Birthrights: Why We Should Begin A Rational Debate On Neonatal Euthanasia

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For a society that is ostensibly against neonatal euthanasia, even where, it is submitted, it would be the most compassionate and reasonable thing to apply in certain circumstances; society and its institutions have, in other circumstances, strangely taken for granted and enforced a status of the neonate's life that is lesser than the rest of the population. However, there is no clear and consistent reason why there is a lack of concern for the life of a neonate in one situation and not the other. It is submitted that the lack of a full and open discourse has allowed the whole area to be confused and illogical in the law and medical practice. The corollary of this state of affairs has been that we have been denied the opportunity of having a more consistent and appropriate body of jurisprudence in this area. This essay attempts to deconstruct and expose some of the law and practice surrounding the issue of how the life of a neonate is actually treated and valued; and to suggest that it is dishonest, hypocritical and irresponsible to continue the official sanction against neonatal euthanasia, particularly in circumstances where the neonate, or newly born, is severely retarded mentally or severely damaged physically.

I see the sleeping babe, nestling the
breast of its mother;
The sleeping mother and babe-hushed,
I study them long and long.
Walt Whitman, Leaves of Grass

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Introduction

Undoubtedly, the issue of neonatal euthanasia is a difficult jurisprudential, moral and social issue. "If there was ever a hard case for the law", says Professor Schneider of Michigan University, "it is the question of whether, how, and by whom it should be decided to allow newborn children who are severely retarded mentally or severely damaged physically to die".[1] The mere raising of this subject alone is difficult enough due to the emotions that are often raised: one might find oneself being accused of being insensitive, a fascist, or just plain evil; and one might not blame the accuser, lost in the institutionalised quagmire of unreason and contradictions that shroud and misdirect healthy rational discourse on this subject. This essay attempts to lift this shroud in order to encourage the inclination to publicly meditate upon this subject afresh. It is submitted that such a discourse is necessary for, whether one agrees with neonatal euthanasia or not, the current jurisprudence and action surrounding this issue is confused as it is practised, albeit inconsistently and arbitrarily.

The initial hurdle to a reasoned discourse: confronting taboo

Oftentimes, taboo works to quickly shut up any talk of certain subjects. Neonatal euthanasia is one such subject. For emotional reasons, neonatal euthanasia can be intuitively taboo. When we think of neonatal euthanasia we think of killing defenceless and blameless babies: of monsters slaughtering cherubs. There is no doubt that it is emotionally hard for us, if not counter-intuitive, to engage in a Gestalt shift from the romantic vision of the baby most of us entertain in our minds when thinking of a 'babe', as captured in the verse of the poet Walt Whitman above, to the hard reality in some of the neonates in the godless wards of children's hospitals.

Adding force to this taboo are certain ethical edicts instilled in us at a very young age which continue to be reinforced thereafter by powerful religious institutions

1 Schneider, C E, "Rights Discourse and Neonaticide" (1988) 76 *California Law Review* 151.

whose pathological phantasmagoria is laundered into credibility via the construction of a (usually) male mascot god of choice and his book co-authored by various ghostwriters, however morphous and contradictory its content. The result is institutionalised brainwashing which secures obstacles to sound thinking, as does the acceptance of religious dogma which requires faith, an inherently self-deluding mental activity which excludes, at least where incompatible with it, the intellectual authority of reason.

However, one should not be too quick to refer to canon, at least of the Judeo-Christian variety, however loud it is. In picking up the 'Good Book' one would note that the god of the Torah, or 'Old Testament', ordered Abraham to sacrifice his son Isaac as a sign of allegiance.[2] That god also presumably killed pregnant women and children in order to punish the people that generally displeased him, save Lot and his family in the story of Sodom and Gomorrah;[3] and Noah and his family, as well as representatives of the animal kingdom, in the story of The Flood.[4] That god was also said to be responsible for the murder of every first born son of the Egyptians in the story of the Jewish emancipation from Egypt.[5] The god of the Gospels sacrificed his own son to cleanse his followers of sin in effect by 'punishing' Jesus for the misdeeds of all humans. Followers plundered, raped, tortured and killed pregnant women and children throughout history — for instance, in the Crusades — in the name of Jesus and under the authority of the Church.

