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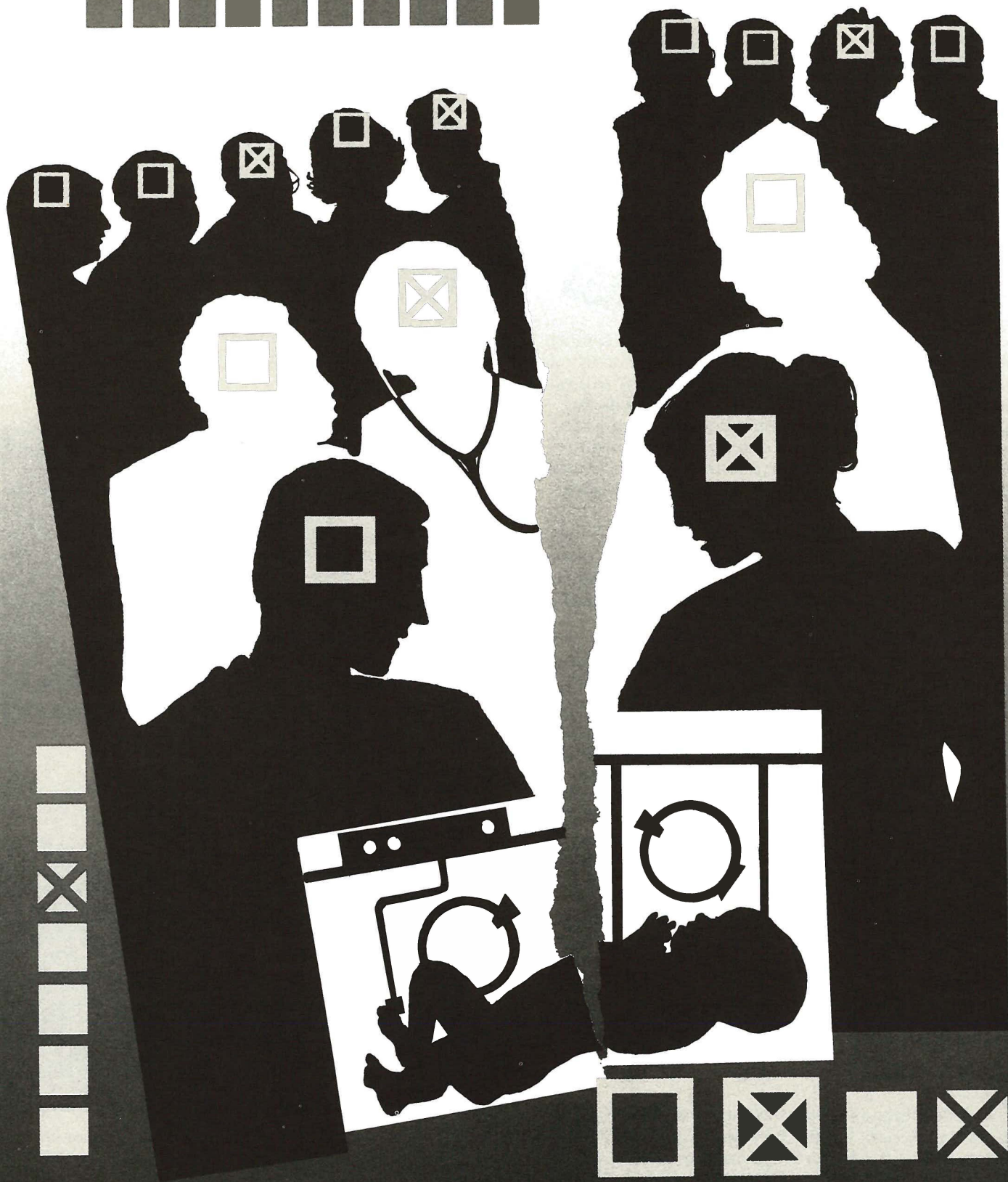
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Rights Discourse *and Neonatal Euthanasia*

Carl E. Schneider

Hard cases, they say, make bad law. But hard cases, we know, can also make revealing law. Hard cases identify for us problems we have not solved. They reveal how our goals conflict. They force us to articulate the assumptions implicit in our approach to a problem, and to identify and evaluate the ways of talking and reasoning the law has gradually come to use.

