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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 discourse are obliged to borrow in their daily controversies the ideas, and even the language, peculiar to judicial proceedings? How suited are the habits, taste, and language of the judicial magistrate to the political, and more particularly, the bioethical, questions of our time?

We ask these questions because, as the incomparable Tocqueville foresaw, Americans today truly do resolve political—and moral—questions into judicial questions. As Abraham Lincoln hoped, the Constitution “has become the political religion of the nation,” and many Americans now “take for granted that the Constitution embodies moral as well as legal rules.” We revere 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.” Trial courts, *L.A. Law* wants to teach us, are forums for the apotheosis of social and moral reasoning. The legalist error proliferates that “moral rights [necessarily] represent claims that *ought* to be made in legal rights, that *ought* to be protected and enforced by law.”¹

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Bioethics in the Language of the Law

by Carl E. Schneider

Law provides a rich language for thinking about bioethical issues and is a tool for action as well as talk. But the language of the law, often inapt, regularly fails to achieve its desired effect.

Inevitably, the spirit of the law has penetrated into the bosom of bioethics. For one thing, the two fields are not wholly distinct: many bioethicists are lawyers, including several prominent staff members of several influential commissions.² For another, bioethics is as much a political movement as an academic discipline. This has given bioethicists an incentive to learn and speak the language of the law. Further, bioethical issues have been framed for public discussion in legal terms in cases from *Quinlan* to *Cruzan*, in the tribulations and trials of Baby Doe and Baby M, in the constitutional principles of *Roe v. Wade*, in legislative reforms of law at the end of life, in referenda in Washington and California, in the law’s travails with Jack Kevorkian. Finally, the spirit of the law has penetrated into the bosom of bioethics because it has penetrated into the bosom of society generally: bioethicists partake of the habits and tastes of their time and place, and those habits and tastes are in no small part those of the judicial magistrate.

It would be easier to see the consequences of formulating bioethical issues in legal terms if we knew bioethics’ “native language,” how it would speak freed of legal influences. For the reasons I just gave, that counterfactual is unimaginable. We can, however, identify qualities we want bioethical discourse to have, and

then ask if the language of the law promotes them. I take bioethics to be the study of those ethical problems relating to health care and ranging from questions about how a particular doctor and patient should make a specific decision to questions about how American health care should be ethically structured. Such questions are extraordinarily perplexing, raising as they do the most basic and intractable issues about human life and the most intricate and intimate issues about human relationships. I assume that to treat so wide a range of such baffling problems, a rich vocabulary of ethical considerations, styles, and approaches is necessary. Different bioethical issues arising in different contexts may demand a regime of rules or the flexibility of discretion, a rights discourse or a language of duties, public policy analysis or private preference, the salvation of religion or the neutrality of liberalism, the profits of principles or the insights of casuistry, the uses of utilitarianism or the devices of deontology, the rigors of economics or the consolations of philosophy. In my father’s house there are many mansions.

I will argue that the language of the law has enriched bioethical discourse. Law has done so by generating vivid and pressing instantiations of bioethical issues, by scrutinizing them—in part—in moral terms, and

by proffering means of resolving them. It has contributed vocabulary and concepts to bioethical discourse and offered ways of putting those words and ideas into practice. But the law's gifts to bioethical discourse and to effectuating that discourse should be cautiously received. For the law has goals that go beyond the immediate problems of bioethics, and those goals peculiarly shape the moral terms the law employs and specially alter the direction legal discourse takes. Furthermore, the law has limits that arise from its special social purpose, and those limits crimp the usefulness of law's language as a vehicle for bioethical discourse.

Law is essentially a device for social regulation. It is the means by which society through its government seeks to establish a framework for human interactions. This framework helps set minimum standards for human behavior (criminal law and tort law exemplify this function), helps establish and support the institutions and practices people use in organizing their relations with each other (this is what contract and commercial law, for instance, do), and helps people resolve their disputes (which is a primary function of civil courts). In this century, the law has broadened that framework by providing some minimum assurances of human well-being (what we call the welfare state).

Law's calling as a device for social regulation 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, professionally precise, systematically disciplined language for thinking about bioethical issues, a rich language Holmes called "the witness and external deposit of our moral life."³ 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 sometimes seems to have hardly any effect at all.

