

## TERRI SCHIAVO

WALTER BLOCK

THE CASE OF TERRI SCHIAVO is almost as controversial as it is tragic.<sup>1</sup> In 1990 Mrs. Schiavo, who reached her 40th year in 2005, fell victim to brain damage. She has been in a vegetative state ever since, kept alive not under her own power, but aided by a welter of feeding tubes and other paraphernalia of modern medicine.

The controversy? Her husband Michael is adamant that the doctors pull the plug on Terri, and her parents are just as determined to keep her alive. Earlier court decisions in Florida where all parties reside were in favor of the husband's position, whereupon in 2003 Jeb Bush, Governor of that state prevailed upon the state legislature to pass "Terri's Law." This enabled the Governor to override these judicial findings and keep her alive. However, on 9/30/04 the Florida Supreme Court unanimously found this law invalid and ordered all life support systems to be disconnected.

Who is in the right in this heart breaking medical controversy? According to the legal philosophy now prevailing, a spouse has the final say regarding the well being of an incompetent mate, even superceding those of her parents, unless he is himself incompetent, or guilty of malfeasance. In the present case, the fact that Michael Schiavo has involved himself with another woman after his wife fell ill, and despite the claim of his in-laws that he is motivated in his decision by money stemming from a medical malpractice suit, the Supreme Court of Florida made no such finding. They ruled on the basis that he was the proper guardian, and in effect took his word

---

Walter Block is the Harold E. Wirth Eminent Scholar Endowed Chair and Professor Economics in the College of Business Administration at Loyola University New Orleans.

<sup>1</sup> <http://search.yahoo.com/search?p=Terri+Schiavo+&sm=Yahoo%21+Search&fr=FP-tab-web-t&toggle=1&ei=UTF-8>

that his wife either would have preferred death to her present predicament, or had previously indicated this preference to him.

How would this case be decided under the libertarian legal code? In order to apply such a code to the Schiavo case, we will have to take a detour and examine this philosophy in some detail. In this John Lockean perspective, rights to control persons and also real property are all based upon homesteading. Let us start with the relatively simple case of rights inland, and then move on to the more complex issue of rights to control persons.

In this philosopher's famous phrase,<sup>2</sup> one "mixes one's labor" with virgin land and in this way comes to own it. There are only two alternative options to this one; all others are but combinations and permutations of these. First, we can all own  $1/n$  of every acre of the earth. This can be dismissed, out of hand, as impractical. A half dozen or so friends have enough trouble figuring out which restaurant and movie to attend. Requiring accord on the part of 6 billion people as to the use of each square inch of the earth's surface would be at worst an exercise in socialism on a world scale,<sup>3</sup> and at best a recipe for endless committee meetings. Nothing would or could get done, and most of the population would die. Second alternative: the Jones', or the state, or the Aryans, or any one particular individual owns the entire earth, or various people own small parts of it, not based on their labor that they have mixed with it, but rather on the basis of some other criterion: claim, or royalty, or democracy, or beauty, or some such irrelevant consideration. One problem with any such scheme is conflicting ownership claims. Many people can say they own this or that acreage, and there is no clear way ahead to determining who is correct.

How would this work for human bodies? Let us start at the beginning. The parents are in effect the owners of the baby. He came from their flesh, after all. This would be as clear an analogue to land homesteading as it is possible to derive in this very different area. Of course, they do not own the baby, as the slave master owns the slave. Slavery is illegal in the libertarian society.<sup>4</sup> Rather, they own the right to keep raising the infant, as long as they keep doing so, in a manner that does not involve child abuse. In other words, the homesteader in this case may keep homesteading, as long as his homesteading is not illegitimate.

---

<sup>2</sup> See Hoppe, 1993; Locke, 1948; Rothbard, 1973, 32; Block and Yeatts, 1999–2000.

<sup>3</sup> That is, mass deaths due to starvation. Think of soviet collectivized farms vastly multiplied.

How, then, do newborns eventually gain control and full ownership over themselves? We each own ourselves due to a sort of meta-physical “homesteading.” The baby of a few weeks is incapable of making any such claim. For this period of time, as an example, the parents can kiss the infant all they want with nary an objection. His arm and leg movements at this time are not purposeful. He has no control over himself, at either end. But when the baby reaches the age of 18 months or so, he begins to assert some limited authority over himself. He learns the word “no.”<sup>5</sup> All too soon after that, he refuses some of the hugs and kisses offered him by his parents. He attains more and more control over his body and mind. He is now on the way to self ownership.

