [*l'événement n'est pas de l'ordre des corps*]." (The English translation has simply: "the event is not corporeal.")

What we need here, though, is precisely a corporeal materialism in order to understand changes to a body in and through an event. A (de-)politicizing

predication attaches itself to a body that remains materially unchanged by the act of predication, even though the exposure of bare life thus effected might open that body up to profound changes by means of the action of other bodies. In other words, a change in biopolitical *status* can open a body up to a different set of biopower *practices*.

Here are three examples: (A) a person is first named "non-Aryan," then "Jew," then "deportee," and then "camp prisoner." These are all different grades of de-politicizing predication, producing different statuses. Shock, overwork, exhaustion and malnutrition might drive this person to the point where they are named "Muselmann," but we must note two things here: (i) "Muselmann," is informal camp jargon, unique to Auschwitz, not an official biopolitical designation; (ii) such informal naming follows the physical changes that follow upon the original official de-politicizing predications. In other words, "Muselmann" is a *diagnosis*, an evaluation of a state, not a transforming predication; it caps what has already happened to a body, rather than opening that body up to what is to come.

(The shunning of the *Muselmänner*, I would argue, was caused by the behavior of the bodies, not by their having been named as "Muselmann." While being named "camp prisoner" transformed the status of the person and allowed the exposure of bare life and the degradation to the condition of *Muselman*, the act of being so named did not open the body up to different treatment; it was an acknowledgement of their being differently treated; it was an acknowledgement that nothing else could be done, that no further degradation of de-politicizing status or material condition was possible.)

(B) A person is named an "enemy combatant" and is then put into (i) "stress positions" which can produce pain "approaching but not equaling that of major organ failure or death" or (ii) subjected to political physiological manipulation by means of such practices as forced watching of gay porn, exposure to strobe lights and / or excruciatingly loud American music. A monster like Donald Rumsfeld might laugh and call this the "disco treatment" – just as he is said to have compared his work at a standing desk to the "standing punishment" (Field Punishment #1 for the British Army, the so-called "Jesus pose" or "the crucifix") – but there is no question as to the psycho-physical destruction prolonged exposure to such treatments wreaks on persons in the "detention facilities" of the New World Order.

(B) A person is named "brain dead" and is then "abandoned to the vicissitudes of transplantation" as Agamben puts it in *The Open*. (Here we see a diagnosis that is also a de-politicizing predication.)

Let us note that the official medical categorization of "PVS," like the informal social categorization of "Muselmann," follows upon real change – they are both diagnoses – but they do not themselves provoke change in the body. Nor do they open the body up to later changes by allowing a different type of interaction with other bodies. (Thus "PVS" is not the same as "braindead.") The import of the

*Cruzan* decision is that PVS does *not* remove the right to privacy involving refusal of life-sustaining medical treatment, including feeding tubes. Thus the diagnosis of PVS is *not* a de-politicizing predication: it leaves the person's legal status unchanged and allows them the same exercise of rights as other citizens, albeit by proxy.

Agamben writes movingly of the physical changes suffered by the camp prisoners, but he can only use everyday concepts to do so; there's nothing in his specifically philosophical concepts that covers these changes, as there is in, for instance, Deleuze and Guattari's materialist ontology of complex systems. But it is precisely a corporeal materialism that is needed to think the material changes that occur in and through the action of a physiological event such as that suffered by Terri Schiavo.

(B) My second point in criticism of Agamben is that it's not just judgments as to braindeath authorizing organ harvesting or inferior quality of life authorizing euthanasia that concerns us in biopower (again, any such judgment in this case was Terri's own, and so it was a matter of assisted suicide rather than euthanasia), but also the construction of an inescapable State interest in fostering the life of the favored group, those graced with an implicit politicizing predication. While it is true that the politicizing predication is part of Agamben's conceptual system, virtually all of his analyses in *Homo Sacer* and *Remnants of Auschwitz* concern the way in which bare life is exposed, excluded from law, threatened, while *bios*, politically-informed life, is protected. But in the Schiavo case we are concerned not with exclusion of *zoe*, but with its inclusion, with a bare life that the law holds close. A total sphere of protected bare life, a biosphere, into which the out-group cannot penetrate – its bare life is exposed via a de-politicizing predication – and from which the in-group can never escape. Again, the relative neglect of the notion of trapped bare life is not so much a conceptual problem for Agamben as it is a matter of emphasis.

The limits that exclude the out-group – that create exposed bare life – are currently formed by the state of exception regarding the "enemy combatants" (so that the Guantanamo camp is the state of exception become rule, the spatialization of the state of exception), while the limits of the in-group – trapped bare life – are formed by the two versions of "Terri's Law." (Technically speaking, these were not sovereign decisions, as they were laws, but the federal version could have provoked a constitutional crisis regarding federalism, just as the state version impacted Florida's doctrine of separation of powers.) 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, while the bodies of those in the in-group are subjected to the most intense medical interventions.