If there was ever a hard case for the law, it is the problem whether, how, and by whom it should be decided to allow newborn children who are severely retarded mentally and severely damaged physically to die. For many years, the law has not had to confront that hard case. Recently, however, the issue has evoked intense public and legal concern. The Department of Health and Human Services has, after receiving more than 115,000 comments on a proposed rule, issued final regulations requiring states to be ready to respond to reports of newly born infants being denied medical treatment, and the Supreme Court has agreed to hear a case arising out of a predecessor to those regulations.¹ Legal battles over several "Baby Does" have dramatized the issue.

The public and legal debate over neonatal euthanasia reveals what our understanding of hard cases leads us to expect: both the law and the debate about it are awkward, anomalous, and unsatisfactory. The law is marked by an increasingly prominent disjunction between the law on the books (which seems to make neonatal euthanasia criminal) and the law in action (which never prosecutes neonatal euthanasists). Positions in the debate about neonatal euthanasia have developed in startling ways. One might expect, for instance, that conservatives, believing in the autonomy of the family and the authority of the parent, would let parents make this decision as they make other medical decisions for their children. Yet many conservatives would use federal power (which they distrust) in the form of anti-discrimination legislation (which they dislike) through the device of conditions on federal aid (which they detest) to intrude into an area of classic state-government authority (which they revere). One

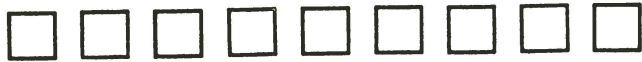
might expect, for instance, that liberals, believing in the rights of the individual against the state, believing in the autonomy (state-aided, if necessary) of children from their parents, and in the rights of groups (like the handicapped) traditionally discriminated against, would advocate affirmative action to protect those rights. Yet many liberals would leave these decisions to parents (helped, perhaps, by a committee of doctors).

This essay is an attempt to understand something about how the debate over the law regulating neonatal euthanasia has been shaped. In it, I am particularly interested in the fact that that debate involves or must respond to various "rights" modes of thought which have become increasingly prevalent in American family law. That prevalence comes at a time of social ambivalence about rights. On one hand, even the Burger Court has been willing to extend the regime of rights, if not by finding new rights, at least by finding fresh implications of old ones. And in our intellectual and social life, rights modes of thought have achieved a centrality unmatched in our history. On the other hand, there has arisen a sense, expressed at various levels of sophistication, that those modes of thought have reached the limits of their usefulness, or at least need to be tempered by giving greater prominence to other modes of thought. A development so multifaceted and momentous as this one cannot readily be surveyed, much less evaluated. But I wish to use the problem of neonatal euthanasia to begin to explore the usefulness of talking about social issues in terms of rights.

At the heart of our problems in approaching neonatal euthanasia lie the intractable questions that issue raises: What is human life? When is death preferable to life? What do parents owe their children? Those moral questions are further complicated when they must be resolved in terms of generally applicable social rules: It is hard, and even perhaps impossible, to write rules that will command widespread respect and work well for the entire spectrum of cases. These difficulties press us to take the problem of neonatal euthanasia outside

the sphere of substantive social rules. Where there is such pressure, the law generally, and especially family law, has developed procedural devices that seem to obviate the need for substantive rules. In the case of neonatal euthanasia, this approach commonly entails establishing a hospital committee to decide case by case whether neonatal euthanasia is appropriate.

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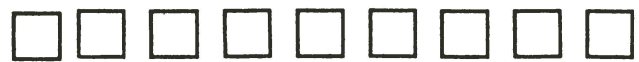
The difficult substantive questions of neonatal euthanasia can, however, be treated in an alternative non-substantive way. This alternative is to define the issue in terms of rights. If parents, for example, have a right to decide whether their children will receive medical treatment, the substantive issues will be theirs, not society's, to resolve. The appeal of this alternative is enhanced by the fact that, when we think about a social problem, we in America today tend to think about it in terms of rights. That tendency is specially marked in lawyers, since rights solutions arise readily from formal legal (especially constitutional) doctrine as administered by courts—sources which are basic in lawyers' training and which they monopolize. But the civil rights movement, as the central moral enterprise of our time, has made "rights" solutions to social problems paradigmatic and has lent them powerful moral authority in popular as well as legal thought. Thus it should not surprise us that rights solutions have been attractive to both wings of the debate over neonatal euthanasia.

