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Law at the End of Life

The Supreme Court and Assisted Suicide

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CHAPTER 11 Concluding Thoughts: Bioethics in the Language of the Law

Carl E. Schneider

> Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.
>
> Alexis de Tocqueville, *Democracy in America*

What happens when the language of the law becomes a vulgar tongue? What happens, more particularly, when parties to bioethical disputes are obliged to borrow in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings? How suited are the habits and tastes and thus the language of the judicial magistrate to the political, and more particularly, the bioethical, questions of our time?

We must ask these questions because, as the incomparable Tocqueville foresaw, it has become American practice to resolve political—and moral—questions into judicial questions. We now reverently refer to the Supreme Court as the great arbiter of American moral life, as performing a "prophetic function," as expressing what "we stand for as a people." Lower courts, as *L.A. Law* wants to teach us, likewise are considered forums for the apotheosis of social and moral reasoning. Certainly bioethical issues in our time have been presented to the public in legal terms, in cases ranging from *Quinlan* to *Cruzan* to *Glucksberg,* in the constitutional principles of *Roe v Wade,* in referenda in Washington, California, Oregon, and Michigan, in the law's travails with Jack Kevorkian, in the tribulations and trials of Baby Doe and Baby M.

Professional and public discourse about bioethics has been primarily concerned, I think, with analyzing the moral issues each bioethical problem presents. Law has contributed to that endeavor by generating vivid and pressing instantiations of many of those issues, by discussing them—in part—in moral terms, and by proffering means of resolving them. I want to

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explore some of these contributions. But I also want to argue that the law's gifts should be cautiously received. For the law has goals that go beyond the purposes of professional and public debate over bioethical issues, and those goals peculiarly shape the moral terms the law employs and specially alter the direction legal discourse takes.

Law is essentially a device of social regulation. This is its boon and bane as a language of bioethics. As boon, law's attractions are two. First, it provides a highly developed, conceptually fertile, analogically abundant, carefully precise, systematically disciplined language for thinking about bioethical issues, a rich language Holmes called "the witness and external deposit of our moral life."[1] Second, law provides a tool not just for talk, but for action. As bane, law's disadvantages are also two. First, its language is often inapt. Second, it regularly fails to achieve its desired effect, and indeed sometimes seems to have hardly any effect at all.

Let us begin with law's two attractions as a vehicle for considering bioethical issues. First, because law draws on centuries of experience with social regulation, it furnishes a highly articulated method and language for analyzing social problems. The method, in the United States, is the common law process. In it, courts construct legal principles incrementally, by evaluating the facts of one case at a time, and legislatures respond intermittently with reforms and reconsiderations of their own. One might think of the common law method as Rawls's reflective equilibrium in action. It brings to bear long-nurtured principles on emerging problems, and thus is an appealing way of dealing with as new and febrile a field as bioethics. It is also a method particularly congenial to medicine and applied ethics, since, like those fields, it relies centrally on cases.

This almost-dialectical common law method has over the last millennium elaborated a language of social regulation. That language includes a vocabulary not just of terms, but of conceptual, organizing ideas. Three sets of ideas have formed idioms that particularly influence bioethical debate and that will repay our attention: law's dispute-resolution function, its facilitative function, and its rights talk.

One of law's oldest goals is to help resolve disputes among citizens. American law does this partly through the law of torts. When one citizen injures another, the law may—although it does not always do so—offer the remedy of a tort suit. This is the legal remedy when one person strikes another with his fist, runs over another with his car, sells another a defective product, or injures another in the practice of a profession. The tort action provides a means of settling the dispute between the injurer and the victim and of restoring the victim to his prior well-being. But by setting the substantive terms for resolving disputes, tort law also establishes a standard of behavior which—one hopes—may shape future conduct so that injuries are deterred, disputes are forestalled, and, even, citizens are induced to behave better.

The language of torts provides a temptingly convenient framework for thinking about those bioethical issues that arise where one person has in-

jured another. In particular, tort law has in recent decades seemed a promising response where doctors have abused their power over patients. Thus, building on tort doctrines of malpractice, the law of informed consent arose to achieve three bioethical goals: to help resolve disputes over injuries caused by a doctor's failure to inform a patient adequately; to provide a way, however unsatisfactory, of recompensing the injured patient; and—more ambitiously—to improve the way doctors in general treat their patients.