But he is still a long way from adulthood. What rights and responsibilities do parents, in the libertarian legal code, have to and against one another?<sup>6</sup> The basic premise of libertarianism is the non-aggression axiom and private property rights, opposite sides of the same coin. But a main corollary is that there are no positive obligations. People, under this system, are only required to refrain from the initiation of violence; they are not legally required<sup>7</sup> to come to the aid of their fellow man. Good Samaritanism is supererogatory; over and above the requirements of law. One cannot be penalized, under the libertarian legal code, for failure to in effect contribute charity to someone else.

What about parents and their responsibility for their own children? There is none. Nada. Zero. For in this system there are only negative obligations, to refrain from initiatory violence, not positive ones, to come to the aid of others, even one’s own children.

Of course, if parents do not want to raise their child, they cannot simply put him in a back room and starve him to death. They must make a public notification of their intention to stop homesteading their child. In the olden days, that meant placing the baby on the

---

<sup>4</sup> Re the debate over “voluntary slavery,” see for the positive side: Block, 1970, 1999, 2001, 2003, 2005, forthcoming, unpublished; Nozick, 1974; for the negative: Barnett, 1986, 1998; Calabresi and Douglas, 1972; Epstein, 1985; Evers, 1977; Gordon, 1999; Kinsella, 1998–1999; Kronman, 1984; Kuflik, 1984, 1986; McConnell, 1984, 1986; Radin, 1986a, 1986b, 1987; Rothbard, 1998; Smith, 1997.

<sup>5</sup> Ask any parent: things go down hill for a while after that episode.

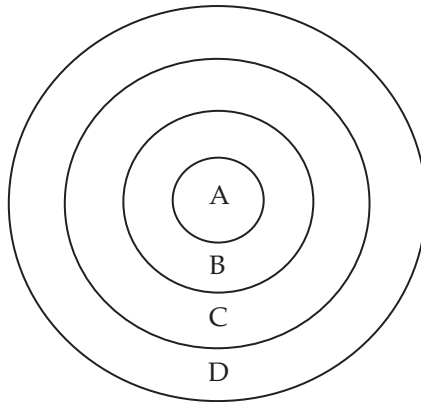
<sup>6</sup> For the impatient, a helpless Terri Schiavo is in effect a child. I am intending to analyze her case as if there were true. For more on children and rights see Rothbard, 1973; Evers, 1978a, 1978b; Kaufman, 1982; Block, 1991.

<sup>7</sup> What morality requires is an issue beyond the scope of the present paper.

church steps or at a hospital or with a physician or clergyman. Not to do so would imply not merely refusing to raise the child (the parents' right) but preventing all other potential parents from doing so.

An analogy from homesteading land can illustrate this point. Suppose a man mixes his labor with a bagel shaped piece of property: a circle, one mile wide, enclosing, say, 20 square<sup>8</sup> miles of territory inside of it. (See figure 1, where the homesteaded outer circle of land is marked B, and the inside, the hole in the bagel, is marked A.) Let us further suppose that it is technologically impossible for anyone to bridge over, or tunnel under (Block and Block, 1996; Block, 1998), this one mile wide swath of land B which has been duly and appropriately homesteaded by this man; he legitimately owns it.

Figure 1



Is such a scenario compatible with the libertarian theory of homesteading land? It is not. For the purpose, the reason d'être of this perspective is that all land, every bit of it with no exception, shall come under private ownership.<sup>9</sup> Here, we have a lacunae. From one perspective, A is unavailable for homesteading. From another, so is C, the land lying outside of B, assuming now that all the people are

<sup>8</sup> Ok, round.