Proponents of neonatal euthanasia can use the familiar constitutional doctrine arising from *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Parham v. J.R.* that parents have a "privacy" right to control decisions about their children's welfare in general and their children's health and medical care in particular. Of course, this doctrine does not wholly liberate parents from governmental supervision: their decisions have been over-ridden where they have refused medical care for their children on religious grounds, and their behavior is still criminal when it amounts to clear-cut child abuse. But the parental-rights doctrine *can* plausibly be applied where non-treatment is arguably in the child's best interests. Furthermore, of course, the doctrine reflects the practical reality that parents ordinarily make medical decisions for their children and that the government is ill-situated to intervene. Finally, the doctrine is sustained by the lively public feeling that

parents have and ought to have such a legal right.

The doctrine of parental rights pervades the background of neonatal euthanasia decisions, though the argument for the doctrine is made with varying clarity and emphasis. One prominent commentator, for example, would permit the state to intervene in parental medical decisions only where the medical procedure was "proven" and where "its denial would mean death for a child who would otherwise have an opportunity for either a *life worth living* or a *life of relatively normal healthy growth* toward adulthood . . ." This commentator believes that these are "highly personal terms about which there is no societal consensus," and that "it must be left to the parents to decide, for example, whether their congenitally malformed newborn with an ascertainable neurologic deficiency and highly predictable mental retardation, should be provided with treatment which may avoid death, but which offers no chance of cure . . ." ² Courts have applied the parental-rights doctrine in a number of child-medical-care cases. In one life-or-death case, for instance, the court said, "It is fundamental that parental autonomy is constitutionally protected. . . . Inherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best."³

It is hard to say to what extent the law should encourage people in their better impulses. Many of the law's attempts to do so—Prohibition comes to mind—have been moralistic in the narrowest sense and unsuccessful in the broadest sense.



Opponents of neonatal euthanasia can likewise employ rights solutions. Indeed, although no single rights solution as powerful as the parental-rights doctrine is available to them, they can call on a striking range of conceivable rights. Thus the Reagan administration, when it wished to attack neonatal euthanasia, used a provision of the Rehabilitation Act of 1973 which bars discrimination against the handicapped. Advocates for the retarded urge that retardation should be treated as a suspect classification, and though the Supreme Court recently rejected that proposal, the Court's treatment of the factual issue in the case seemed to signal some enhanced level of scrutiny.⁴ Those advocates have also contended that there is a constitutional "right to treatment" which applies when the handicapped are in a state institution. Opponents of abortion argue for a "right to life" held by the defective newborn and the fetus alike. Finally, the Court has often said that children have constitutional rights, although the nature and scope of those rights is uncertain.

I wish now to suggest that, despite its apparent attractions, discussing the problem of neonatal euthanasia in terms of rights is awkward and inapt. This is so for several reasons. The first is that, when we in America think in terms of rights, we tend to think in terms of the “Mill paradigm.” That is, we think in terms of the state’s regulation of a person’s action. In such conflicts, we are predisposed to favor the person, out of respect for his moral autonomy and human dignity. We have, to use a legal expression, a presumption in favor of a decision by the person. This presumption is tolerable partly because society can afford to bear the risk an incorrect substantive decision better than a person can. Thus the classic liberal position on voluntary euthanasia—that the individual has a right, against the state, to decide for himself whether to live or die—is thought proper partly because the consequences for the state of an incorrect decision may be unfortunate but are relatively slight, while the consequences for the individual of being compelled to bear a life he would rather give up are great.

In family law, however, the “Mill paradigm” often breaks down, because in family law the conflict is often not between a person and the state but between one person and another. In that conflict, we cannot be guided by our presumption in favor of the person: both contenders have their claim to moral autonomy and human dignity; neither is *a priori* better situated than the other to bear the risk of improperly allocated authority. Our legal thinking about rights has conspicuously, if understandably, failed to develop a satisfactory alternative to the Mill paradigm with which to approach this kind of problem. That failure is reflected in the painful awkwardness of the Supreme Court’s treatment of, *inter alia*, statutes requiring parents’ consent to their minor children’s abortions, of statutes requiring a husband’s consent to his wife’s abortion, of statutes prohibiting abortion, and of the question whether foster parents acquire constitutional rights in other people’s children. As we will see, the legal issues raised by neonatal euthanasia likewise exemplify the ways the Mill paradigm breaks down in family law.