The law tries to conduce good in yet another way—through what I call the facilitative function. The most familiar example of this function is the law of contracts, which allows people not just to reach whatever agreements about their affairs they themselves desire, but to deploy the law's power to make those agreements binding and thus predictable and reliable. The facilitative function also lets individuals recruit the law's force to give binding effect to their personal preferences. Two common examples of this are the will and the power of attorney, documents that permit people to dispose of their property as they wish or to allocate that power to someone else.

As bioethics began to hunt for ways of enhancing the power of patients, the idiom of the facilitative function attractively presented itself. Some people have, for example, sought to improve the relationship between doctors and patients by analyzing it in contractual terms. (This effort has not succeeded because, I think, of a classic problem with contract law: contracts tend to ratify preexisting differences in power.) More successful have been analogies to the law of wills and the law of agency (the law providing for the power of attorney). Out of those analogies have arisen the living will and the durable power of attorney, devices that extend the authority of patients to control their medical treatment when they can no longer think and act for themselves.

Finally, as Cardozo said, "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions. . . ."[2] This process calls on the language of rights, a language that has achieved a potence and preeminence in the United States that may be unmatched anywhere in the world. That language is woefully marred by our tendency to muddle moral rights, statutory rights, and constitutional rights. (In *Glucksberg,* the Court held there is no constitutional right to assisted suicide, but in Oregon there is a statutory right to it in some circumstances, and everywhere there may be a moral right.) Nevertheless, constitutional rights are undoubtedly the trump cards of our legal system. Once recognized, they massively prevail against statutes that infringe on them. What is more, they have not just a legal, but also a special social and moral, authority.

Rights discourse has seemed delightfully suited to that engine of bioethical thought, the doctrine of autonomy. Thus proponents of one set of bioethical positions have enlisted the doctrine of constitutional rights with overwhelming effect in the law of reproduction generally and abortion specifically.

Because the debate over that law came to be phrased in rights terms, its language, tone, content, and result have been transformed. And proponents of another bioethical position have similarly labored, with some profit, to transpose the discourse about euthanasia into a debate over a—constitutional—right to die.

In America, then, the language of the law lies easy on the tongue. It abounds in productive principles and illuminating analogies. It provides familiar and powerful tools for treating many social problems, including perhaps most bioethical issues. And to a truly notable extent, bioethical discourse in the United States has been phrased in legal terms, has been conducted in courts and legislatures, and has produced legal reforms. But alluring as the law's language may be, it carries drawbacks and limits that are not always perceived or understood. Like the attractions of that language, these drawbacks arise from law's status as a means of social regulation.

First, the idioms of the law are often inapt. They have grown up in response to needs for social regulation. But the systemic imperatives that have shaped the law are not always a good pattern for bioethical discourse. For example, the law of torts is centrally a way of compensating victims of an injury. But bioethicists, noting that tort law has some broader aims, have hoped that the law of informed consent would not just provide a remedy for specific failures to inform patients, but would fundamentally reform the doctor-patient relationship. Despite its apparent appositeness, however, tort law is poorly suited to this ambitious goal.

For one thing, the language of torts is the language of wrongs. That language states only a minimal level of duties; it is not the language of aspiration. A doctor may meet its requirements through quite mechanical and sadly unsatisfactory routines that mock the solicitous dialogue bioethicists imagine for doctors. Furthermore, the law (generally speaking) penalizes the breach of even those minimal duties only sporadically—when a patient has actually been injured by that breach (and injured enough to justify the expenses and misery of a suit). In short, for these reasons and many others, the law of torts particularly and the law generally are not good at regulating relationships—particularly relationships that are instinct with intimacy. The law that tries most directly to do so—family law—is perhaps the sorriest of law's enterprises. Thus the attempt to improve the relationship between doctor and patient through tort law may be an example of what Judith Shklar disparagingly calls "the structuring of all possible human relations into the form of claims and counterclaims under established rules."[3]

