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Carl Schneider

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Rights Discourse and Neonatal Euthanasia

Carl E. Schneider

76 California Law Review 151 (1988)

At the heart of our difficulty in approaching neonatal euthanasia lie the intractable questions it raises: What is human life? When is death preferable to life? What do parents owe their children? What does society owe the suffering? Those moral questions could hardly be more perplexing, yet they are further complicated when they must be resolved not informally and case by case, but through generally applicable social rules. This is so for numerous reasons. For instance, the wide range of deeply held opinions about neonatal euthanasia makes rules hard to formulate, and the wide range of factual situations in which questions of neonatal euthanasia arise makes rules hard to apply. It is, in other words, difficult, perhaps impossible, to write rules that will command general respect and work well for the entire spectrum of cases. This difficulty presses us to take the problem of neonatal euthanasia outside the sphere of substantive social rules by seeking ways to make decisions about neonatal euthanasia which do not require social conclusions about its underlying questions. Where there is pressure of this kind, the law generally, and family law particularly, seeks procedural de-

vices that obviate the need for substantive rules. For neonatal euthanasia, the nonsubstantive solution has commonly been to establish hospital committees to decide case by case whether neonatal euthanasia is appropriate. There is, however, an alternative nonsubstantive approach. That 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 struggle with.

A nonsubstantive social resolution of the problem of neonatal euthanasia may be unsatisfactory to those who have specially clear and firm convictions about its substantive aspects, since nonsubstantive resolutions rarely assure that a 'correct' result will be reached. Such people may nevertheless be led to 'rights' solutions, because such solutions often have substantive implications. For instance, according parents the right to decide may somewhat increase the likelihood of euthanasia; attributing a right to life to infants may decrease it. Rights solutions also attract the committed because these solutions can greatly simplify the political battles that need to be fought: rights are the 'trumps' of legal analysis, and rights solutions can often be easily implemented nationally and not just state by state.

People are drawn to rights solutions to the issue of neonatal euthanasia for yet other reasons. In particular, the debate is shaped by the fact that, when we think about a social problem, we in America today tend to think about it in terms of rights, a mode of thinking we find accessible, convenient, and comfortable. That tendency developed for reasons both too familiar and too complex to be reiterated here. It is specially marked in lawyers, since rights solutions arise readily from formal legal (especially constitutional) doctrine as administered by courts—a source which is basic in lawyers' training and which lawyers monopolize. But rights-thinking is not at all confined to lawyers. 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. Partly in consequence, much of the social and legal thought of the last quarter of a century has been devoted to exploring and extending the doctrine of rights. Thus it should not surprise us that rights solutions have appealed to both wings of the debate over neonatal euthanasia. To an examination of that appeal we now turn.

Proponents of neonatal euthanasia can use the familiar constitutional doctrine arising from *Meyer v. Nebraska*,¹ *Pierce v. Society of Sisters*,² and *Parham v. J.R.*³ that parents have a 'privacy' right to control decisions about their children's welfare in general and their children's medical care in particular. This doctrine articulates a constitutional right of great social and moral appeal that is buttressed by the practical realities that parents ordinarily make medical decisions for their children and that government is ill-situated to intervene. Furthermore, the doctrine is sustained by the popular feeling that parents have and ought to have such a legal right. Of course, this doctrine does not wholly liberate parents from governmental supervision: their decisions have been overridden where they have refused medical care for their children on religious grounds, and their be-

1. 262 U.S. 390 (1923).

2. 268 U.S. 510 (1925).

3. 442 U.S. 583 (1979).

havior is still criminal when it amounts to clear-cut child abuse. But the parental-rights doctrine can plausibly be applied where nontreatment is arguably in the child's best interests.

The doctrine of parental rights pervades the background of neonatal euthanasia discussions, though the argument for the doctrine is made with varying clarity and emphasis. Most starkly, Professor Goldstein would forbid the state to overturn parental medical decisions except 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.' Professor Goldstein believes that, '[o]utside of a narrow central core of agreement, 'a life worth living' and 'a life of relatively normal healthy growth' 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.'⁴ . . .