Thinking about neonatal euthanasia in terms of rights is awkward for a second reason: The origin, scope, justification, and purpose of parental rights are all uncertain. That uncertainty inheres first in the absence of a constitutional text in which such a right is stated or from which it could be inferred. Such uncertainty, of course, is not unique to constitutional analysis. But in many other areas of constitutional analysis, some kind of theory—usually some kind of political theory—is available as a guide either to the intent of the framers or to modern analysis. In the area of personal rights, we lack and need, as H.L.A. Hart has repeatedly argued, “a sufficiently detailed or adequately articulate theory showing the foundation for such rights and how they are related to other values which are pursued through government.”⁵ We particularly lack a satisfactory theory of parental rights.

Perhaps in consequence, neither the courts nor the commentators explain satisfactorily why we accord parents rights over their children, and each of the possible explanations is in important ways unhelpful in resolving the legal dilemmas of neonatal euthanasia. Let us briefly see how this is so.

When philosophers talk about rights, they talk of a complex web of relationships and duties between individuals. When lawyers talk about rights, they tend to talk about an area of liberty to act without interference.



First, some of the holdings and language of courts intimate that parents are accorded rights because that is best for the parents themselves. Seen this way, the parental right is analogous to the right to marry and to live the intimacies of married (or, to some uncertain extent, single) life as one chooses. On this view, parents have a right to carry on their relations with their children in the way they prefer and to express parental feelings freely. A right so based has, perhaps, some appeal in some circumstances, as when it prevents the state from ending a parental relationship without a hearing. But, as that illustration suggests, its appeal is substantial only in easy cases; only, that is, in cases where the parents’ interests and the child’s are essentially the same and which thus fit the Mill paradigm. But in cases which do not fit the Mill paradigm, and especially where parental choices determine whether the child lives or dies, the rationale collapses under the weight it is asked to bear, unless we are to believe that parents’ interests regularly outweigh their children’s basic well-being. This version of the parental right, in other words, too readily conflicts with the commitment to “the best interests of the child,” a commitment central to American family law.

Second, some of the holdings and language of courts intimate that parents are accorded rights because that is best for their children. This rationale assumes that parents will make better decisions about their children than the state because the parents know the child best, love him best, and can make decisions for him taking into account considerations—like religion or ethnic traditions—which are desirable for individuals but illegitimate for the state. This rationale, however, seems essentially prudential and therefore insecure: If we attribute rights to parents because doing so generally helps children, may we not, ought we not, deny parents rights in any class of situations in which attributing rights to parents would generally not help children? And is not the prudential rationale one which ill fits a situation like neonatal euthanasia,

where the parents seem in many ways quite bad decision makers? In the few traumatic days after the birth of a defective child, the parents cannot be said to know their children well, may not have begun to love (and may even have come to hate) their child, suffer harsh emotional and social pressures, have many interests which conflict with those of their child, are thinking often for the first time about moral issues of the cruellest difficulty, and frequently lack accurate information about their child's condition and prognosis. Even this we could perhaps put aside, were the decision not one of life or death for the child.

...even if the law ought not, or cannot, encourage people in their better impulses, we should at least be aware of ways in which the law seems to encourage people in their meaner impulses.



Third, some of the holdings and language of courts intimate that parents are accorded rights because that is best for society. On this view, parental rights promote society's interest in what we loosely call "pluralism," that is, society's interest in social and ideological diversity. In some ways this seems to have been the value most expressly served by the Court's leading "parents' rights" decisions. Indeed, there is a sense in which the whole rights approach itself is an elaborately constructed means of promoting pluralism. Yet serving pluralism through parental rights is instinct with irony. First, parents' rights decisions often broaden the range of choices available to adults by decreasing the range of choices available to their children. In *Yoder v. Wisconsin*, for instance, Amish parents had removed their children from school after they finished eighth grade. The Supreme Court held that Wisconsin could not enforce its truancy statute against Amish parents after that point. The Court's decision served the interest in pluralism because it allowed Amish parents to live according to their particular traditions, and because it helped to perpetuate an unusual community which other American adults might choose to join. But the Court's decision also disserved the interest in pluralism because it allowed Amish parents to "standardize" their children by removing them from the larger community and from the range of choices which education through high school provides.