A second important drawback of analyzing bioethical problems in legal terms is that law is a *system* of social regulation, a system whose parts should mesh to form a (reasonably) coherent body of precedent and principle. Jurists have worried for centuries that changing one area will unexpectedly or undesirably affect another area. Such concerns probably help explain the Supreme Court's decision in *Glucksberg*. That case might have been decided differently except for *Roe v Wade*,[4] which is, of course, the case estab-

lishing a constitutional right to an abortion. The Court has repeatedly reconsidered *Roe,* and several Justices clearly regret that the Court ever embogged itself in the jurisprudential and political quagmire of abortion and the questions of constitutional interpretation and federalism it raises. Whatever the moral appeal of the plaintiffs' right-to-die argument, accepting it would have reinvigorated *Roe* and its controversial answers to those questions. Thus even a Justice who found much to like in the plaintiffs' argument might have voted against it for fear of its systemic implications.[5]

This point can be put somewhat differently. Every judicial opinion looks forward as well as backward; every opinion is both based on precedent and itself becomes precedent. Yet a court cannot easily anticipate what kind of precedent an opinion will become, for the cases and arguments it will govern are cloaked in the mists of the future. The resulting apprehension about the unforeseen consequences of each legal precedent is one reason slippery-slope arguments are so common and so convincing in law.

Accurately foreseeing consequences is particularly urgent in the context of the "privacy" rights that are at stake in *Glucksberg* and *Roe.* To maintain the vigor of those rights, the Court has made it structurally unlikely for a state to justify a statute that conflicts with them. This has introduced a crucial rigidity in the law: the Court has become reluctant to define interests as "rights" because the consequences of that decision are so severe. The more potent the doctrine of rights, then, the more reluctant the Court must be to employ it.

That reluctance is sharpened by yet another factor: Because a system of law demands a stable base of precedent, the Court will only rarely overrule a decision. And the Court's constitutional decisions are virtually immune to reversal by any other means. This increases the incentive for the Court to act cautiously in finding new constitutional rights.

Seen in this light, *Glucksberg* is not hard to understand. The Court faced several kinds of systemic pressures not to extend the privacy rights it had announced in *Roe,* and it had reason to be apprehensive about the slippery slope down which it might be sliding. In addition, it was dealing with a substantive question—euthanasia—in which the slippery-slope problem had long been acute, as to which thinking had changed with chastening speed, and whose future dimensions were forbiddingly murky. Thus, however the Justices may have assessed the ethical merits of the plaintiffs' position, whatever their views of good public policy, and however seductive the idiom of rights, they confronted strong systemic reasons not to find a right to die.

This leads us to a third limitation of thinking about bioethical problems in legal terms. Law is a system of social regulation, and social regulation is the art of the possible and the necessary. Further, law is a system confided to a specialized set of institutions with specialized capacities. For these reasons, there are often gaps in legal doctrine where those institutions have not dealt with an issue or have lacked the capacity to do so fully.

For example, the law of rights has historically flourished in one paradigmatic situation—where a single individual confronts the power of the state.

"'In such conflicts,'" as I once wrote, "'we are predisposed to favor the person, out of respect for his moral autonomy and human dignity.' That predisposition also rests on our assumption that the state can bear any risks of an incorrect decision better than the individual can."[6] But bioethics abounds in troubling situations where the conflict is not between one person and the state, but between two people, each with a claim against the other and each with a rights claim against the state. In these situations, our legal rights doctrine tells us little about how to choose.

Surrogate-mother contracts exemplify this problem. In the Baby M case, did Mr. Stern have a constitutional right to father a child through such an arrangement? Did Mrs. Whitehead have a constitutional right to raise Melissa, the child she had borne? Did Melissa have a constitutional right to a decision made in her best interests? Little in our blunt and limited doctrine of constitutional rights helps answer those questions.

In sum, in investigating the first advantage of law as a vehicle for bioethical thought, I have observed that bioethicists and the public commonly expect to discuss bioethical issues in primarily moral terms and, to a lesser extent, in terms of public policy. Law provides a language that can enrich that discussion. Yet I have been suggesting courts and legislatures must also employ a language shaped by the special exigencies of a legal system of social regulation.

