Escaping from Legalism: Is It Possible?

The law is America's greatest strength, but sometimes also its greatest curse, when it gets in the vicinity of ethics. No myth is so hardy as the notion that "you can't legislate morality," which of course we do all the time. But that myth has been well noted. Less appreciated, however, is the conceit that when the law decides to stand aside from moral judgment and to leave matters to personal choice, it has not made a moral judgment. Our country properly rejected pro-choice arguments in favor of racial segregation, recognizing the tacit public moral approval they gave to segregation. Yet it seems we still try to persuade ourselves that there is no such official moral approbation in leaving matters of sex, or end-of-life choices, including physician-assisted suicide, up to individuals.

The irony here is that, in a country so devoted to the law, so quick to legislate on everything in sight, a failure to legislate—or a removal of an old prohibition from the books—cannot fail to send a moral message. It was once said of some European countries that if the law remained silent on something, it was probably morally forbidden. It is just the opposite here: if the law remains silent, that means an act is probably morally acceptable. It is hardly any wonder, for example, that in the campaign against smoking the only way to demonstrate moral seriousness is legally to ban it, anywhere and everywhere that is politically feasible. For public purposes, true ethical weight rests on the majesty of the law.

None of this would matter so much if—so I hypothesize—the greatest obstacle to outright and serious public moral debate in this country were not the hovering presence of the law. It is as if the public is presented with a stark choice: if you really believe something is morally important, take it to court or pass a law about it. But if you believe the courts should stay out of it, or that there should not be a law, then shut up and leave the matter to private choice. And when we say "private choice" in this country, we characteristically mean one thing: that we ought not to pass moral judgment on each other's choices, much less issue public moral condemnations of the practices of different groups, a patent offense against pluralism.

It is this dilemma, I suspect, that has made it so hard to have any serious debate about the moral uses of freedom, the difference between responsible and irresponsible moral choices. I have met few serious feminists who would deny in private that there can, and are, some wrong and irresponsible abortion decisions. I have met practically none, however, who are willing to admit that publicly, or to sanction *any* moral discourse at all for fear of providing ammunition to those who would like to see *Roe v. Wade* overturned. As much as I deplore elevating expediency over principle, I have to admit it's a smart tactic. The danger in our country of opening moral discussion about private matters is that someone or other is likely to have the idea that "there ought to be a law."

Meanwhile, unfortunately, because we do let the law legislate considerable morality, or use moral arguments to overcome existing bans, a great deal of the work of ethics ends up being done in courtrooms and enshrined in legal decisions. The Ninth Circuit Court of Appeals has recently seen fit to judge what counts as human dignity, as ethical an issue as there can be. I was surprised to learn that, should my life end in the dependent, weak, and messy condition of a baby, I will have lost my dignity. I looked at a newborn baby recently—unable to talk, stinking of feces, not a thought in her head, utterly dependent—and just failed altogether to note the absence of dignity.

It is hard, in fact, to think of a more superficial moral theory of human dignity than the one voiced in the Ninth Circuit's decision. Yet by virtue of its pronouncement in a court decision that theory is likely to have far greater public weight than anything put forward by the field of ethics. The papers report important court decisions in great detail; our judgments get media sound bites. (I assume, for the sake of argument, that ethics as a field can do better, though it has never been immune from moral tone-deafness.)

Legalism may, then, be defined as the translation of moral problems into legal problems; the inhibition of moral debate for fear that it will be so translated; and the elevation of the moral judgments of courts as the moral standards of the land. Are the courts and lawyers to blame for this state of affairs? I would be happy to blame them—many of my best friends are *not* judges or lawyers—but I suspect that there has come to be some enormous moral vacuum in this country, which for lack of better insti-

tutional candidates has been left to the law to fill. The churches are either too sectarian or too morally bland, the universities too caught up in professionalism or culture wars, the journals of opinion tiresomely focussed on the religious right (the left) or assaulting politically correct liberals (the right), and political life reduced during this campaign year to nasty negative attacks on anything and everyone.

That leaves the law. It is relatively free of scandal, still generally respected, national and relatively uniform in its scope, and ready to take on ethics if that is what gets served up to it for the making of decisions. It may be the best institution we have, but it is a poor substitute for moral consensus and public debate on ethics. ■

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Morality and the State, Law and Legalism

Daniel Callahan's essay returns to familiar themes, both his own and those with even older roots: the extraordinary role of law in American life, and the resulting curse of legalism. As always, he has with great economy raised a host of issues. Yet, however acute his observations and cogent his claims, the example that lies at the heart of his argument does not in my view support the generalization he draws from it, which leads me to less dire conclusions about the law's relationship to bioethics.

His first point echoes one made more than 160 years ago by Alexis de Tocqueville, who famously observed that "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."[1] It is worth remembering, however, that Tocqueville did not decry this result; indeed, he saw the civil jury as a unifying and even civilizing force in the raw, new Republic.

As a counterweight to the centrality of law, Callahan notes the myth that "you can't legislate morality," which he believes has pronounced negative consequence. To confirm that it is a myth—whether the word "legislate" is taken literally or used more broadly to mean any form of lawmaking by the state—one need look no further than modern-day Iran or, closer to home, Puritan New England. To some extent, all societies attempt to direct behavior into approved channels by criminalizing certain conduct. In so doing, the law is not merely enforcing morality but *reinforcing* it, and society's success on the first score is heavily dependent on the second, that is, on whether a broad consensus is achieved on the underlying moral view. When wide agreement exists, the law is at once less visible and more powerful. Less visible because in the Peaceable Kingdom, the lamb can safely lie down with the lion: there is less occasion to enforce laws that reflect beliefs deeply ingrained in virtually the entire population. But also more powerful, both because when it acts for the moral consensus the law has strong allies (such as church, school, and family) in its role as teacher and because the existence of the broad consensus makes credible the implicit threat to employ the state's authority by legislating against unacceptable behavior and enforcing the legislation. Again, in Tocqueville's words, "Laws are always unstable unless they are founded upon the custom of a nation: customs are the only durable and resisting power in a people."

But the real issue here is normative, not descriptive: Is it right to legislate morality? Callahan argues that when we answer that question in the negative, we implicitly declare the conduct in question to be acceptable, to be beyond the scope of interference or even critical commentary. It seems to me that he has collapsed two separate ideas here and overlooked important features of liberal societies and especially of the one framed by our Constitution.

Take *Griswold v. Connecticut,* the 1965 decision in which the Supreme Court overturned a state statute banning the use of contraceptives.[2] In Callahan's view the Court thereby encouraged or at least endorsed the use of contraceptives; taking it one step further, Justice Douglas was attacking a vestige of Puritan morality that used the fear of pregnancy to cool the ardor of unmarried couples contemplating sexual intercourse. Now, there is no question that the elimination over the following decade of a wide range of laws governing reproduction—which of course extended to unmarried persons as well as married couples—played a role in what was dubbed the "sexual revolution." But the change in mores preceded the striking down of contraception and abortion statutes. Indeed, so little respected were some of the laws that the story is told of Justice Douglas (who had once taught at Yale Law School) asking counsel for the Planned Parenthood League of Connecticut, after the formal arguments had finished in *Griswold,* whether it was still possible to buy condoms under the counter at the drug store across the street from the Yale campus.

Thus, it would seem fairer to say that the law got out of the way of morality on this question. The moral issue—rather than having been decreed for unmarried couples by the Supreme Court—coincidentally was being resolved in favor of a more relaxed view toward their engaging in sexual activity as well as toward married couples controlling the timing and size of their families. The development of "the pill" and related pharmacologic means of