The purpose of mentioning the foregoing is not to argue that instances of neonaticide in a religious context is sufficient to support an argument in favour of neonatal euthanasia. On the contrary, the point is to anticipate the reaction by religious groups, and those sympathetic to them, against neonatal euthanasia by reference to their god or religion; and in so doing to demonstrate that any argument against neonatal euthanasia, or abortion for that matter, in the name of that god or religion alone is

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2 Genesis, Chapter XXII.
3 Id, Chapter XIX.
4 Id, Chapters VI-IX.
5 Exodus, Chapter XI.

unpersuasive: and particularly unpersuasive where one is considering *neonatal euthanasia*, that is, extinguishing the life of a neonate, or newly born, compelled by a desire to induce "a quiet and easy death"[6] out of compassion and concerns for the neonate who is born 'severely retarded mentally or severely damaged physically'; and not mere *neonaticide*, that is, the murder of newlyborns, an act not specifically referrable to any motive in particular, but can include intergenerational guilt, jealousy, vengeance, and violent imperialism, motives for neonaticide that have been sanctioned in a religious context as pointed to above.

Of anthropological and general cultural interest, neonaticide has been and is common practice in various cultures, and not necessarily with the motive of a 'mercy killing' or euthanasia. Disabled babies were left to die of exposure on the mountainside in ancient Greece; women of the nomadic tribes of the Kalahari Desert would kill a baby if they had an older child who was too young to walk; natives in Polynesian Islands would smother neonates as a part of their effort to keep an equilibrium of the supply of food and population; and infanticide was practised across the social stratum in Japan, prior to the influence of western culture.[7] Some societies considered that not practicing neonaticide in some circumstances was morally wrong.[8] Neonaticide is also being conducted in the Western World, including Australia.

Of course, that the gods and humans alike engage in an act does not indicate anything as to its moral status.[9] However, it should provide cause to examine the issue. This essay is not concerned with suggesting that we should consider neonaticide, ie. the killing of newly born babies, in general but rather with the issue of neonatal euthanasia, the 'mercy killing' of newly born babies in certain circumstances, viz. of infants born physically or mentally

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6 The definition for 'euthanasia' given by *The Shorter Oxford Dictionary*, 3rd ed. The *Encyclopaedia Britannica*, 15th ed, derives the word from the Greek meaning a 'good death'.

7 Singer, P, *Rethinking Life and Death*, The Text Publishing Company, Melbourne, 1995, p129.

8 Singer, P, *Practical Ethics* (2nd ed), Cambridge University Press, 1995, p 172.

9 see Glover, J, "It Makes No Difference Whether Or Not I Do It", in Singer, P, (ed), Oxford University Press, 1990, pp 125-144.

seriously retarded or damaged, particularly where the prognosis in regards to their quality of life is dire.

We would do better than allowing taboo to too quickly guide our minds. Rather we should have the intellectual maturity and honesty to confront the question of neonatal euthanasia. That is so particularly when, in reality, it frequently occurs that in our hospitals seriously retarded and damaged neonates, "especially those who are judged to have poor prospects of life of reasonable quality, and who are unwanted by their parents are deliberately treated in such a way that they die rapidly and without suffering".[10]

Legal acceptance of the lesser status of the neonate

Whilst society and its institutions are officially, on the one hand, ostensibly against neonatal euthanasia; on the other hand, in certain circumstances and without any underlying principle or consistency, jurisprudence and practice have taken for granted and enforced a status of the neonate's life that is lesser than the rest of the population. To illustrate, one might contrast the law's concern for the life of a neonate vis-à-vis neonatal euthanasia — a 'mercy killing' of a neonate — with its devaluation of it in relation to the crime of 'infanticide' — where the mother can be convicted of a lesser crime than murder where she kills her neonate under certain circumstances.

Murder under s18 of the NSW *Crimes Act* 1900 ('the Act') attracts a liability of penal servitude for life of 25 years; it would then follow that, if the life of a neonate is required by society to be awarded the same sanctity of life that is enjoyed by humans in any other age group, then the murder of a neonate would attract the same penalty as the murder of anyone else. However, s 21 of the Act provides for an alternative verdict to murder where the mother has killed her baby, penalising the wilful contribution by the mother to the death of a child whether during or after delivery with a liability of 10 years of penal servitude. Thus there is an obvious recognition by the legislature that killing a neonate is not necessarily equal to killing humans that belong to other age groups.

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10 Singer, already cited n 7, p115.

Likewise, s 22 of the Act allows s 85 to be used as an alternative verdict to murder. Section 85 awards a penalty of two years for anyone who disposes the dead body of a child who has died before, during or after birth whilst concealing the fact of birth, yet it is a defence to this crime if the child had been issued from the mother before the expiration of the 28th week of pregnancy.

The Act under s 22A also provides for the separate offence of infanticide, or allows infanticide to be used as an alternative verdict to murder as long as the child was under the age of 12 months. By making such a provision, the legislature is recognising, in this context, that the status of a 12 month old child, let alone a newly born child, is not as great as an older human.

True, to avail herself of s 22A the mother must prove that she was labouring under a disturbed mind by reason of not having recovered from the effect of giving birth or of lactation. Yet, if such mental states are the only concern then the character of the victim would be completely irrelevant, regardless of the age the victim happens to be. However, such mental states are of no concern to this s 22A in relation to the murder of older children and adults. The legislature has curiously made the relevancy of this mental state, in relation to criminal law, victim specific.