Opponents of neonatal euthanasia can likewise employ rights theories. Indeed, although they lack any single rights solution as powerful as the parental-rights doctrine, they can call on a striking array of conceivable rights responses, from the constitutional to the quasi-constitutional. For example, the Reagan administration, when it wished to restrict neonatal euthanasia, used sections of the Rehabilitation Act of 1973, a provision which bars discrimination against the handicapped. Similarly, advocates for the retarded have urged that retardation be treated as a suspect classification, and, though the Supreme Court formally rejected that proposal in 1985, its treatment of the factual issue in the case seemed to signal an intention to require some enhanced level of scrutiny. Those advocates have also propounded a constitutional 'right to treatment' for the handicapped in state institutions. Opponents of abortion argue that the defective newborn and the fetus alike have a 'right to life.' Finally, the Court has often said that children have constitutional rights, although it has not defined the nature and scope of those rights.

I wish now to suggest that, despite its apparent attractions and evident currency, discussing neonatal euthanasia in the language of parental rights is awkward and inapt. I will identify three ways in which this is so. The first is that, when we in America think about 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 actions. 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 of an incorrect substantive decision better than a person can. The classic illustration of this comes from criminal law, where the accused is accorded due process rights because society can better bear the risk of a guilty person going free than an innocent person can bear the consequences of being convicted. This reasoning applies in other rights contexts as well. Thus the classic liberal position on voluntary euthanasia—that a person has a right, against the state, to decide for himself whether to live or die—is

4. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L. J. 645, 654-656 (1977).

thought defensible partly because the consequences for the state of an incorrect decision may be unfortunate but are relatively slight, while the consequences for the person of being compelled to bear a life he would rather escape are onerous.

In family law, however, the Mill paradigm often breaks down, because in family law conflicts are often not between a person and the state but between one person and another person. In these conflicts, 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 such conflicts. That failure is reflected in the painful awkwardness of the Supreme Court's treatment of, *inter alia*, statutes requiring a parent's consent to a minor child's abortion, statutes requiring a husband's consent to his wife's abortion, statutes prohibiting abortion, and claims that foster parents can 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 parental rights is awkward for a second reason: the origin, scope, justification, and purpose of parental rights are all uncertain. That uncertainty begins in the absence of a constitutional text in which such a right is stated or from which it could be inferred. This kind of uncertainty, of course, is not unique in or 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, however, we lack and need, as Professor 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 three possible explanations is in important ways unhelpful in resolving the legal dilemmas of neonatal euthanasia. Let us briefly see how this is so.

First, some of the holdings and language of courts seem to 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 conduct their relations with their children and to express their parental feelings in the way they prefer. 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, where the parent's interests and the child's are essentially the same and where the Mill paradigm thus essentially applies. 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 par-

5. H.L.A. Hart, "Utilitarianism and Natural Rights," in *Essays in Jurisprudence and Philosophy* (1983), p. 195.

ents' interests regularly outweigh their children's basic well-being. This rationale for the parental right, in other words, too readily conflicts with the commitment to 'the best interests of the child' that is central to American family law. It also conflicts with the second rationale for parental rights, to which we now turn.

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 their child best, love him best, and can consult ideas—like religious beliefs or ethnic traditions—which are appropriate 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 child well, may not have begun to love (and may even have come to hate) their child, suffer under harsh emotional and social pressures, have many interests which conflict with the child's, are thinking often for the first time about moral issues of the cruelest difficulty, and frequently know little 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.

Third, some of the holdings and language of courts seem to 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 'parent's 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, decisions like *Wisconsin v. Yoder*⁶ broaden the range of choices available to adults by decreasing the range of choices available to their children. In *Yoder*, the Court held that Amish parents were constitutionally entitled to remove their children from school after eighth grade despite Wisconsin's truancy statute. The Court's decision served the interest in pluralism because it allowed Amish parents to live according to their own particular traditions and because it helped to perpetuate a heterodox 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 opportunities and 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. To put the point somewhat differently, when the parent's pluralism

6. 406 U.S. 205 (1972).

interest is strong, the state's interest is often strong as well, and frequently for the same reason—because the child's interests in the decision are also pressing.

