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. ■

Alexander Morgan Capron

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

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preventing fertilization and implantation had more to do with the change in sexual behavior among the young than the change in the law. That changes in the law made it feasible for drug companies and physicians to act more freely does not mean the law endorsed these actors producing or prescribing as they did or patients engaging in any particular behavior.

More important, the Court's ruling did not rest primarily on a negative answer to the normative question whether it is right to legislate morality. Rather, the "right of privacy older than the Bill of Rights" that Justice Douglas articulated in *Griswold* precludes the state from punishing as accessories to a crime physicians or others who prescribe or provide contraceptives because the state may not achieve indirectly what it is barred from doing directly. Moreover, the prospect of police searching "the sacred precincts of the marital bedroom for telltale signs of contraceptives" (which use the statute outlawed) is "repulsive." But it is a huge leap from holding that the state is constitutionally precluded from regulating conduct to concluding that the state—or a majority of the people—endorse the conduct. A liberal society does not legislate when the benefits that would come from enforcing a particular rule are outweighed by the harm that comes from the intrusion of the state into private matters, from the inevitable chilling of conduct that falls near the border of the forbidden, and above all from the risk that the power to intrude into peoples' lives will be abused. In sum, when people decide not to pass—or judges refuse to accept—a law, it does not follow that they do not think the matter "morally important," as Callahan asserts, and the decision to regard it as "a matter of private choice" does not mean that we must (as he boldly states) "shut up." Indeed, the need to speak out and the legitimacy of doing so may be increased precisely because we have decided that *state* enforcement of a prohibition would entail unacceptable costs.

One way to illustrate this point would be to consider an area in which the law has lately been strengthened, namely protecting children against abuse. Plainly, some parents do not do, indeed, may be incapable of doing, enough to ensure their children's healthy development, and some children would probably be much better off if raised by people other than their parents. Yet we have chosen to be very circumspect in intervening in families to promote the well-being of children and very reluctant to supervene parental authority. Why is that? It is not because we endorse the view that children have no moral standing or worth, or that we are insensitive to their well-being. Rather, we recognize that a wide range of lifestyles are compatible with successful development, and that we are severely limited in our ability to predict accurately when a particular style of childrearing or even certain conduct will cause long-term harm to a child. Moreover, when we substitute state for parental authority, the result is often worse for the child, as shelves of studies of the foster care system attest.

Finally, fairly and effectively ensuring that no children were being raised improperly would require routine state intrusions into family life that not only would be unacceptably invasive and burdensome but that would so badly undermine the integrity of the family and the authority of parents as to result in ill effects far in excess of any benefits. As an alternative, we establish mechanisms that are much less intrusive (such as the obligations placed on physicians to report abuse of child-patients) and we set the trigger for state intervention higher (aiming to identify clear mistreatment or neglect). In recent years, child protection agencies have become increasingly sensitive to, and willing to intervene to forestall, sexual abuse of children. To employ Callahan's view, does this amount to the legal system announcing that sexual abuse is more immoral than it was before? Of course not. What has happened is simply a recalculation—in the wake of highly publicized scandals (alleged or real) as well as greater research on the prevalence of the problem—of the balance between, on the one side, missing some instances of harmful behavior, and on the other, traumatizing children as well as parents by pursuing and punishing conduct that is not wrongful.

In addition to this concern for safeguarding interests encompassed by a liberal society's respect for privacy, lawmakers in the American constitutional system have a further reason for not enacting, or for striking down, statutes that embody an explicitly religious view—our commitment to toleration of religious differences, symbolized by the wall between church and state. Of course, this does not always happen, as we were reminded just a decade ago. In June 1986, Justice White and four colleagues upheld Michael Hardwick's felony conviction for violating the Georgia statute that criminalized sodomy between consenting adults on the ground that the Western moral tradition overwhelmingly condemned such practices.[3] This opinion's reasoning is muddled and fails to grasp what the Framers understood, namely that linking state action directly to religious doctrine weakens religion because it precludes the full flowering of faith in people's lives since the range of human experience and belief may not be encompassed within a single, sanctioned church. The Court thus diminishes an open discussion of moral issues in society because it privileges the views of a particular religious group and may make nonadherents unwilling to discuss public policy in moral terms lest they cede control of the outcome to the official religion.