To add to the intrigue, an amendment to s 22A changed the wording from "newly born" to "under the age of twelve months", thus extending the provision in response to judges who interpreted the phrase narrowly.[11] Also, the phrase "the effect of lactation" was inserted in s 22A although at the time it was considered as doubtful science; it is now discredited in the medical community although it still stands as law.[12]

Why is a special and lesser criminal offence allowed where the child is less than 12 months of age yet not if older than 12 months even if the mother's mind is host to the same psychological/biochemical problems recognised by the legislature? Why has parliament extended this

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11 Brown, D, Neal, D, Farrier, D, Weisbrot, D, *Criminal Laws*, The Federation Press, Sydney, 1990, p 721.

12 Ibid.

provision in favour of the mothers only where it is to the detriment of the life of an infant up to the age of 12 months of age?

The authors of *Criminal Laws* make an interesting insight which indicates that the whole discourse in respect to infanticide has been twisted and confused. Apparently, although the Act adopts a medical model to justify the infanticide provision, it is a fact that "reformers were most concerned with the oppressive *social* conditions which led to infanticide, such as poverty, abandonment by fathers...and parents [of the women], and social disgrace attendant upon the illegitimate births".[13] Thus the drafters of the provisions, labouring under the tyranny of taboo, were too afraid to explicitly address their motives in allowing for the defence of infanticide — quality of life issues such as the inability to properly raise a child without sufficient resources, and raising an unwanted child — and have injected into our jurisprudence a pseudo-science which has infused the law with irrationality, leaving it all the harder to address.

The consistency of this 'medicalisation of infanticide' has been subject to criticism. In an article written over a decade ago it was pointed out that the 1975 Butler Committee set up to report on mentally ill offenders declared that "puerperal psychoses are now regarded as no different from others"; and the Fourteenth Report of the Criminal Law Revision Committee [Offences Against the Person, 1980] found that there was no or little evidence between lactation and mental disorder; and evidence from the Royal College of Psychiatrists showed that "the medical basis for the present [provisions on infanticide]...are not proven".[14] The article also points out the legal inconsistency, referred to above, that there is no special defence if the mother murders another sibling or the father even though she is still labouring under "the effect of lactation".[15]

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13 Id, pp 720-1.

14 O'Donovan, K, "The Medicalisation of Infanticide", cited by Brown, D et al, already cited n 11, p 721.

15 Ibid.

Despite the foregoing, the provision remains as law. The article concludes that the defence is an acknowledgment by the legislature that infanticide may be a response to the mother's social role.[16] That conclusion seems to be supported by the CLRC which recognised a role for a separate offence in the situation of a mother killing her baby, whilst recognising the inadequacy of the medicalisation of infanticide.[17]

The CLRC's recommendation was that, although it did not approve of the medical basis of the offence of infanticide and recommended that the reference be struck out from the provision, the crime of infanticide should remain but broadened to include "environmental or other stresses" including poverty and the failure to bond or cope with the child.[18] Apparently mindful of the likelihood that the community would not bring themselves to confront the true reason for allowing for infanticide as a separate offence to murder, the CLRC continued with the legal psycho-babble of the past and connected such factors to "hormonal and other bodily changes produced by it (ie, the birth)" in order to allow the court to take account of factors that would not give rise to the defence of diminished responsibility.[19] The legislature neglected to touch this politically and emotionally sensitive area and thereby chose the middle ground by default by doing nothing; heeding neither the recommendations to strike out the references to lactation or to broaden the definition of infanticide whilst contenting itself to keep this confused offence as law.

Whilst the analysis of O'Donovan's article is enlightening, it seems to beg an important question: that is, on what grounds should one allow considerations such as finances to be relevant in the offence of infanticide as an alternative to murder? The one issue that wants discussion is not what frame of mind one can take into account in respect to allowing the mother to avail herself of the defence of infanticide; but rather one must ask, what is it that is unique about the status of an infant that

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16 Ibid.
17 Id, p 722.
18 Ibid.
19 Ibid.

its being murdered may attract lighter treatment by its killer? The point that one should keep in mind is that a mother suffering from 'the effects of lactation' cannot get special treatment from the law if the human whose life she extinguishes is older than 12 months of age. Obviously, something deeper is being acknowledged *sub voce*, but for a jurisprudence that is required to be honest, consistent and effective it must be made *sub dio.*

A deeper understanding of the law is more effective if the anthropological context of the black letter of it is brought to the fore; and so, intriguingly, a study found that women actually found guilty of the crime of infanticide were nearly always discharged or given a bond.[20] Furthermore, between 1968 and 1981, only 10 women were charged in respect to neonates, with 15 deaths between them, and only one woman received a gaol sentence.[21]