Quite apart from these ironies, the usefulness of the 'pluralism' rationale for parental rights is clouded by our vagueness about pluralism's status in American law. Everyone likes pluralism, where pluralism means only some loose kind of cultural tolerance. But the role of pluralism in American law has—outside of the area of freedom of religion—been strangely neglected in scholarly writing, and the sporadic cases arguably espousing pluralism have hardly enunciated any discernible systematic doctrine. For example, pluralism as it is ordinarily understood speaks to the protection of diverse groups, yet the pluralism of the courts seems often 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 pluralism serves the latter interest, we are left uncertain just which kinds of 'diversity' merit special protection. That uncertainty reflects another important constraint 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 of 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.

Thus far, I have argued that a rights approach to neonatal euthanasia is problematic because it relies on the inappropriate Mill paradigm and because the origin, scope, justification, and purpose of parental rights are uncertain. I want now to suggest that the rights approach is problematic in a third and final way. The problem has to do with the social and psychological consequences of treating issues like neonatal euthanasia in rights terms. 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 when deciding whether their severely impaired child 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 common response to that acknowledgment is that many parents have raised such a child, have found it 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 sometimes 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 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.⁷

My project in this Essay is not to say whether, or how far, we should set up such standards and rules for decisions about neonatal euthanasia. But I do suggest that, even if law ought not, or can not, encourage people in their better impulses, we should at least be aware of ways in which 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-concerning.' In one important sense, of course, rights are 'other-concerning': 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-concerning.' 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.

* * *

One obvious response to the problems with the parental-rights approach to neonatal euthanasia has been to answer in kind by arguing that children or the handicapped have constitutional rights that offset such parental rights. Such a response has the attraction of seeming to put the risk of an erroneous decision on the parents (who stand to lose their happiness) instead of on the child (who stands to lose his life). I cannot in this Essay canvass the issues fully; my point, rather, is that here too a 'rights' approach is awkward and inapt.

First, a children's rights approach is problematic for one of the same reasons a parents' rights approach is—it does not fit the Mill paradigm. The Mill paradigm, we may recall, involves a person versus the state. However, when we use children's rights (or the handicapped's rights) in the neonatal situation, we have two people—the child and the parent—as well as the state. We lack here, as we did with parents' rights approaches, 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, parents are inhibited from protecting children from 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 non-paradigm beings (children, infants, fetuses, the severely abnormal, nonhuman animals, perhaps also artificial intelligences) is awkward for such a theory.' If we give people rights out of respect for their status as independent moral agents, it makes little sense to attribute rights to people who cannot be independent moral agents. This problem is particularly acute as to neonatal euthanasia, since severely retarded, newborn infants are patently incapable of making or articulating

7. 14 Q.B.D. 273, 288 (1884).

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. But 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 the 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 benefits and costs, the wisdom or wickedness, of neonatal euthanasia. One attraction 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, its utility is markedly weakened.

One way out of the dilemma of a right which must be defined in terms of the substantive questions about neonatal euthanasia might seem to be to establish not a right to a particular kind of result, but a right to a choice made on behalf of the child. However, if newborn children are to have rights of choice, someone must exercise them. That someone is ordinarily the parent, but in relation to neonatal euthanasia it is precisely the parent whose influence one attempts to check by assigning children rights. That someone cannot be the state, because privacy rights are precisely rights to be 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 the perspective of advocates of rights for children and the handicapped) ironic that, when courts have attempted to think in terms of the rights of patients unable to speak for themselves, they have not uncommonly interpreted those rights as rights to die, not to live.

* * *

[Professor Schneider now explores the slippery slopes that compromise rights views when the lives of impaired neonates are at issue.]