<sup>9</sup> And the goal of this, in turn, is that everyone shall know what human actions are legal, and which are illegal. A necessary but not sufficient condition for this is a regime of complete private property. In that way, each owner can set rules for behavior on his property. This is only necessary, but not sufficient, since these private property owners can still launch howitzers onto the property of their neighbors; here, the non-aggression axiom comes into its own.

trapped inside B, in A, and cannot get out into C. But whichever perspective one looks at the matter, the conclusion is inescapable: there is some land, A or C it matters not which, that is simply unavailable for homesteading. This farmer is guilty of the crime of forestalling (Block and Whitehead, 2005). He is in effect controlling property (A or C) that he has not himself homesteaded. He is forcibly preventing others from having access to unhomesteaded and therefore unowned land. This is a serious no-no. Under this legal code, he must either cease and desist from this pattern of “homesteading,”<sup>10</sup> or make available to others access routes through his otherwise licit property holdings, D.

Let us now apply this to the case under consideration. Children, awkward as is this to say, occupy a status with regard to ownership that lies somewhere between that applying to land or animals on the one hand, and other adults on the other. The former can be owned outright, the latter cannot be.<sup>11</sup> It is illicit to own children, but the right to continue to homestead them, e.g., raise them, can be. How? By continuing to bring them up, care for them, feed, clothe and house them, etc.

It would be a violation of justice for someone to come to a parent, and take his child away from him. This is true, as long as the parent is raising the child appropriately (no neglect, no child abuse). But if the parent no longer continues to raise the child, then someone else is justified in taking it away, and caring for it himself. Under such circumstances, before the second adult steps into the picture, the parent has in effect abandoned the child. This youngster, as it were, reverts to an “unowned” status. He is in effect akin to virgin territory, able to be raised, as a first approximation, by the next non abusive non neglectful potential parent who comes along.<sup>12</sup>

But this is only a first approximation. More accurately, it holds if and only if there are no relatives who have a better claim to the child than does the next passerby. We base this claim on the fact that when a man dies intestate, his possessions automatically and properly go to his nearest relative, e.g., wife and/or children.

---

<sup>10</sup> Scare quotes to indicate the illegitimacy of this pattern of land settlement.

<sup>11</sup> Exceptions to this general rule include punishment for criminal acts, which is a form of justified slavery. Also, see fn. 4, *supra*.

<sup>12</sup> We assume, now, that the parent has not made other arrangements, such as giving his child to a shelter, or to a relative, or to a church, etc. If this is so, then the parents’ rights to do so must be respected, provided only that the new custodians will duly care for the child. The rough parallel here is that someone who wants to abandon land can give it to whomever he chooses.

Does the parent who no longer wishes to raise his child have the right to determine who shall take over in his stead? Yes. We here assume that all potential parents will be equally good for and to the child, so that we can abstract from the eminently reasonable rule “best interests of the child.” We do so in an attempt to shed light on succession rights in the absence of this consideration.

We are now ready to more directly approach the case of Terri Schiavo. For all intents and purposes, she is a child. She is as helpless as an infant. Her “parent,” the person with whom we start out for purposes of analysis in this role, is at present her husband.

Michael Schiavo asserts that it is Terri’s will that she be put out of her misery by allowing her to die. No court worthy of the name would accept his say so on the matter, even apart from him having a vested interest in taking this position. The libertarian accepts the right to suicide for adults, and even the right to assist others to engage in such a horrific act. But surely all sorts of safeguards should be first put in place before any such act can be considered legal. There must be evidence of an unequivocal wish to this effect, at least witnessed by a notary public. There is no such thing in this case, so we may safely ignore his claim about his wife’s wishes.

This consideration notwithstanding, Michael Schiavo retains his “parental” relationship with Terry. She is legally under his care. He is in effect that parent of a child, who no longer wishes to continue his “homesteading” or bringing up of this “child.” May she be put to death solely on the basis of this consideration? Not at all. Rather, as we have seen, Michael Schiavo has the responsibility to inform someone in authority—a charity, a hospital, a religious institution—that he no longer wishes to care for this “child.” They, in turn, are legally, not just morally obligated, not necessarily to raise this “child” themselves, but at least to inform as much of the world as they reasonably can of the existence of this now unwanted “child.”<sup>13</sup>

---

<sup>13</sup> Then, if and only if there is not a single solitary adult person on the entire planet who is willing to take on responsibility for her care and feeding, may she be put to death, not merely by withdrawing support, e.g., the feeding tube, but rather, more humanely, through a mercy killing. This would appear to violate the letter, and also the spirit, of the libertarian non-aggression axiom. There is a scene from the movie “Sand Pebbles” where the hero, Steve McQueen sees his former assistant being tortured to death. He shoots him with a long-range rifle, to save him from a miserable and excruciating death he is unable to prevent. There is not a libertarian court in the land, I contend, that would hold this character guilty of any crime. I think that the reconciliation with the non-aggression axiom is that McQueen had the implicit permission of the torture victim to put him out of his misery. Of course, the