We move now to study the second advantage of law as a language of bioethical discourse. Perhaps the most delightful thing about that language is that it is not just talk. Law is also a way of actively, directly trying to change the world. It is not the only way, it is not always the best way, but it has conspicuous attractions.

The first of those attractions is that law embodies an already established enforcement structure. Further, that structure is backed, ultimately, by society's fiercest instruments of coercion. For instance, the fear of criminal prosecution even today influences—and on some views, should influence—decisions about terminating medical treatment. And anti-abortionists feel precisely that it is wrong not to use the criminal law to prevent abortions.

But law is not just a structure of regulation backed by force. Law also enjoys moral authority. Laws are often obeyed because people believe they should obey the law. And people are subtly but truly influenced by the law's expressive capacity and by the social force acquired by institutions the law supports. This is, for instance, one defense of the law of informed consent: even though recalcitrant doctors may evade it, it symbolizes society's aspirations for medicine. That symbol over time, and taken with other legal and social measures, may gradually prevail in the minds and methods of doctors.

These concerns may help us understand why legislatures have been reluctant to follow the logic of the principle that patients have a right to refuse treatment toward the principle that patients have a right to the help of a doctor in committing suicide.[7] Even if legislators could see no moral difference between dying by refusing treatment and dying by taking the pills a doctor prescribed, legislators must worry about preserving inviolate in the public

and medical mind the unbreachable rule: Thou shalt not kill. A rule embroidered with elaborately qualified and subtly phrased exceptions stands in danger of losing the moral force on which its enforcement relies.

The law is an appealing device for change for yet another reason—there are so many points of access to it. The law can be reached through the instruments of democracy and through litigation, all means available—in principle—to anyone. This helps explain why people trying to challenge, for instance, the institutional authority of medicine and the individual power of doctors have sought to speak in the voice of the law.

Despite these attractions, almost all laymen and too many lawyers grossly overestimate the law's effectiveness. Why does law so often fail to translate hopes into reality?

Once again, it is crucial that law is a system of social regulation. Bioethical reflection generally analyzes each case meticulously to produce the right result for that case. But a system of social regulation cannot trust each decision maker to do justice in each case. Nor can it tolerate the inconsistency and unpredictability of discretionary justice. In fact, a wisely considered and carefully formulated rule may produce the right result in more cases than the ad hoc efforts of individual decision makers. For all these reasons, justice may require that an agency of social regulation write rules.

Considerations of efficiency may lead to the same result. As Whitehead wonderfully wrote,

> It is a profoundly erroneous truism, repeated by copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking about what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.[8]

But of course, when you adopt a rule, you risk diminishing the chance of doing exact justice in every case, since rules by their nature sweep many cases under a single category. These are the problems the Washington legislature confronted in the statute tested in *Glucksberg*. That statute flatly forbade doctors to help their patients commit suicide. The legislature presumably calculated that allowing scope for discretion in such decisions was likelier to result in more "errors" than the rule it adopted. Similarly, some legislatures have concluded that a rule prohibiting surrogate-mother contracts will produce more good results than a series of discretionary decisions. But the cost of both rules is what might be widely regarded as wrong decisions, as the stories of the plaintiffs in *Glucksberg* suggest.

Rules have another drawback. They must be written clearly and comprehensibly enough that the people who actually need to apply them will

be able to do so. This problem has plagued bioethics. It has infected attempts to define death, for example. And, to take another example, doctors have not unreasonably complained that the vague "reasonable patient" standard of tort law tells them deplorably little about their duties of informed consent.

In all these ways, then, the languages of the law have to give up something—and sometimes a great deal—in precision and in sensitivity to the moral and social contexts in which law is actually applied. But there is a further problem. One of the great truths about law is that, with unnerving frequency, it fails to achieve the effects intended for it, and sometimes quite fails to have any effect at all. Some of the most fascinating modern legal scholarship reminds lawyers how removed their talk is from the world's ken. That literature reveals that, to the lawyer's chagrin, businesses resist using contracts, ranchers do not know what rules of liability govern damage done by wandering cattle, suburbanites do not summon the law to resolve neighborhood disputes, engaged couples do not know the law governing how they will own property when they marry, citizens repeatedly reject the due process protections proffered them, and, what is worse, many of these people simply don't care what the law says.