The "pluralism" rationale for parental rights is ironic in a second way. Where the pluralism interest of the parents has been strongest—where parents resist medical treatment for their children on specifically religious grounds—courts have readily found that the child's interest in physical health overrides the parents' interest in their religion, the child's interest in his soul, and society's interest in pluralism.

The usefulness of the "pluralism" rationale for parental rights is made further uncertain by our uncertainty about the role pluralism should play in American law. Everyone likes pluralism, where pluralism means only some loose kind of cultural tolerance. But the role of pluralism as such in American law has—outside of the area of freedom of religion—been virtually unaddressed in scholarly writing, and the sporadic cases arguably espousing pluralism have hardly enunciated any discernible systematic doctrine. For example, pluralism as it is ordinarily conceived speaks to the protection of diverse *groups*, yet the pluralism of the courts seems sometimes to protect *ad hoc* social diversity. If pluralism serves the former interest, it has little to do with parental decisions about neonatal euthanasia, since few, if any, groups in American society make beliefs about that subject central to their way of life. If it serves the latter interest, we are left uncertain just which kinds of "diversity" merit special protection. That uncertainty reflects another important limit on the usefulness of the pluralism rationale for parental rights: We lack a sense of the limits of pluralism. Pluralism is not an absolute, and is perhaps not even a pre-eminent, value, since some common views about behavior and morals are necessary if society is to function at all, to say nothing about functioning well. And questions about when one human may end another's life are classically and properly central among the views about behavior and morals which society as a whole has been thought entitled, even obligated, to address.

This last point suggests a third and final way in which the rights approach to neonatal euthanasia is troublesome. It is hard to say to what extent the law should encourage people in their better impulses. Many of the law's attempts to do so—Prohibition comes to mind—have been moralistic in the narrowest sense and unsuccessful in the broadest sense. What, then, can the law reasonably ask of parents of a severely impaired child when they decide whether he should live? The difficulty of that question may be indicated by the rarity with which it is directly addressed. One begins, perhaps, by acknowledging that to ask parents to raise such a child is to ask them to suffer. One response often made to that acknowledgment is that many parents have raised such a child, have found doing so rewarding, and have made it inspiring. Yet it seems callous to tell the parents of such a child to wait and they too will know the joys of difficult parenthood; and it seems presumptuous—and in some cases false—to tell them that eventually the joy will outweigh the pain. In any event, I doubt that we should suggest that the parents' decision *ought* to rest on the chances that they will, on balance and in the end, benefit by it: I would suppose that parents have a moral obligation to their children independent of any such calculation; and I would suppose that we want to encourage parents to make their decision as selflessly as possible. Yet this last supposition eventually leads

toward the disquieting position the court in *Regina v. Dudley & Stephens* maintained:

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.⁶

My project in this essay is not to say whether, and how far, we can set up such standards and rules for decisions about neonatal euthanasia. But I do suggest that, even if the law ought not, or cannot, encourage people in their better impulses, we should at least be aware of ways in which the law seems to encourage people in their meaner impulses. I wish to raise, cautiously, the possibility that, as a matter of practical psychology, to frame the question of neonatal euthanasia in terms of parents' rights is to encourage parents to be "self-regarding." In one sense, of course, rights are "other-regarding": rights are an acknowledgment by society that its members have claims against it. But by the same token, and I think more commonly in ordinary thinking, rights are claims by individuals against society, and are "self-regarding." Thinking in terms of rights encourages us to ask what we may do to free ourselves, not to bind ourselves. It encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought. Legal rights are significantly different from moral rights in this respect: When philosophers talk about rights, they talk of a complex web of relationships and duties between individuals. When lawyers talk about rights, they tend to talk about an area of liberty to act without interference. This difference is inevitable, since law's scope must be less than morality's, but this inevitability probably does not greatly affect the psychological consequences of the system of legal rights.

It is of course true that the system of legal rights is not entirely self-regarding, for most rights find some kind of limit in a conflicting right. But in the context of our discussion, that limit is precisely the problem, for it is not restrictive enough. Rights not only conflict with rights, "they conflict in the demands they make upon us with moral considerations to which the concept of a right does not seem to apply at all: the requirement that we help someone in need, the generosity or kindness we ought to extend to persons simply out of love and affection for them. . . ."⁷ Rights discourse in the law encourages us to think of the claims of others on us in terms of their legal rights; the danger is that it may thereby encourage us to feel those rights fully describe the limits of what we should do for them.