The Language of the Law

We turn now to law's first attraction as a language for bioethical discourse. Because law has centuries of

experience with social regulation, it offers a highly articulated method and language for analyzing social problems. That method, in America, is the common law process: courts build legal principles incrementally, by evaluating one case at a time; legislatures intermittently respond with reforms and reconsiderations. One might think of it as Rawls's reflective equilibrium in action. It is a method well suited to a field as new and febrile as bioethics, since it brings to bear long-nurtured principles on emerging problems. And it is a method particularly congenial to medicine and applied ethics, since, like them, it relies in important ways 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 form idioms that particularly influence bioethical debate and that will repay attention: law's dispute-resolution function, its facilitative function, and its rights discourse.

One of law's oldest aims is to help people resolve disputes. American law does so partly through the law of torts. When one person injures another, the law may authorize 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 commits professional malpractice. The tort action provides a way of settling the dispute between the injurer and the victim and of restoring the victim to his prior well-being. By setting the substantive terms for resolving disputes, tort law also establishes a standard of behavior which—one hopes—may shape conduct so that injuries are deterred, disputes are forestalled, and, even, people behave better.

Because the language of torts provides a convenient pattern for thinking about those bioethical issues that arise where one person has injured another, it has seemed a promising response where doctors abuse their power over patients. Building on tort doctrines (like the principle that people may not be touched unless they have given their consent), courts

have developed a principle of informed consent. This principle serves three bioethical goals: to help resolve disputes over injuries caused by a doctor's failure to inform a patient adequately; to recompense—however crudely—the injured patient; and—more ambitiously—to improve the way doctors treat patients.

The law tries to conduce to good not just through tort law, but also through what I call the facilitative function—by, that is, lending people the law's authority to use in organizing their relations with each other. A familiar example of this function is the law of contracts, which allows people to reach whatever agreements about their affairs they desire, and to deploy the law's power to make those agreements binding and thus predictable and reliable. The facilitative function also lets people 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, which 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 reform the relationship between doctors and patients by treating it in contractual terms. (This effort has foundered because 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 authorizing powers 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."⁴ This process evokes the language of rights, a lan-

guage that has achieved a potency and preeminence in the United States unmatched anywhere in the world. That language is woefully muddled by our tendency to conflate moral rights, statutory rights, and constitutional rights. But constitutional rights are undoubtedly the trump cards of our legal system.

drawbacks arise from law's role as a means of social regulation. More specifically, the law's language is shaped for a system with a particular aim—social regulation. That aim itself is a limited one—to shape and not to supplant social practices and institutions. And the law is a blunt chisel even for that task.

est of law's enterprises. As James Fitzjames Stephen wrote, "To try to regulate the internal affairs of a family, the relations of love or friendship, or many other things of the same sort, by law or by the coercion of public opinion, is like trying to pull an eyelash out of a man's eye with a pair of tongs. They may put out the eye, but they will never get hold of the eyelash."⁵ Familial affairs involve relations among people who deal with each other in private on a personal basis concerning intimately personal questions and consulting personal values that are passionately felt. In such affairs, it is hard for law to learn what is going on in the relationship, to write rules that will fit each relationship, to supervise it, and to induce people to follow those rules and cooperate with that supervision.

The law's rights discourse has seemed delightfully suited to that engine of bioethical thought, the doctrine of autonomy.

Once recognized, they massively prevail against statutes that infringe on them. What is more, they have not just a legal, but also a luminous social and moral authority.

The law's 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 was phrased in rights terms, its language, tone, content, and result have been transformed. And proponents of another 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 analyzing many social problems, including many bioethical issues. And to a notable extent, bioethical discourse has been phrased in legal terms, has been conducted in courts and legislatures, and has won legal reforms. But alluring as the law's language is, it has drawbacks and limits that are not always perceived or understood. Like the attractions of that language, these

First, the idioms of the law are often less apt than they might appear. They have arisen in response to needs for social regulation, but the systemic imperatives that shape the law are sometimes a poor pattern for bioethical discourse. For example, the law of torts is centrally a way of compensating victims of an injury. But bioethicists have wanted the law of informed consent not just to remedy specific failures to inform patients, but to fundamentally reform the relationship between doctors and patients. However, tort law ill suits this ambitious goal. For one thing, the language of torts is the language of wrongs. That language states only minimum duties; it is not the language of aspiration. A doctor may obey it through quite mechanical and sadly unsatisfactory routines that mock the dialogue bioethicists imagine for doctors and patients. Furthermore, the law penalizes the breach of even those minimal duties only sporadically—when a patient has actually been injured by that breach, when the injury is great enough to justify the expenses of a suit, and when the patient realizes all this and is willing to sue.