Happily, in the present case, there is no need at all for such heroic measures. Her parents, to say nothing of thousands of well-wishers, are more than willing to take on the responsibility for safeguarding her life. According to our analysis, Terri should be taken from her husband's authority,<sup>14</sup> and given over to whichever one of these people has the most standing, presumably her parents. Her husband's desire to keep her, and allow her to die, would be trumped by the fact that in so doing he would be guilty of the crime of forestalling: he would be demanding the right to keep as (quasi) property an entity (a person in this case) he had not homesteaded (continued to homestead). His claim would be invalid.

In general, who should be the guardian of Terri Schiavo: her parents or her husband? The point is, it really does not matter how this question is answered, at least insofar as keeping her alive is concerned. For in the libertarian perspective, whoever will maintain her life, when the other party will not,<sup>15</sup> would be judged the proper guardian. Suppose matters were somehow reversed: Terri Schiavo was now under the control of her parents, who wanted her to die, and her husband, who wanted to keep her alive was suing for guardianship over her. Again, as in the realistic situation just discussed, the libertarian court would make her a ward of the party willing to support her life; in this contrary to fact case, the husband.

What about whether or not each life is of intrinsic value? What about quality of life? How does dignity enter into our analysis? Life after death? The sanctity of life? Federalism? None of these are relevant to the libertarian analysis put forth above. All that matters is that this adult "child" not be abused; or, more technically, that the rights and responsibilities of homesteading children be upheld. And if they are, then whoever is at first control of her must maintain her; if he refuses, her guardianship reverts to the second closest party, her parents. If they will not homestead her, then perhaps her siblings. If not them, then anyone who wishes to take up this burden. Based on the number of protests at the callous way she is being treated,<sup>16</sup> there

---

overwhelmingly strong presumption in all such cases is that this would be a murder on McQueen's part. But, at least in the context of this movie, this would be a presumption that could be refuted.

<sup>14</sup> Eric Cartman would say "Authoritah."

<sup>15</sup> Assuming no third party with better can be found who will also homestead her.

<sup>16</sup> I write at a time, 3/30/05, when she has not had access to her feeding tube for almost two weeks. She is expected to die momentarily.

are any number of people, certainly including her family, who are willing to do so.

## REFERENCES

- Barnett, Randy E. 1986. "Contract Remedies and Inalienable Rights" *Social Philosophy & Policy* Vol. 4, Issue 1, Autumn, pp. 179–202.
- . 1998. *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Clarendon Press.
- Block, Walter. 1970. "Voluntary Slavery," *Libertarian Connection*, Vol. 6, No. 1, pp. 9–11.
- . 1991 [1976]. *Defending the Undefendable*, New York: Fox and Wilkes.
- . 1998. "Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock," *Journal des Economistes et des Etudes Humaines*, Vol. 8, No. 2/3, June–September, pp. 315–326; [http://141.164.133.3/faculty/Block/Blockarticles/roads2\\_vol8.htm](http://141.164.133.3/faculty/Block/Blockarticles/roads2_vol8.htm)
- . 1999. "Market Inalienability Once Again: Reply to Radin," *Thomas Jefferson Law Journal*, Vol. 22, No. 1, Fall, pp. 37–88.
- . 2001. "Alienability, Inalienability, Paternalism and the Law: Reply to Kronman," *American Journal of Criminal Law*, Vol. 28, No. 3, Summer, pp. 351–371.
- . 2003. "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein," *Journal of Libertarian Studies*, Vol. 17, No. 2, Spring, pp. 39–85; [http://www.mises.org/journals/jls/17\\_2/17\\_2\\_3.pdf](http://www.mises.org/journals/jls/17_2/17_2_3.pdf)
- . 2005. "Are Alienability and the Apriori of Argument Logically Incompatible?" *Dialogue*, Vol. 1, No. 1.
- . Forthcoming "Epstein on Alienation: A Rejoinder."
- . Unpublished. "Kuflik on Inalienability: A Rejoinder."
- Block, Walter and Matthew Block. 1996. "Roads, Bridges, Sunlight and Private Property Rights," *Journal Des Economistes Et Des Etudes Humaines*, Vol. VII, No. 2/3, June–September, pp. 351–362; [http://141.164.133.3/faculty/Block/Blockarticles/roads1\\_vol7.htm](http://141.164.133.3/faculty/Block/Blockarticles/roads1_vol7.htm)
- Block, Walter and Guillermo Yeatts. 1999–2000. "The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform,'" *Journal of Natural Resources and Environmental Law*, Vol. 15, No. 1, pp. 37–69.
- Block, Walter and Roy Whitehead. 2005. "Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy," *Appalachian Law Review*, Vol. 4, No. 2, pp. 1–45; [http://www.walterblock.com/publications/block-whitehead\\_](http://www.walterblock.com/publications/block-whitehead_)