Another study, one conducted by the social historian Judith Allen, showed that in New South Wales between 1880 and 1939, despite the "pro-natalist" ideology and laws of the state and despite the knowledge by the police and coroners that infanticide "occurred on a large scale", criminal prosecutions and convictions were rare.[22] There were only 205 indictments for infanticide and concealment resulting in 73 convictions.[23] In understanding this phenomenon, Allen had this to say:

> "Contrasting with the severity of the law was the selectivity and sparseness of police enforcement, and the overwhelming leniency of jury verdicts and judges' sentences. The closer the agent to the social context of the crime, the greater the sympathy for unmarried mothers and over-burdened wives. Police frequently had the same class origins as the working

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20 Landsdowne, R, "Child Killing and the Offences of Infanticide: The Development of the Offence and its Operation in New South Wales 1976-1980", UNSW LLM thesis, 1987, cited by Brown, D et al, already cited n 11, p 719.

21 Ibid.

22 Allen, J, "Octavius Beale re-considered: Infanticide, baby-farming and abortion in NSW 1880-1939", in Sydney Labour History Group (ed), "What Rough Beast? The State and Social Order in Australian History" (1982) p 111, cited by Brown, D et al, already cited n 11, p 719.

23 Id, p 720.

class women involved in reproduction-related crimes and understood their lack of options."[24]

Thus, not only were the judicial and enforcement arms of the law sympathetic towards the mother; they did not limit themselves to medical conditions of the infant *but allowed other broad quality of life issues as well.* Therefore, despite officially being 'pro-neonate', it seems that in a contorted and ad hoc way, society accepts, through its legal institutions and the people who work within them, that the status of a neonate is not the same as that of other humans.

It is submitted, then, that the foregoing shows that when people are confronted with the issue of the life of a neonate in certain situations in hard reality, rather than in the abstract where there is the tendency towards a 'romantic' and ideal reference, people recognise that extinguishing the life of a neonate is not quite the same, or, at least, not necessarily quite the same as killing other humans. However, it is obvious by the way the area is treated and how jurisprudence and practice is confused and contradictory, often a reliable indication that the truth is being avoided, that there is a great reluctance to be open and honest about the issue.

Yet we must be open and honest about the issue and deal with it properly and not indulge ourselves the complacency to ignore the issue or to treat it as an untouchable for public discourse. In the foregoing, I have attempted to deconstruct the jurisprudence of infanticide in order to show that we cannot pretend that we accept that a neonate's life is not always[25] accorded the same

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24 Ibid.

25 The neonate's life is not always considered by the law to be less than that of humans of other age groups. For example, in the recent English case *Attorney General's Reference (No 3 of 1994)* [1996] 2 All ER 10 the Court of Appeal held that a person could be charged with murder or manslaughter if a causal link is found where an "unlawful injury is deliberately inflicted either to a child in utero or to a mother carrying a child in utero" in the circumstances of this case, which involved a man who stabbed his pregnant girlfriend who subsequently gave birth to a child who died 120 days after birth possibly due to the knife wound that penetrated the mother's uterus and the foetus' abdomen. However, this was a pure act of violence completely unmotivated by any other factors: and the Court recognised this when considering the

protection and value by society that is accorded to other humans, for it is plainly not the case.

In the light of such a realisation, it would be reasonable to desire a rational and fresh public discussion on the issue of neonatal euthanasia; namely in the circumstance of an infant that is born physically or mentally seriously retarded or damaged, particularly where the prognosis in regards to the quality of life is abysmal from its birth to the very day it dies.

Abortion and neonatal euthanasia

The limited acceptance by law and politics of abortion may provoke one to meditate on the question of neonatal euthanasia afresh. Section 82 of the Act explicitly outlaws an abortion administered "unlawfully", with a 10 year liability of penal servitude. That the penalty for murder and manslaughter attracts a liability of 25 years of penal servitude indicates an acceptance by the legislature that terminating a foetus is not of the same character as terminating the life of other humans.

The judgment of Levine J in the District Court case of *R v Wald*[26] is, despite its low status on the jurisdictional hierarchy, the landmark case on abortion in New South Wales and will remain to be so until the issue is directly decided in a higher court.[27] *R v Wald* was upheld in *K v Minister for YACS*[28] where Helsham CJ in the Equity Division of the Supreme Court of New South Wales held that lawful abortion occurs when it is procured by a person with consent:

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relevant common law principles whilst "Leaving aside *such matters* as provocation and diminished responsibility, which have no bearing upon the issues presently under consideration" (italics added) (at 16). Thus, the question is still left open as to why the law allows a lesser recognition of life in circumstances where certain factors, including quality of life issues and socio-economic issues (see below), are extant but it does not in situations which most warrant it, that is where a baby is born 'severely retarded mentally or severely damaged physically'.