More broadly, not just tort law, but the law generally, is inept at shaping relationships—particularly relationships that are instinct with intimacy. The field that tries most directly to do so—family law—is perhaps the sorri-

The relationship between doctor and patient is not always all that it might be, and it is sometimes more bureaucratic than personal. But it can partake, and its members often want it to partake, of those qualities that make it inapt for the law's regime. Thus trying to organize that relationship 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."⁶

A second drawback of analyzing bioethical problems in legal terms is that law is a *system* of social regulation, a system whose parts should mesh into what Holmes called "a thoroughly connected system,"⁷ that is, a (reasonably) coherent body of precedent and principle. Jurists have worried for centuries that changing one area will unexpectedly alter another. Such concerns help explain, for instance, the Supreme Court's decision in *Cruzan*,⁸ in which the Court was asked to declare a constitutional right to die. The Court might have done so except for *Roe v. Wade*,⁹ which established a right to an abortion. The court has been reconsidering *Roe*, and several justices regret ever embogging themselves in the jurisprudential and political quagmire of abortion and its questions of constitutional interpretation and federalism. Whatever the moral appeal of the Cruzans' right-to-die argument, ac-

cepting it would have reinforced *Roe* and its expansionist view of constitutional analysis and judicial power. Thus even a justice who liked much in the Cruzans' argument might have rejected it for fear of its systemic implications.

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 fear of the unforeseen consequences of each legal precedent is one reason slippery-slope arguments are so common and so telling in law. Anticipating consequences is particularly urgent where, as in *Cruzan* and *Roe*, "privacy" rights are at stake. To maintain the vigor of those rights, the Court has made it structurally arduous to justify a statute that conflicts with them. Yet this has introduced a crucial and almost perverse rigidity in the law: the Court hesitates to define interests as "rights" because that decision's consequences are so severe. The stronger the doctrine of rights, then, the more reluctant the Court must be to deploy it. Thus the majority in *Cruzan* declined to find a "right to die" in the Constitution partly for fear of what Cardozo called the "tendency of a principle to extend itself to the limits of its logic."¹⁰

Seen in this light, *Cruzan* is not hard to understand. The Court faced several kinds of systemic pressure to cabin the privacy rights it had announced in *Roe*, and it dreaded the slippery slope it might slide down. In addition, it faced a substantive question—euthanasia—whose slopes were notoriously slippery, whose contours had changed with chastening speed, and whose future dimensions were disturbingly murky. Thus, however the justices may have assessed the ethical merits of the Cruzans' position, whatever their views of good public policy, and however seductive the idiom of rights, they faced strong systemic reasons not to create 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. Out of a sense of what is normatively desirable and practically possible, American law seeks only to plan a bare framework for society and not a complete blueprint for it. Our law does not—unlike civil law—even aspire itself to be a complete system. Thus there are often gaps in legal doctrine where legal institutions have not fully dealt with an issue.

One such limitation arises from the fact that our judicial system is primarily driven by litigants. Cases they do not bring cannot be adjudicated. Arguments they do not make will not be heard. Another limitation arises from the fact that law relies on precedent. Propositions for which there is no precedent will have trouble making their way into law. One example of this "incompleteness" problem appears in the law of rights. That law has historically flourished in one paradigmatic situation—where a single individual confronts the state. Virtually all rights thinking in American law is organized around that paradigm. "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."¹¹ But in bioethics the conflict often 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. Our legal rights doctrine tells us little about how to make such choices because those are not situations the law was designed to cope with.

Pregnancy contracts exemplify this problem. In the Baby M case, did Mr. Stern have a constitutional right to father a child in this way? 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? To be reared by her natural mother? To stay in touch with both her natural parents? Little in our crude and crabbed doctrine of constitutional rights helps answer those questions.