The self-regarding quality of the rights approach may be seen in the extent to which it has become acceptable to weight the interests and even the comfort of parents against the life of their child. This weighting of interests is perhaps foreshadowed in *Roe v. Wade*,

where the Court seems to found the very right to an abortion on the "detriments" a woman would suffer who could not have an abortion. Similarly, writing about neonatal euthanasia, one leading medical commentator won the approval of a leading legal commentator when he said: "Families know their values, priorities and resources better than anyone else. . . . If they cannot cope adequately with the child and their other responsibilities and survive as a family, they may feel that the death option is a forced choice. . . . But that is not necessarily bad, and who knows of a better way."⁸

The self-regarding quality of the rights approach may be seen in the extent to which it has become acceptable to weight the interests and even the comfort of parents against the life of their child.



As a logical matter, of course, one may have a right without exercising it or feeling encouraged to use it. But I have been speculating about what we might call the socio-psychological consequences of the mode of rights discourse in the United States today. My sense, which is strong but not susceptible to ready proof, is that that mode has encouraged us to feel that "to demand our rights, to assert ourselves as the moral agents we are, is to be able to demand that we be dealt with as members of the community of human beings."⁹ The civil rights movement taught us the reasons for that attitude. But attitudes appropriate to civil rights may be inappropriate to privacy rights. Civil rights are rights to participate in self-government and society. Such participation is at least a virtue and may be a duty. But privacy rights are in a sense the opposite of civil rights—they are rights *not* to be affected by government and society—and to forego their use can be a virtue and even a duty. A person may, for example, have a privacy right to father more children than he can support, but he presumably has a moral duty to refrain from exercising that right.

I said at the beginning of this essay that opponents of neonatal euthanasia also have available to them various rights approaches, particularly those dealing with the rights of children or of the handicapped. I cannot in this essay canvass them fully; I can only briefly suggest that here too a "rights" approach is awkward and inapt.

First, a children's rights approach is problematic for the same reason a parents' rights approach is—it does not fit the Mill paradigm. The Mill paradigm, we may recall, involves a single individual versus the state. However, when we use children's rights (or the handicapped's rights) in the neonatal euthanasia situation, we have two individuals—the child and the parent—

as well as the state. We lack here, as we did with parents' rights, criteria for choosing between the two sets of rights. We encounter a further difficulty as well. Insofar as the state tries to protect children from parents by strengthening children's rights, it becomes hard for parents to protect children against the state by the traditional means—invoking parents' rights.

Children's rights are incompatible with the Mill paradigm in another way. As Professor Sumner notes, "Rights theories have generally been formulated for the paradigm right-bearer—a competent adult human being. The existence of nonparadigm beings (children, infants, fetuses, the severely abnormal, nonhuman animals, perhaps also artificial intelligences) is awkward for such a theory."¹⁰ If we give people rights out of respect for their status as independent moral agents, it makes little sense to give rights to people who cannot be independent moral agents. This problem is particularly acute for neonatal euthanasia, since severely retarded, newborn infants are patently incapable of making or articulating any kind of decision at all, and, unlike other children, they will never develop fully the ability to do so.

Children's rights, particularly in the context of neonatal euthanasia, differ from the Mill paradigm and from parental rights in yet another significant way. Parental rights are rights to make decisions unregulated by the state. Since children cannot make decisions for themselves, children's rights are commonly formulated in terms of some view of what is good for children. In simple formulations, the right is a right "to life"; in the many grander formulations, the right is to conditions necessary to make life happy. Thus a crucial inaptness of rights discourse is that it simply leads us back to the substantive questions about the rights and wrongs, the benefits and costs, of neonatal euthanasia. One of the attractions of a rights approach is that it seems to relieve society of these difficult questions and to transfer decisions to those most concerned. Where a rights approach serves neither function, we must ask whether it has any utility.

Society as a whole has an interest not just in setting standards for the treatment of severely handicapped infants; it also has an obligation to do what it can to help both them and their parents.