In highlighting the subjection of the in-group to medical intervention aimed at keeping trapped bare life going (to be distinguished from Agamben's analysis of the exposure of bare life of the "experimental persons" of the Nazi camps for the sake of knowledge that would purify and strengthen the body politic of the

German *Volk*), we see how we need Foucault's genealogy of materialist biopower, to which we now turn.

## FOUCAULT'S MATERIALIST GENEALOGY OF BIOPOWER

I will focus on three areas in which Foucault enables us to think the Schiavo case in ways that are not the focus of Agamben's work: (1) medical intervention and the "administrative supplement" in hospital / hospice palliative care; (2) the sexuality and racism elements in the Schiavo case; (3) hints as to a transformation of right to privacy jurisprudence away from the sovereignty paradigm.

(1) In "*Society Must Be Defended*" Foucault mentions the 1976 Franco case as an example of medical intervention creating an encompassing biosphere of trapped bare life. (To be fair, let's note that in *Remnants*, Agamben cites Foucault on Franco.) 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. Who is to decide the end of treatment?

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: everyone has to die, sometime; care has to stop, sometime. 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 in 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.

(2) 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: Schiavo fell sick from bulimia, the "tyranny of slenderness." (The proximate cause of Terri Schiavo's collapse was bulimia, according to the ruling in the 1992 malpractice suit brought by Michael Schiavo.)

We must also note 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 malpractice case jury ruled that Schiavo's bulimia should have been diagnosed by the OB-GYN treating her for "infertility.") 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, they were in need of phallic domination: give her the tube of life, whether she wants it or not. An ugly thing deserves an ugly name: "tube-rape."

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.) But in the American case, it's more often the "social racism" Foucault talks about ("*Society*" 232 / 261), directed against the economically unproductive; the marker of that unproductivity being their lack of insurance. 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. (Again, in *Remnants*, Agamben cites Foucault's analysis of racism in "*Society*".)

(3) Jurisprudence. The Schiavo case was resolved by means of the right to privacy as the right to die, but we want to be wary here, for we remain trapped at the intersection of discipline and biopower if we ground that right in sovereign rights of personal autonomy, which is the theoretical base of current American jurisprudence on "end of life issues." In *History of Sexuality, volume 1*, Foucault tells us that the initial legal recourse to the new found intersection of discipline and biopower was the "right to life." 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 "*Society Must Be Defended*": "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 anti-disciplinary and emancipated from the principle of sovereignty" (35 / 39-40).

#### A NEW JURISPRUDENCE: PRIVACY AS SINGULARITY

What to do about end of life issues in order to avoid the sovereignty trap? The challenge to our jurisprudence is to creatively transform the right to privacy. I propose four aspects of that transformation.

(1) Rights do not protect an already formed subject, but must instead protect the bases for a project of individuation (Drucilla Cornell takes an important step in this direction in *The Imaginary Domain*; in her scheme bodily integrity is protected as the condition of a project of individuation, not as the recognition of a domain controlled by an already-established sovereign; Cornell's second and third conditions center on the imaginary realm as the realm within which our projects are undertaken, and she presents a moving meditation on the right to die as the exercise of this project of individuation in her 2005 article "Who Bears the Right to Die");

(2) Singularity must be seen in both its *logical* sense of uniqueness (the way in which the singular is that which escapes the capture of the particular by the universal category under which it is subsumed; an extended encounter with the Kantian notions of reflective vs determinate judgments could be staged here), and in its *mathematical* sense (as that which marks a change in direction of the graph of a function; this is used in non-linear dynamical systems analysis to indicate a threshold or turning point in which a material system qualitatively changes its behavior: classic examples are the phase transition between the solid and liquid and gas phases of, say, water; a more appropriate example is the legal, medical and ontological change from a material system exhibiting behaviors of a social subject – a legal person – and one exhibiting only those behaviors of an organic system, as in the PVS (Persistent Vegetative State) cases of which Schiavo is an example);

(3) Privacy, as the realm within which a project of individuation occurs, must also be protected from the productive aspect of law, as Jeb Rubenfeld notes in his important 1989 *Harvard Law Review* article on "The Right to Privacy"; Rubenfeld shows that anti-abortion laws, for instance, do not simply remove an action from the field of permissible action (the negative or prohibitory notion of law as interfering with a primordial liberty), but also actively produces a person as a mother, creating both a juridical and an ontological change in the person. In the Schiavo case, then, the right to privacy does not simply keep the State from prohibiting an action that an autonomous subject might wish to undertake, but protects decisions at the turning point of PVS, so that persons are able to prevent having State action actively produce them as PVS cases – or at least maintain them as PVS cases, producing them as long-term PVS cases;

(4) The project of individuation has for Deleuze and Guattari its basis in de-personalization. For DG, the project of individuation does not aim at a wholeness that we project even though we know in advance it to be impossible (Cornell's formulation), but aims at revealing the singularity (logical uniqueness) of persons as the nexus of virtual differential "lines" that cross us and that are actualized on the spot at various turning points (mathematical sense of singularities) in our lives.

In other words, only in an extraordinary, ethical, situation, living along the fault line between organic – bare – life and personhood, 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.

Such a judgment is made in love, as DG memorably write in ATP: “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.