In this section, I have observed that law's language can enrich bioethics' discussion of the moral and public policy issues that subject treats. Yet I suggested that courts and legislatures speak a language shaped by the special exigencies of a legal system of social regulation, a language that is easily misunderstood by an unwary public and that fits uneasily with the language of bioethical reflection. In particular, I discussed that part of the law's language closest to the main-springs of bioethical discourse—the law's rights talk. I suggested that rights talk is narrow enough to begin with. Ladd, for instance, profitably contrasts that talk with a broader discourse, the language of "responsibility." In bioethics, "a responsible decision may require consideration of such different things as risks and benefits, other relationships, concerns, needs and abilities of persons affected by and affecting the decision. In addition, to make responsible decisions it is usually necessary to 'weight' a number of factors against each other; the final decision often requires what we generally call 'judgment.'" He contrasts rights talk: "Decisions based on rights, on the other hand, are quite different. They do not permit taking into account most of the considerations mentioned, and they do not involve the same kind of weighing, deliberation, judgment, etc., that is called for in cases of responsibility."¹²

But rights talk in the law is importantly more limited even than in ethics, for the apparent similarity of the law's rights talk and bioethics' autonomy principle is misleading. Bioethics can describe a principle of autonomy complex and modulated enough to assimilate the full range of relevant moral considerations. But the law is constrained by its function as an agency of social regulation. It must find authority in legal precedent, fit its rights principles into a demanding context, and articulate rights doctrines that can be translated into the day-to-day work of courts, lawyers, and citizens. Such factors are inevitable in any system of law. However, they corrode the wide-ranging, subtle, and complex principles necessary to a system of ethics. And they suggest one reason that some bioethi-

cal versions of the autonomy principle will not readily be transformed into law.

Political and Judicial Questions

This leads us to law's second advantage as a language of bioethical discourse. Perhaps law's most beguiling aspect is that it is not just talk. It is also a way of actively, directly trying to change the world. It is not the only way, nor always the best way, but it has conspicuous attractions.

The first such attraction 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 some say, should influence—decisions about terminating medical treatment. And opponents of abortion precisely want to use the criminal law to prevent abortions.

But law is not just a structure of regulation backed by force. Law also enjoys social and 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 (which exploits the law's power to impart ideas through words and symbols) and by the social force (the force of familiarity, custom, and legitimacy) 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, supported by an emerging practice, and taken with other legal and social measures, may gradually prevail in the minds and methods of doctors.

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 precision and reach. 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 can analyze each case meticulously to seek the right result for that case. But a system of social regulation cannot trust each decisionmaker to make each case right. Nor can it tolerate discretion's inconsistency and unpredictability. Further, a wisely considered and carefully formulated rule may produce the right result in more cases than the ad hoc efforts of individual decisionmakers. For all these reasons, justice may require that an agency of social regulation substitute rules for discretion. Further, considerations of efficiency may lead to the same result. As Alfred North 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.¹³

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 somewhat diverse cases into a single category. This is the problem the Missouri legislature faced in the statute tested in *Cruzan*. That statute's rule set a high standard of evidence for terminating treatment. The legislature presumably calculated that making such decisions discretionary was likelier to produce more "errors" than the rule it adopted. Similarly, some states have concluded that a rule prohibiting pregnancy contracts will yield more good results than a series of discretionary decisions about enforcing each specific contract. But both rules pay a cost in

wrong decisions, as the facts of *Cruzan* suggest.

Rules have another drawback. They must be so clear and comprehensible that the people who apply them will understand them. Yet clarity exacts a cost in justice. This problem plagues bioethics. For example, doctors reasonably complain that tort law's hazy "reasonable patient" standard tells them frustratingly little about their duties. Yet critics who want a doctrine of informed consent with real bite reasonably complain that a clearer standard would leave uncovered the numerous unforeseen situations that ought to be covered.

In all these ways, then, the language of the law must give up something—and sometimes a great deal—in precision and in sensitivity because of the contexts in which law is actually applied. But there is a further, deeper 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 offered them, and, what is worse, all these people simply don't care what the law says.¹⁴

Much the same can be said of many of the law's recent bioethical reforms. There is evidence that as few as 10 percent of us have made an advance directive, that only a quarter of us have signed an organ donor card (despite the swarms of us who say we want to be donors), that even competent patients are not widely consulted about do-not-resuscitate orders, that doctors have reduced informed consent to one more bureaucratic chore, and that plaintiffs rarely win informed consent suits.

What is going on here? Well, of course, lots of things. But central

among them is society's enormous complexity and the narrow relevance of the law to it. People are enticed by many pressures beyond those the law creates. They have their own agendas and, more important, their own normative systems. The law writes rules, but the governed—when they know the rules—often have the incentives, time, and energy to avoid them.