26 (1971) 3 NSW DCR 25; see also *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 which referred to that decision.

27 The High Court was to hear an appeal to *Superclinics* (see n 26) which might have provided it with an opportunity to resolve the law on abortion. However, the case was settled out of court.

28 (1982) 1 NSWLR 311.

> "who has an honest belief on reasonable grounds that the termination of pregnancy was necessary to preserve the woman involved from serious danger to her life or physical or mental health and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted. Reasonable grounds can stem from social, economic or medical bases."[29]

While those cases recognise limited rights of a woman over her body and health, and to allow her limited 'choice' over her body and health; the law does not adequately address the issue of the status of the foetus in a way that is philosophically coherent. As the philosopher Michael Tooley argues, whether an organism is physiologically dependent on another is:

> "irrelevant to whether the organism has a right to life...One doesn't want to say that since one of [Siamese twins]...would die were the two to be separated, it therefore has no right to life."[30]

Similarly, for the law of unlawful abortion which does not attract liability for murder because the law does not recognise the foetus as a human being;[31] simply deeming or legally not recognising a foetus as not being human does not change what might be the case in reality. As we have seen above, pseudo medical science does nothing to enhance jurisprudence or rational discourse. In the case of the law relating to abortion, it does nothing to indicate why there is a difference between the morality/legality of pre and post natal termination of life.

As the philosopher Peter Singer recently argued in a book advocating neonatal euthanasia,[32] "human life is a gradual process, and it is not easy to see why any particular moment should be *the* moment at which a human life begins."[33] So much can be said about *Watt v Rama*[34] where

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29 Id, at 318.

30 Tooley, M, "Abortion and Infanticide", in Singer, P, (ed), *Applied Ethics*, Oxford University Press, New York, 1990, p 71.

31 Macfarlane, *Health Law* (2nd ed), Federation Press, Sydney, 1995, p184.

32 Singer, already cited n 7.

33 Id, p 101.

the Full Court of the Supreme Court of Victoria followed a long and old line of cases on when legal personality begins. In that case it was held that a child is "deemed to be a person" and thereby assumes legal personality when it has completely proceeded from the body of its mother or when it has been wholly born into the world.[35] Thus the legal understanding is inspired not by science or any serious attempt to get to the truth of the matter but caprice, thereby creating a jurisprudence beset with layers of legal fictions and deemed truths: intellectual and moral shortcuts borne out of a lack of commitment to deal directly with reality.

Singer does acknowledge that the act of birth is significant for the mother because she has a relationship with her baby that is different to the one she had with it when it was inside her womb.[36] Yet this does not cure the problem of the distinction: what might be significant *for the mother* does not change what is inherent in the baby; its environment changes, to be sure, and it has the experience of birth, one of the many experiences it will have in life, but birth does not induce such a fundamental change in the constitution of the baby that so alters the nature of its being. Why the law is so enamoured with the view that a baby sucking its thumb in a womb is of such a completely different character and status to the same baby sucking its thumb an hour after it is born, the latter being 'deemed' to be a person whilst the former is not, is not just curious or even merely arbitrary but ridiculous and absurd. As Singer points out:

> "Shakespeare's image of life as a voyage is consistent with the idea that the seriousness of taking life increases gradually, parallel with the gradual development of the child's capacities that culminate it its life as a full person. On this view birth masks the beginning of the next stage of development, but important changes continue to

[34] (1972) VR 361.
[35] Id, at 375-6.
[36] Singer, already cited n 7, p 130.

happen in the weeks and months after birth as well."[37]

One might also add that whilst the occasion of the birth itself is of significance, particularly for the mother, it is a matter of degree and thus must compete with other significant factors, such as the desire to have a healthy and normal child.

Another area of politics and law of dubious intellectual integrity is the view that abortion is a woman's choice, a view generally endorsed by both Prime Minister Keating and John Howard as the Leader of the Opposition during their 1996 televised debates. The reason why relying on this view alone in justifying abortion has little moral weight is because it begs the question of what it is about the foetus' status that allows a woman to exercise this choice. Singer points out that the 'pro-choice' rhetoric "may be good politics, but it is poor philosophy".[38] This stance avoids recognising when a human being has a right to life: "to present the issue of abortion as a question of individual choice...is already to presuppose that the foetus does not really count".[39] Thus we must again ask questions that confront the full truth of the matter.