Much the same can be said of a number of the law's recent bioethical reforms. There is evidence that as few as 10 percent of us have made an advance directive, that as few as a quarter of us have signed an organ donor card (despite the swarms of us avowing our desire to donate organs), that even competent patients are not widely consulted when do-not-resuscitate orders are written, that doctors have turned informed-consent principles into one more bureaucratic chore, and that virtually no plaintiff wins an informed-consent suit.

What is going on here? Well, of course, lots of things. But central among them is the fact that the society law tries to regulate is enormously complex. The people the law wants to affect are enticed by many incentives beyond those the law creates. They have their own agendas and, more important, their own normative systems. The law writes rules, but the governed often have the incentives, time, and energy to avoid them.

Consider advance directives. They offer people a surely irresistible way of speaking in one of life's greatest crises. Yet people spurn them. People do so because they have their own lives to lead. Momentous as the issue may be, it will generally not seem pressing until it arrives. People resist thinking about their own mortality. They don't easily understand and heartily dislike legal forms: People find them obscure and darkly imagine how they might be misused. For that matter, people may—reasonably—doubt that they will be used at all. Finally, many people have trouble envisioning their circumstances years into the future and how they would respond to those hypothetical circumstances. In short, advance directives were formulated and promoted by people—bioethicists, lawyers, and doctors, for instance—who know what they want to do through them and keenly want to do it. Much of the public is less clear about what it wants and about whether getting it is

worth the costs. In short, while the language of the law may have penetrated into the bosom of society, it must still, in quotidian life, compete with the many other languages that people speak more comfortably, more fluently, and with more conviction.

In this chapter, I have argued that law offers a rewarding language for treating questions of social regulation. But I have also contended that, as a vehicle for morally consequential issues like those in bioethical disputes, that language is momentously limited and often inapt. Law is the language of social regulation and hence responds to systemic imperatives that are irrelevant to and even may conflict with genuine understanding and wise resolution of moral issues. This is why Holmes saw himself "as a judge whose first business is to see that the game is played according to the rules whether I like them or not."[9] It is why Cardozo thought the judge "is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'"[10]

Of course courts and (much more) legislatures sometimes speak in moral terms and always strive to write law that is consistent with moral insight. But that fact must be understood in light of law's task as a system of social regulation: "The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it. . . . Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[11] *Glucksberg* does not express the Court's opinion about whether the plaintiffs should have been helped to die. *Roe* does not state the Court's view of the desirability of Texas's abortion statute. The law of informed consent does not embody any legislature's whole understanding of the ethical duties of doctors to patients.

The law, then, has evolved to regulate social life, however awkwardly, and its language reflects that purpose. That is its strength. But like any lexicon, law's vocabularies must be handled cautiously. For its idioms rule us in ways we do not always grasp or desire, and they have limits growing out of the ends for which they were created.

NOTES

1. Oliver Wendell Holmes, *The Path of the Law,* in *Collected Legal Papers* 170 (Harcourt, Brace, 1920).
2. Benjamin N. Cardozo, *The Nature of the Judicial Process* 92–93 (Yale University Press, 1921).
3. Judith Shklar, *Legalism: Law, Morals, and Political Trials* 10 (Harvard University Press, 1964).
4. 410 US 113 (1973).
5. For one of several attempts to free the assisted-suicide issue from *Roe,* see Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An*

Essay on Roe, Casey, *and the Right to Die,* 44 American University Law Review 803 (1995).

6. Carl E. Schneider, *Bioethics and the Family: The Cautionary View from Family Law,* 1992 Utah Law Review 819, 838.
7. For a helpful discussion of this problem, see Howard Brody, *Physician-Assisted Suicide in the Courts: Moral Equivalence, Double Effect, and Clinical Practice,* in this volume.
8. Alfred North Whitehead, *An Introduction to Mathematics* 61 (n.d.).
9. Oliver Wendell Holmes, *Ideals and Doubts* in *Collected Legal Papers* 307 (Harcourt, Brace, 1920).
10. Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale University Press, 1921).
11. Oliver Wendell Holmes, *The Path of the Law,* in *Collected Legal Papers* 171–2 (Harcourt, Brace, 1920).