If newborn children are nevertheless to have rights to choice, someone must exercise them. That someone is ordinarily the parent, but in the context of neonatal euthanasia it is precisely the parent whose influence one attempts to check by giving rights to children. That someone cannot be the state, because privacy rights are

precisely rights to act free of state supervision. Even if the anomaly of a privacy right exercised by the government could be overcome, it still would not be clear *how* that right should be exercised for the child. There is no way to know how any particular newborn child, much less a severely retarded child, would exercise his rights, and thus one is again cast back to the basic substantive questions about neonatal euthanasia. It is instructive and (from this perspective) ironic that, when courts have attempted to think in terms of the rights of patients unable to speak for themselves, they have sometimes interpreted those rights as rights to die, not to live.

At the beginning of this essay, I observed that the rights approach and the committee approach have in common the purpose of avoiding social discussion of the substantive issues of neonatal euthanasia. Yet the rights approach does not achieve that purpose satisfactorily, for those issues keep cropping up even in discussions phrased in rights terms. To some extent, the jurisprudence of rights attempts to factor in those issues when it defines the right at stake. Thus we saw that questions of children's rights and of the handicapped's rights regularly devolve into questions about the substantive desirability of neonatal euthanasia. Substantive considerations that are not factored into the definition of a right seek accommodation elsewhere. Fourteenth-amendment jurisprudence attempts to create such accommodations by "balancing" the "state" interest against whatever private rights are asserted. But it is symptomatic of the rights mode of legal discourse that state-interest analysis is the least developed aspect of fourteenth-amendment jurisprudence. In judicial opinions, that analysis is often perfunctory and rarely dispositive. In scholarly commentary, state-interest analysis is slighted in discussions of particular issues and virtually ignored as a separate topic of inquiry, especially compared to the cascade of attention given to identifying and enforcing rights. Consequently, the substantive issues of neonatal euthanasia are neither avoided by the rights approach, nor dealt with satisfactorily.

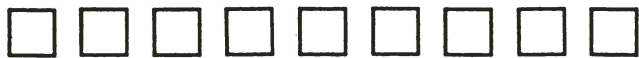
The committee approach, of course, relieves society as a whole of the debate over the substantive issues, and leaves them to be thrashed out case by case by many discrete committees. Yet I believe it is a failure of both the rights approach and the committee approach that they seek to avoid a social debate of the issues involved in neonatal euthanasia. These issues seem to me matters in which society as a whole has an interest, which it may legitimately bring into public discourse, and in which it may, as in some measure it does now, legitimately try to set standards.

Society as a whole has an interest not just in setting standards for the treatment of severely handicapped infants; it also has an obligation to do what it can to help both them and their parents. Politically, that help will be provided only if some sense of communal responsibility is widely felt. There is nothing logically inconsistent between such a sense of communal

responsibility and the rights approach. Indeed, a community with a developed sense of mutual responsibility may gladly acknowledge a wide range of rights against itself. Yet it seems to me possible that, as a practical matter, the rights approach, when used broadly, discourages such a sense of responsibility. A community that attempts to unite itself largely in terms of the rights each citizen has against the whole has little to stimulate in each citizen concern for the others. A community which relies too completely on the rights approach can too readily slip into viewing rights as stating the maximum as well as the minimum it owes its citizens. Thus, I hope that an approach to neonatal euthanasia based on a sense that society has a legitimate interest in the question might stimulate a sense that society has a duty to commit resources to what would be seen as a common problem.

I have argued that rights discourse is, in its present form, an inapt means of discussing problems like neonatal euthanasia. The significance of my argument, if such there be, lies in its doubts about a deeply ingrained, deeply useful mode of social and legal thought. Yet these doubts themselves have their limits: they are directed toward rights discourse in its present form, and rights discourse may someday develop "a satisfactory theory of basic human rights and their relationship to other values pursued through law."¹¹ Further, some of the inadequacies of rights discourse may be due to conflicts in social values which will eventually resolve themselves. In any event, while my doubts about the rights approach may all be justified, I have not asked what alternative modes of discourse would be more satisfactory.

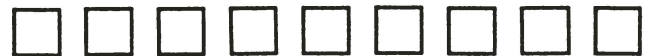
I would, at least temporarily, retain the law on the books while society, in the numerous ways available to it, debates the social and moral problems neonatal euthanasia presents.