Consider advance directives. They offer an apparently irresistible way of speaking in one of life's greatest crises. Yet people spurn them. They do so because they have their own lives to lead. Momentous as the crisis may be, it will generally not seem urgent until it arrives. People resist contemplating their own mortality. They heartily dislike and don't easily understand legal forms; they find them obscure and darkly imagine how they might be misused. For that matter, people may doubt that they will be used at all. Further, many people have trouble envisioning their circumstances years into the future or how they would respond to those hypothetical circumstances. And I suspect that people expect that decisions about their welfare would in any case fall to people they trust—to their families. 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. But many of us are not clear about what we want 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 much more conviction. These are languages of religion and morality, of love and friendship, of pragmatism and social accommodation, of custom and compromise. The danger for bioethicists, then, is believing too deeply that law can pierce the Babel, can speak with precision, can be heard.

The Spirit of the Law

I have tried to show how law's function as an agency of social regulation

produces a language that, despite its uses and attractions, can be an inapt idiom for bioethical discourse and even for transforming bioethical principles into social policy. I now want to propose that "sociopsychologically," if not logically, that language may tend to sway us in undesirable directions. I will suggest two of them.

Let me give a brief example of my first concern. Every year I ask my (law and medical) students whether they have any moral obligation to give blood. They immediately bristle and tell me that the law should not require people to make such donations. I repeat what I have already told them, that I am not asking about legal duties, but about moral ones. They reply that no such obligation should be imposed on them, whether by law or any other outside force. When I ask why those of them who have given blood have done so, they say that they happen, purely as an arbitrary matter of personal preference, to want to do so. Like the subjects of *Habits of the Heart*, even their "deepest ethical virtues are justified as matters of personal preference."¹⁵

I think this story has many explanations. The one relevant to our problem begins with the observation that law generally conceives of problems in terms of rights, whether constitutional or not. This promotes bioethics' own legalistic tendencies, for "it is hardly an exaggeration to say that discussions of medical ethics often amount to little more than glosses on the rights to life, liberty, and the pursuit of happiness."¹⁶ It is often desirable for people to look on their relations with government in rights terms. It is sometimes necessary for people to look on their relations with other people in those terms. But making rights central to one's world view carries a danger:

Thinking in terms of rights encourages us to ask what we may do to free ourselves, not to bind ourselves. It encourages us to think about what constrains us from doing what we want, not what obligates us to do what we ought. Legal rights are tellingly different from moral rights in this respect: When philosophers talk about

rights, they commonly talk about a complex web of relationships and duties between individuals; when lawyers talk about rights, they commonly talk about areas of liberty to act without interference.¹⁷

This tendency of rights thinking is exacerbated in the United States by the feeling that to assert one's rights is a virtue, that "to demand our rights, to assert ourselves as the moral agents we are, is to be able to demand that we be dealt with as members of the community of human beings."¹⁸ In dealing with the government, this may often be true. However,

attitudes appropriate to civil rights may be inappropriate to privacy rights. Civil rights are rights to participate in self-government and society. Such participation is at least a virtue and may be a duty. But privacy rights are in a sense the opposite of civil rights—they are rights *not* to be affected by government and society—and to forego their use can be a virtue and even a duty.¹⁹

One reason rights thinking is so prevalent in the United States is that in a self-consciously pluralist and secular society other sources of value have lost much of their authority. But this also aggravates the risks of rights thinking, for it deprives people of the incentives for modulating rights claims that a moral system can supply. My students vehemently believe that nothing should bind them to give blood; only their "arbitrarily" chosen preferences counsel them to do so. Nothing in rights thinking *requires* this kind of response, but in a world in which the language of the law has become a vulgar tongue, that response comes all too readily to the lips.