Liberals have been influenced in formulating and defending their position by several slippery slopes. The first such slope is the possibility that making neonatal euthanasia acceptable might legitimize involuntary euthanasia of adults. For at least a century, some liberals have advocated loosening legal constraints on euthanasia. But they have generally been careful—either out of conviction or strategy—to limit their arguments to voluntary euthanasia. Indeed, as Professor Burt notes, 'A generation ago proposals for authorizing voluntary euthanasia for terminally ill adults were met, in part, by assertions that such practices would lead to euthanasia for defective newborns. Proponents of voluntary euthanasia rejected this argument, in effect, as implausible and wholly fanciful.' The practice of neonatal euthanasia brings us to the borderland of involuntary euthanasia and to many troubling questions about which other groups might be subject to it,

with all the disturbing associations with 'the elimination of the unfit' such questions carry. All this makes it desirable to find handholds on the slope toward involuntary euthanasia. One such handhold has been the distinction between 'active' and 'passive' euthanasia: if euthanasia is confined to those who will die if not treated, some limits have been placed on the scope of involuntary euthanasia. But the debate over neonatal euthanasia has strained that distinction too: its advocates have generally argued only for passive euthanasia (that is, death by non-treatment), but passive euthanasia can cause deaths so horrifying that active euthanasia begins to seem humane.

This first slippery slope poses a variety of dilemmas for the liberal position on neonatal euthanasia. To those liberals who favor involuntary euthanasia, the slippery slope from neonatal euthanasia to involuntary euthanasia of adults should be troubling only tactically. But the tactical problem is not insubstantial. And to those—liberal or conservative—who oppose involuntary euthanasia, that slope raises intractable questions about how neonatal euthanasia can be distinguished from other forms of involuntary euthanasia. Further, even if satisfactory logical distinctions can be found, applying them must almost surely be difficult. Finally, there remains what might be characterized as a psychological aspect of slippery slopes: they work partly by domesticating one idea and thus making its nearest neighbor down the slope seem less extreme and unthinkable. In the context of neonatal euthanasia, this process sparks the fear that even an extension of euthanasia that is logically defensible will be psychologically brutalizing. . . .

The liberal's commitment to parental freedom to choose neonatal euthanasia is hardened by his second slippery slope. This slippery slope suggests that, to countenance doubts about the parents' right to choose neonatal euthanasia is to encourage doubts about women's right to choose abortion: If neonatal euthanasia is wrong or is a question for social, not private, decision, why is not abortion wrong, or a question for social decision? Given the centrality the right to an abortion has assumed in much liberal thinking, this slippery slope, by endangering that right, impels the liberal more adamantly to defend the parental right to choose neonatal euthanasia. Nor can this slippery slope be easily avoided. On the contrary, attempts to distinguish between the moral status of the fetus and the new-born child have long been deeply perplexing. . . .

A third slippery slope pulls the liberal away from his position on neonatal euthanasia. This slope embodies the fear that to emphasize the parental right to choose neonatal euthanasia is to risk eroding children's rights and the rights of the retarded. The conflict between children's rights and parental rights has long bedeviled the liberal: while the two rights can usefully harmonize, they can as easily clash. Indeed, the Court has generally declined even to attempt to construct a doctrine of children's rights, largely because of the difficulty of working out the relation between the two sets of rights. When the Court has occasionally accorded children rights, it has done so ad hoc and for reasons largely responsive to the particular considerations of each case. For example, the rights of daughters who wish to have an abortion without their parents' consent may perhaps be best understood in terms of the Court's elaboration of the right to an abortion. Where children's rights have been most systematically developed—in juvenile justice—the state, not the family, is the entity with which the child is thought to be in conflict, there is an easily adapted standard (adult criminal-procedure rights)

to consult, and the area is so circumscribed that a slippery slope into other kinds of children's rights is unlikely.

The conflict between the rights of the retarded and of parents is less developed, since parents have generally spoken for the rights and welfare of their retarded children, but it has of late been emerging in complex and troubling ways. For example, in *Pennhurst State School and Hospital v. Halderman*,⁸ reformers and parents of retarded children who wished to close an institution for retarded children found themselves opposed by parents of retarded children who wished to keep the institution open. Each side had some reason to claim that it spoke for the rights of the retarded, and the only way to decide what those rights were seemed to be to return to 'substantive' questions about what methods of care and treatment best serve the retarded.