Singer threw open these questions in his latest manifesto on the subject, *Rethinking Life and Death*[40] and showed that much reasoned thinking is wanting. He gives an example of a woman, Peggy Stinson, who was 241/2 weeks pregnant with a placenta in the wrong position, threatening to detach causing haemorrhaging with the life threatening consequence for the mother and child. There was a possibility that the baby could be born alive but would be severely brain damaged. Legal abortion was still an option for her in the USA, and in the midst of considering it with her husband she went into premature labour giving birth to a baby boy whose prematurity provided for a doubtful survival; survival being a life with brain damage and disability. The parents requested that the doctors not attempt to save the boy's life, but the

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37 Id, p 216.
38 Id, p 85.
39 Ibid.
40 Singer, already cited n 7.

doctors responded by threatening court action if they did not consent to the treatment they advised. This experience left a philosophical and bewildered Peggy Stinson to wonder:

> "A woman can terminate a perfectly healthy pregnancy by abortion at 241/2 weeks and that is legal. Nature can terminate a problem pregnancy by miscarriage at 241/2 weeks and the baby can be saved at all costs; anything else is illegal and immoral."[41]

Singer argues that this legal distinction is unsound, arguing that "[m]orality...is not a set of isolated units"; ie, it is irrational to use birth as some arbitrary moral point of discontinuity.[42] Singer points to the ridiculousness of the view that a foetus is not human and that that is what makes abortion permissible.[43] A foetus is undeniably a living human being: it is living, as doctors know when a foetus has died whilst still in the womb; and human for "what else could it be but human?"[44]

To the point, Singer further points out that:

> "[t]he tiny, very premature baby in the intensive care ward on the day after his birth was really not very different from the foetus that Peggy and Robert were considering aborting the day before the birth. Why should the location of the foetus/infant, inside or outside the womb, be so significant that it marks the beginning of a new human life?"[45]

Why could the Stinsons not practice what is in effect euthanasia inside the womb, but not outside the womb only a day later although the reasons for the desire to induce neonatal euthanasia remained the same?

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41 Id, pp 83-4.
42 Id, p 85.
43 Id, p 101.
44 Ibid.
45 Ibid. See also Singer, already cited n 8: "A prematurely born infant may well be *less* developed in these respects than a fetus nearing the end of its normal term. It seems peculiar to hold that we may not kill the premature infant, but may kill the more developed fetus. The location of a being — inside or outside the womb — should not make that much difference to the wrongness of killing it" (p 148).

It might be added that nature practices neonatal euthanasia itself, so to speak, in the womb. Miscarriages, also known as 'spontaneous abortions', are more often than not "a natural rejection of a maldeveloping foetus", usually involving a foetus which is grossly deformed or has chromosomal abnormalities.[46] However, sometimes such foetuses do not spontaneously abort, leaving these foetuses to develop into babies, creating a most formidable situation for them and their carers.

The problem of the advancement of medical science and technology

There are other concepts and categories constructed and assumed by society that are used to determine the life of newly borns, perhaps daily. For example, Singer argues that the use of the concept of "viability", ie. when a foetus can survive outside the womb, as the benchmark of the beginning of human life is also farcical.[47] A newly born baby's "viability" often depends on the technological stage of medical science or the mother's proximity to medical care, but not on characteristics inherent in the foetus itself. For example, a baby born close to the latest in medical technology might be characterised as being 'viable', but the same baby born in an area with less resources might not for reasons outside its control and not directly referrable to itself.

Obviously, such a concept might have a practical application for doctors but is of little moral guidance. However, if we can cope with such a loose and external test for deciding whether much effort should be applied in ensuring that a newly born child will live, then surely we should be able to at least consider a more sensible test based on and sensitive to the direct nature of the child: namely the consideration of quality of life issues in cases where the child is facing an extremely unkind and unfortunate existence.

Indeed, an issue that requires us to think afresh about neonatal euthanasia is the consequence of "the success of

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[46] *The Merck Manual of Diagnosis and Therapy*, 14th ed, 1982, p 1723.
[47] Ibid.

neonatal and paediatric medicine".[48] The collateral effect of the ingenuity of modern science is that where neonatologists and paediatricians were, in the past, unable to save severely retarded or damaged infants despite their best efforts; now medical technology and pharmaceutical intervention can keep alive, if only for an indeterminate time, many babies with gross non-correctible deformities, or severe mental retardation.[49]

Are we content to merely leave life and its quality of infants and their carers as a function of the state of technology? Put another way, why are we comfortable with technology deciding who remains alive without looking into what is the nature of that life. We must engage in a reasoned and public discourse in order to guide the advances of science in a sane manner guided by a coherent and acceptable jurisprudence and social practice without opting to allow taboos and emotional rhetoric to lead us to a situation provided by default. The importance of such public discourse is highlighted by Tooley: "Most people would prefer to raise children who do not suffer from gross deformities or from severe physical, emotional, or intellectual handicaps. If it could be shown that there could be no moral objection to [neonatal euthanasia]...the happiness of society could be significantly and justifiably increased."[50]