Another "sociopsychological" peril lies in abandoning people to their rights. If doctors and patients meet clad in the armor of their rights, both of them will lose as well as gain: "The physician who is now instructed to obey the 'informed consent' of his patient, no matter how harmful he feels that action to be for the patient, is not only permitted but positively enjoined to separate himself from his patient, to respect his patient's 'au-

tonomy' by suppressing his own identifications, his self-confusions, with that patient."²⁰ Robert Zussman suggests that such a separation may be taking place: "While a number of observers of the medical scene have argued that patients and patient advocates may demand rights in response to the impersonality of relations with physicians, few have noted that physicians may also become advocates of patients' rights in response to the impersonality of their relations with patients."²¹ As Charles Bosk writes, "The dark side of patient autonomy [is] patient abandonment."²²

Of course, rights thinking has achieved its present power in bioethics exactly because of medicine's long history of paternalism and because of its long prospect of increasingly bureaucratic and impersonal relations between doctor and patient. The question I raise is about the costs of responding to these evils in too legalistic a way: "The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."²³

The Vulgar Tongue

In this paper, I have argued that law offers a rewarding language of social regulation. But I have also contended that, as a vehicle for discussing morally consequential issues like those in bioethical disputes, that language is momentarily limited and often inapt. Law is the language of social regulation, and hence obeys systemic imperatives that are irrelevant to and may even 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."²⁴ 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.'"²⁵

Of course courts and (much more) legislatures sometimes speak in moral

terms. 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."²⁶ *Cruzan* does not express the Court's belief about whether Nancy Beth Cruzan should have been allowed 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 sense of the ethical duties of doctors to patients. All this sharply and crucially limits both the extent to which the language of the law may safely be imported into bioethical discourse and to which bioethical ideas may be effectively translated into law.

We no doubt must live with the fact that the law has become in some measure a vulgar tongue, that its spirit has penetrated into the bosom of society. Yet we should remember that the law's calling is 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.

References

1. John Ladd, "Legalism and Medical Ethics," in *Contemporary Issues in Biomedical Ethics*, ed. John W. Davis, Barry Hoffmaster, and Sarah Shorten (Totowa, N.J.: Humana Press, 1977), pp. 13, 14-15.
2. "As most public men are or have been legal practitioners, they introduced the customs and technicalities of their profession into the management of public affairs." Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage, 1959), p. 290.
3. Oliver Wendell Holmes, "The Path of the Law," in *Collected Legal Papers* (New York: Harcourt, Brace, 1920), p. 170.
4. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 92-93.

5. James Fitzjames Stephen, *Liberty, Equality, Fraternity: And Three Brief Essays* (1873; reprint, Chicago: University of Chicago Press, 1991), p. 162.

6. Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964), p. 10.

7. Holmes, "Path of the Law," p. 168.

8. *Cruzan v. Director, Missouri Department of Health*, 497 US 261 (1990).

9. *Roe v. Wade*, 410 US 113 (1973).

10. Cardozo, *Nature of the Judicial Process*, p. 51.

11. Carl E. Schneider, "Bioethics and the Family: The Cautionary View from Family Law," *Utah Law Review* 1992, no. 3 (1992): 819-47, at 838.

12. Ladd, "Legalism and Medical Ethics," pp. 27-28.

13. Alfred North Whitehead, *An Introduction to Mathematics*, rev. ed. (New York: Oxford University Press, 1959), p. 61.

14. Two fine examples of this literature are Stewart Macaulay, "Non-contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28 (1963): 55-67, at 55; and Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991).

15. Robert N. Bellah et al., *Habits of the Heart: Individuals and Commitment in American Life* (Berkeley and Los Angeles: University of California Press, 1985), p. 6.

16. Ladd, "Legalism and Medical Ethics," p. 6.

17. Carl E. Schneider, "Rights Discourse and Neonatal Euthanasia," *California Law Review* 76 (1988): 151-76, at 163.

18. A. I. Melden, *Rights and Persons* (Berkeley and Los Angeles: University of California Press, 1977), p. 25.

19. Schneider, "Rights Discourse and Neonatal Euthanasia," p. 164.

20. Robert A. Burt, "The Limits of Law in Regulating Health Care Decisions," *Hastings Center Report* 7, no. 6 (1977): 29-32, at 32.

21. Robert Zussman, *Intensive Care: Medical Ethics and the Medical Profession* (Chicago: University of Chicago Press, 1992), p. 87.

22. Charles L. Bosk, *All God's Mistakes: Genetic Counseling in a Pediatric Hospital* (Chicago: University of Chicago Press, 1992), p. 158.

23. Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), pp. 110-11.

24. Oliver Wendell Holmes, "Ideals and Doubts," in *Collected Legal Papers*, p. 307.

25. Cardozo, *Nature of the Judicial Process*, p. 141.

26. Holmes, "The Path of the Law," pp. 171-72.