Conservatives too have their slippery slopes. The first slope runs from parental rights toward children's rights. That is, the more conservatives defend their position on neonatal euthanasia in rights terms, the more they are led to defend rights (children's rights) which they view as subversive of the proper authority and rights of parents. This slippery slope, like some of the liberal slopes, is ancient: although conservatives have been enthusiasts for parental rights, they have also been relative enthusiasts of state regulation of familial affairs. Conservatives might argue that their slippery slope has a useful handhold by which they may prevent their preference for children's rights here from leading to children's rights more generally. This handhold is the principle that the parent's right of control ends at the child's (absolute?) right to life. Yet while this principle is consistent with the conservative position on abortion, it is hardly a full statement of the ambivalent conservative position on the relations of the family and the state.

The conservative's second slippery slope does not threaten his position, but drives him to affirm it more resolutely. That slope expresses the fear that to allow neonatal euthanasia is to promote a distinction between people who are inherently worthwhile and those who are not. The conservative's perception of this slope is described in Professor Luker's fascinating study of women active in the political controversy over abortion. She notes, 'A considerable amount of social science research has suggested, at least in the realm of medical treatment, that there is an increasing tendency to judge people by their official (achieved) worth.' She suggests that anti-abortion activists detest that distinction:

To insist that the embryo is a baby because it is genetically human is to make a claim that it is both wrong and impossible to make distinctions between humans at all. Protecting the life of the embryo, which is by definition an entity whose social worth is all yet to come, means protecting others who feel that they may be defined as having low social worth; more broadly, it means protecting a legal view of personhood that emphatically rejects social worth criteria.

For the majority of pro-life people we interviewed, the abortions they found most offensive were those of 'damaged' embryos. This is because this category so clearly highlights the aforementioned concerns about social worth.⁹

8. 451 U.S. 1(1981).

9. K. Luker, *Abortion and the Politics of Motherhood* (Berkeley: Univ. of California Press, 1984), p. 207.

This slippery slope, as Professor Luker's reference to the abortion dispute suggests, in one sense corresponds to the liberal's slippery slope away from the right to an abortion. But in another, ironic, sense, this slippery slope, which confirms conservatives in their thinking about neonatal euthanasia, seems to lead toward principles liberals espouse: 'Caring for defective newborns... reinforces societal commitment to values of life, equality, and the non-allocation of rights by meritocratic or other discriminatory principles and thus produces respect for the life and moral equality of all persons.'

* * *

We may close this discussion of slippery slopes by noting that, from one perspective, they too indicate the inaptness of the rights discourse. The presence of difficult slippery slopes suggests the presence of conflicting interests which are incommensurable. Such conflicts demand some kind of accommodation. But when interests are described as 'rights,' accommodation is impeded. Defining an interest as a right masks the nature and complexity of what is actually at stake; defining an interest as a right makes accommodation seem arbitrary, since we lack a hierarchy of rights to help us choose between them; and defining an interest as a right makes accommodation seem to be the breaching of a right or the defining away of a right and thus a moral and political wrong.

* * *

In closing so skeptical an Essay, I perhaps owe the reader some clearer, more specific sense of how I would begin to confront, if not resolve, the practical dilemmas of neonatal euthanasia.... I would hesitate 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 quandary neonatal euthanasia presents. I am drawn to this tentative 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 euthanasia is sometimes proper, though I believe such occasions 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.

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 and even makes it odious. As I wrote above in a somewhat different context, rights discourse masks the nature and complexity of the interests actually at stake; turns the accommodation of interests into the breaching or defining away of a right,

and thus a political and moral wrong; and, because of the absence of a hierarchy of rights, makes choices between interests harder. Further, defining interests as rights inhibits compromise because the pull of surrounding slippery slopes makes a whole system of rights, and not just the question of neonatal euthanasia, seem to be at stake. On the other hand, a virtue of the present state of the law is that it may ease compromise. . . . [T]he dichotomy between the law on the books and the law in action represents a compromise, a compromise all the more attractive because unacknowledged. Second, the present law allows each state to regulate the problem in its own way. Since there are still important differences in social attitudes between many states, federalism 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 a problem depends on the problem's scope, and we lack a clear sense of how common neonatal euthanasia actually is, or 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 will someday be able to learn a job and to live semi-independently or perhaps even independently. He can know 'true love and strong feelings.' 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. 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.