This essay, however, is not the place to propose an alternative to the rights mode of discussing neonatal euthanasia. But perhaps I owe the reader some clearer, more specific sense of how I would begin to confront, though not resolve, the practical issues of neonatal euthanasia. Because of the difficulties I have described with the rights approach to neonatal euthanasia, and because I share the skepticism of other commentators about "legalizing" these decisions by adopting the committee solution, I share their reluctance to change the law on the books, despite its disjunction with the law in action. I would, at least temporarily, retain the law on the books while society, in the numerous ways available to it, debates the social and moral problems neonatal euthanasia presents. I am drawn to this hesi-

tant conclusion because I see human life as an ultimate value; because I believe the helpless and deformed deserve compassion, not calculation; and because I believe it would be degrading to live in a society which permitted children to die because they are burdensome. I concede that there will be cases in which euthanasia is proper, though I believe such cases are extraordinary and few. But like other commentators, I do not see how standards can be written which limit euthanasia to those few cases, which do not depersonalize questions of life and death, which do not dangerously diffuse responsibility for people's lives, which do not ask the state to endorse the principle that some lives are not worth living. Perhaps these are very personal reasons, but they seem to me directed toward a question of legitimate public concern.

Defining something as a right masks the nature and complexity of the interests actually at stake.



I see this, then, as a matter involving important moral principles. Others see it as a matter involving important human rights. The danger of either view is that both moral principles and human rights are commonly felt to be, and to some extent ought to be, uncompromisable. But in a complex democracy, some compromise of both principles and rights, some decent respect for the opinions of others, some realization that time has upset many fighting faiths, are necessary. It seems to me a fault of the rights approach that it impedes compromise. Defining something as a right masks the nature and complexity of the interests actually at stake. Defining the interests at stake as rights makes accommodation more difficult, since we lack a hierarchy of rights that would help us choose between them. Defining the interests as rights turns the accommodation of interests into the breaching or defining away of a right and thus a political and moral wrong. On the other hand, a virtue of the present state of the law is that it may ease compromise. First, the dichotomy between the law on the books and the law in action represents a compromise, a compromise all the more attractive because unacknowledged. Second, at least until recently, each state was able to regulate the problem in its own way. Since there are still important differences in social attitudes between many states, this federalist flexibility seems to me to permit a useful, though neglected, form of compromise.

I said that my conclusion was hesitant. Whether the law responds adequately to the problem depends on the scope of the problem, and we seem not to have a clear sense of how common neonatal euthanasia actually is, nor of how unbearable the lives of its victims actually were or were to be. I hesitate out of fear that

cases like that of Phillip B. may be common. He is a Down's Syndrome child. His IQ is 57. He may someday be able to learn a job and to live independently or semi-independently.¹² He is capable of "true love and strong feelings."¹³ When he was twelve, he needed a heart operation to prevent his gradual suffocation. His parents, with whom he had never lived, refused to permit the operation, and the California courts refused to order it. Custody of Phillip has now been sought by and given to a couple who befriended him, and he has, belatedly but successfully, had the operation.¹⁴ But if mere retardation, to say nothing of retardation so mild, is commonly cause for denying children medical care, I hope the law in action, at least, will change. ☒



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1. Heckler v. American Hospital Assoc., 84-1529, cert. granted, 54 U.S.L.W. 3053 (1985).
2. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L.J. 645, 651 (1977) (emphasis in original).
3. In re Phillip B., 92 Cal.App.3d 799, 801 (1979), cert. denied sub nom. Bothman v. Warren, 445 U.S. 949 (1980).
4. City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (July 1, 1985).
5. Hart, *Utilitarianism and Natural Rights*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 195 (1983).
6. 14 Q.B.D. 273, 288 (1884).
7. A. MELDEN, *RIGHTS AND PERSONS* 1 (1977).
8. Dr. Raymond Duff, quoted in Goldstein, *supra* note 3, at 656.
9. A. MELDEN, *supra* note 7, at 25.
10. L. SUMNER, *ABORTION AND MORAL THEORY* 56 (1981).
11. Hart, 1776-1976: *Law in the Perspective of Philosophy*, in H.L.A. HART, *supra* note 5, at 158. I discuss some of these doubts and place them in a larger context in Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 601 (1985).
12. Guardianship of Phillip B., 188 Cal.Rptr. 781, 788 (App. 1983).
13. 188 Cal.Rptr., at 787.
14. New York Times, October 10, 1983, at 10.