If this description of religious orthodoxy supplanting public moral debate sounds familiar, it is because it parallels Callahan's complaint about legalism supplanting moral discourse. He illustrates

his point—as he did in his justly famous 1990 *Commonweal* article[4]—by pointing to what has happened to discussion of the morality of abortion in the two decades since *Roe v. Wade*,[5] namely, that it became impossible. Pro-choice advocates are loath to engage in an open debate, for fear that pro-life advocates will seize on any admission of personal moral qualms about some abortions as support for state interference. Pro-life advocates are reluctant to admit that a woman might be justified in seeking an abortion when her pregnancy results from rape or incest because that allows pro-choice advocates to characterize this as a pluralistic realm in which the fetus is not sacrosanct. I believe that Callahan is right in his description, but I am very inclined to think that just as the Supreme Court has repeatedly emphasized that its decisions on reproductive freedom are a thing unto themselves, so too his case is sui generis. The lesson of *Roe* is not that the justices cut off moral discourse, but that they have been too divided to put an end to the apparently interminable attempts to overturn *Roe*. The consequence for the larger society is that normal political debate and compromise is supplanted by highly polarized, single-issue, all-or-nothing political posturing and maneuvering.

There are many reasons why I hope the Court will overturn the Second and Ninth Circuits' recent decisions on assisted suicide, and not the least of them is that I would hate to see death further "constitutionalized."[6] But it seems likely to me that the complexity that people find in this field and the fact that it is closely connected to another (namely, forgoing life-sustaining treatment) in which detailed societal and institutional rules have been developed and will continue to be employed, ensures that a lively debate will remain no matter what the courts do. Moral views will continue to be freely voiced and challenged, alongside arguments pro and con in pragmatic or consequentialist terms (not the least because most of the objections have concerned the risks of abuse, leading to involuntary euthanasia). In sum, assisted suicide and euthanasia embody the more prevalent truth that despite the American inclination noted by Tocqueville to seek judicial resolution of political (and moral) issues, we do not necessarily embrace the view that we ought freely to do everything we are free to do.

References

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2. Griswold v. Connecticut, 381 US 479 (1965).

3. Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

4. Daniel Callahan, "An Ethical Challenge to Pro-Choice Advocates—Abortion and the Pluralistic Proposition," *Commonweal* (23 November 1990): 681-87.

5. Roe v. Wade, 410 US 113 (1973).

6. Alexander M. Capron, "Constitutionalizing Death," *Hastings Center Report* 25, no. 6 (1995): 23-24; Alexander M. Capron, "Liberty, Equality, Death!" *Hastings Center Report* 26, no. 3 (1996): 23-24. ■

Carl E. Schneider

Moral Discourse, Bioethics, and the Law

Dan Callahan follows a distinguished tradition when he uses the phrase "moral discourse" to describe the law's work. The frequency with which that image is deployed suggests its resonance and even rightness: When we think about the way society considers moral issues and develops moral positions, it can be useful to imagine the law as one of many social institutions that contribute to a social discussion. Nevertheless, this image is misleading.

At least for our (graying and balding) generations, the law is regarded as a worthy participant in American moral discourse preeminently because of its part in the civil rights movement, and particularly because of the Supreme Court's role in propelling school integration to the fore of public consideration and controversy. But what was the nature of the law's contribution to moral discourse in this paradigmatic context? First, it was crucially—though hardly exclusively—judicial. While legislation certainly can be, and often should be, seen as profoundly moral, in popular and even scholarly eyes legislation seems to be most easily regarded as the product of power politics, a coarse and cynical process of coalition and compromise. In contrast, courts have been more readily described as disinterested and principled.

Second, the moral discourse the law undertook in areas like civil rights can be characterized as "tutelary." In the crucial area of school integration, the Court is widely seen as having correctly perceived that the country had failed to deal honestly and decently with a great moral crisis of its history. Calling on the deepest moral lessons of the Constitution, the Court compelled the country to confront that crisis. In short, this paradigmatic moral discourse of the 1950s and '60s was the tutelary discourse of courts, acting as interpreters of the Constitution.

This tutelary role is no stranger to the law. It is, for example, characteristic of the criminal law. Academics and judges have often found the tutelary role a praiseworthy one for courts. Robert Burt, for example, sees the judge as a moral teacher who exercises a power "akin to the force wielded by the greatest moral teachers from Gandhi to Christ to Socrates . . ."[1] Nevertheless, the tutelary role is not entirely consistent with the image of moral discourse. Discourse denotes an exchange, a conversation. Discourse connotes a discussion among relative equals in which one side prevails through persua-