- abortion-2005.pdf; [http://www.walterblock.com/wp-content/uploads/publications/block-whitehead\\_abortion-2005.pdf](http://www.walterblock.com/wp-content/uploads/publications/block-whitehead_abortion-2005.pdf).
- Calabresi, Guido and Melamed, Douglas. 1972. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review*, Volume 85, April, No. 6.
- Epstein, Richard. 1985. "Why Restrain Alienation," *Columbia Law Review*, vol. 85, 970.
- Evers, Williamson. 1977. "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies*, Vol. 1, Winter 1977, pp. 3–13.
- . 1978a. "The law of omissions and neglect of children," *The Journal of Libertarian Studies*, Vol. 2, No. 1, Winter, pp. 1–10.
- . 1978b. "Rawls and children," *The Journal of Libertarian Studies*, Vol. 2, No. 2, Summer, pp. 109–114.
- Gordon, David. 1999. "Private Property's Philosopher," *The Mises Review*, Vol. 5, No. 1, Spring, pp. 1–7.
- Hoppe, Hans-Hermann. 1993. *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy*, Boston: Kluwer.
- Kaufman, Bill. 1992. "The Child Labor Amendment Debate of the 1920's; or, Catholics and Mugwumps and Farmers," *The Journal of Libertarian Studies*, Vol. 10, No. 2, Fall, pp. 139–170.
- Kinsella, N. Stephan. 1998–1999. "Reply to George Smith: A Victim's Right to Punish," *Journal of Libertarian Studies*, Vol. 14, No. 1, Winter, pp. 79–93.
- Kronman. 1983. "Paternalism and the Law of Contracts," 92 *Yale Law Journal*.
- Kuflik, Arthur. 1984. "The Inalienability of Autonomy," *Philosophy and Public Affairs*, Vol. 13, No. 4, Fall, pp. 271–298.
- . 1986. "The Utilitarian Logic of Inalienable Rights," *Ethics*, 97, Oct., pp. 75–87.
- Locke, John. 1948. *An Essay Concerning the True Origin, Extent and End of Civil Government*, in E. Barker, ed., *Social Contract*, New York: Oxford University Press, pp. 17–18.
- McConnell, Terrance. 1984. "The Nature and Basis of Inalienable Rights," *Law and Philosophy*, Vol. 3.
- . 1996. "The Inalienable Right of Conscience: A Madisonian Argument," *Social Theory & Practice*, Fall, Vol. 22, Issue 3.
- Nozick, Robert. 1974. *Anarchy, State and Utopia*, New York: Basic Books, p. 58, 283, 331.
- Radin, Margaret Jane. 1986a. "Time, Possession and Alienation," 64 *Washington University Law Quarterly*, 739 (1986).
- Radin, Margaret Jane. 1986b. "Residential Rent Control." *Philosophy and Public Affairs*. Vol. 15. pp. 350–380.
- . 1987. "Market-Inalienability," *Harvard Law Review*, Vol. 100, No. 8, June, pp. 1849–1937.
- Rothbard, Murray N. 1973. *For a New Liberty*, Macmillan, New York; <http://www.mises.org/rothbard/ethics/ethics.asp>

- . 1998 [1982]. *The Ethics of Liberty*, Humanities Press, Atlantic Highlands, N.J., pp. 40–41, 135–136.
- Smith, George. 1997. “Inalienable Rights?” *Liberty*, Vol. 10, No. 6, July 1997, p. 51.