The tyranny and reality of medical practice

The reality is that the public, silencing itself by taboo, is abdicating its say in the matter. Yet it is accepted medical practice now among many health care workers to abstain from treatment or 'treat to die' when a baby is born with a severe disability.[51] The ruling of the English case *Re B*[52] where the wishes of the parents to deny life saving surgery to a Down Syndrome infant suffering from intestinal obstrustion on a 'best interest of the child' were refused, the court allowing the doctors to proceed with the surgery,

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48 Keyserlingk, "Non-Treatment in the Best Interests of the Child" (1987) 32 *McGill Law Journal* 413.

49 Forrester, K W, "Legal and Ethical Dilemmas: Selection of Neonates for Non-Treatment" (1989) 14 *Legal Service Bulletin* 116.

50 Tooley, already cited n 30, p59.

51 See Singer, already cited n 7, p 106-128.

52 (1981) 1 WLR 1421.

suggest that "the law and the debate about [neonatal euthanasia]...is awkward, anomalous and confused."[53]

The underground dealing with this issue has the problem of allowing judges to apply principles in a vacuum, relying on their own views without the educative stimulus of reasoned and healthy debate. Meanwhile, much research shows that a majority of doctors do not believe that saving every neonate is an absolute imperative, including situations similar to *Re B.* Yet since the current reality is that "decisions about the determination of a life are generally made by a team of physicians; the influence of parents and nurses are very small".[54] The result of this is that the treatment of neonates depends on where in the above statistics the physician lies, an unsatisfactory and arbitrary result. A commentator on this issue in Holland, Professor Henk Jochemsen, points out what happens when society fails to openly discuss and assert its will:

> "[T]he criteria for determining when life is 'unliveable' differ from one hospital from another and one physician to another, both with respect to medical and nonmedical criteria" (eg psychological factors and ethical considerations of the physician, situation of the parents).[55]

Infants and finance

Professor Jochemsen further argues that since doctors are making such decisions based on abstract concepts such as 'unliveable life', and since such considerations are not purely medical then the development of the concept is a task that belongs properly not only to physicians but also to "society at large".[56] Of course, decisions on whether to deny treatment based on concepts such as ordinary or extraordinary means to preserve life seems to be a physicians task. Yet, in practice, it is difficult to make a

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53 Schneider, already cited n 1, p 152.

54 Jochemson, H, "Report on Severely Handicapped Newborns: Part 1" (1987) 32 *Issues in Law and Medicine 168.*

55 Id, p 169.

56 Ibid.

precise distinction between what is ordinary and extraordinary in respect to the preservation of life.[57]

The hard fact is that what physicians and hospitals consider to be ordinary and extraordinary treatment is not a constant or universally accepted standard. Instead, again, it is determined by the faculties available to a particular institution and the current procedural protocols. In reality, therefore, "the distinction refers to either the treatment or non-treatment of the patient given the advances in current medical technology".[58]

Also, it is a cost/benefit analysis by hospitals, not compassion, that determines the lives of many neonates. Some hospitals regard resuscitative efforts as 'unwarranted' for babies weighing less than 700g, whereas other hospitals have other policies.[59] Thus what influences the lives of such underweight neonates is very much left to the hands of arbitrariness, the whims of the hospital one happens to be using and how it and the funding government (and thus society) values the relative weight of a baby per dollar.

If these are distinctions that are currently accepted and practised, then surely it would be reasonable, if not more consistent and sensitive, to look at the neonate's condition and future prospect of quality of life.

A new approach is needed

So, it seems that there already is a current practice that involves some sort of neonaticide and lesser recognition of a neonate's life. Yet those in favour of neonatal euthanasia would be advised to not use the current situation as support for their view. Such caution is recommended if only because support for neonatal euthanasia is borne out of compassion and an empathy for neonates born with severe conditions of health which severely prejudice the prospects of the neonates quality of life, whilst current practice is more an ad hoc evolution unassociated with any solid and properly reasoned moral foundation and reasoned

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57 Forrester, already cited n 49, p 118.
58 Ibid.
59 Id, pp 116-7.

control over the way lives of many neonates are to be determined.

Furthermore, even if one agrees with neonatal euthanasia in principle, one must be actively interested in why it is currently done, how it is applied, who is involved in the decision-making process. Such questions must be asked as neonatal euthanasia is currently allowed not upon a rational, consistent and proper basis but is a practice that might be permitted and practised depending on the views of the doctors and officials that are proximate at the time.

On the other hand, those who profess to be against neonatal euthanasia should stop themselves and ask why society allows neonatal euthanasia where cost to the taxpayer is an issue, but is vigorously against neonatal euthanasia in cases where the newly born faces an extremely poor quality of life even though it will prove to be a significant burden to the parents financial, as well as emotional, resources for the life of that child.

Why, such a person should ask, does society turn a blind eye to neonatal euthanasia where the reason for it is based upon the impact on their wallet, but decidedly against neonatal euthanasia in cases where parents implore medical practitioners, politicians and society at large to allow neonatal euthanasia on compassionate grounds? Such persons might want to ask themselves why, where neonatal euthanasia is refused, does society not provide those parents with funds and resources if it is truly concerned with the life of such babies; babies, as well as their caring parents, facing such bleak futures?

Such persons might begin to wonder at the absurdity that currently exists where underweight babies, who could survive with a reasonable quality of life with the appropriate application of resources, might nevertheless be subjected to euthanasia, but Down Syndrome or anencephalic babies are required to live.

As much of this essay has been concerned with distinctions, however specious and vulgar they have turned out to be, we might finish on a final analysis of the attempts to credibly uphold a distinction between foetuses and neonates. As said above, foetuses are live human beings. What Tooley seeks to establish is that philosophers

and commentators alike have been led astray by interchangeably using the terms 'human being' and 'person' where they are not necessarily one and the same.[60]

Tooley's thesis is that it is only a 'person' that may have a right to life, and achieving that status requires necessary conditions:

> "An organism possesses a serious right to life only if it possesses the concept of self as a continuing subject of experiences and other mental states, and believes that it is itself a continuing entity...[and] is capable of desiring to continue existing as a subject of experiences and other mental states...So an entity that lacks such a consciousness of itself as a continuing subject of mental states does not have a right to life."[61]

Singer, shares this argument, stating that human life begins in the womb but its worth varies, depending upon what he calls "ethically relevant characteristics".[62] Yet Singer divides these relevant characteristics into "those inherent in the nature of being", which includes "consciousness, the capacity for physical, social and mental interaction with other beings having conscious preferences for continued life and having enjoyable experiences" and "relevant aspects [that] depend on the relationship of the being with others."[63]

Singer suggests that an infant gains the same right to life as others by the age of 28 days when such characteristics are generally manifest.[64] Clearly stating his position, he argues that,

> "Human babies are not born self aware, or capable of grasping that they exist over time. They are not persons. Hence their lives would seem to be no more worthy of protection than the life a foetus."[65]

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60 Tooley, already cited n 30, p 61.
61 Id, pp 64 and 68.
62 Singer, already cited n 7, p 191.
63 Ibid.
64 Id, p 217.
65 Id, p 210.

It is submitted that this distinction proposed by Singer, although containing an unavoidable element of arbitrariness, is nonetheless a distinction based not only on compassion and commonsense, but on the reality of the situation rather than on intellectual caprice or a lack of willingness to honestly consider the issue in a straightforward and open manner. Singer offers a more honest and coherent approach to the issue of neonates and how their lives are determined than the 'approach' currently adopted by contemporary society and its medical and legal institutions and practitioners. Whilst it is not here necessarily suggested that the exact detail of Singer's approach is *the* course to take, it is submitted that the foundation upon which his thesis is predicated is much more secure and morally tenable than the jurisprudence and practice surrounding the issue at present.

Conclusion: A plea for the beginning of an open and honest discourse

Whether one is for neonatal euthanasia or against it, this essay has sought to clearly establish that the issue is currently alive regardless of whether we wish to address it or not. The aim of this essay has primarily been to at least allow the reader to recognise that neonatal euthanasia is a topic requiring serious consideration, and that it is a hypocrisy for society or any individual in it to condemn a discourse on this subject outright. As one commentator pointed out:

> "An increased level of awareness can only serve to clarify what appears to many as a particularly 'muddy' area of medical practice."[66]

It is also hoped that this essay alerts one to the realisation that a full understanding of this issue must be sought based on reasoned analysis and facts; and that it is unacceptable that these issues are not publicly discussed in an atmosphere of reason. Only when rational public discourse occurs may we be able to engage in the much needed housekeeping, to throw out the forced rationales that have distorted the jurisprudential discourse.

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66 Forrester, already cited n 49, p 116.

If that is done we may be equipped to confront the reality of practice and technological advance in order to achieve a sensibly directed law and practice rather than allowing ourselves to be stuck in an irrational and arbitrary situation that we have allowed ourselves to be subject to by reason of default and a fear to confront that which we cannot be avoided. In considering this issue it is further hoped that one might more clearly appreciate that not allowing neonatal euthanasia in cases of babies who are born 'severely retarded or damaged, mentally or physically' is not necessarily the most humane thing to do, but certainly quite arbitrary, inconsistent and, perhaps, morally unforgivable.