

Law's Virtues: Fostering Autonomy and Solidarity in American Society. By Cathleen Kaveny. Washington, DC: Georgetown University Press, 2012. Pp. 292. \$29.95 (paper). ISBN: 9781589019324.

With her teaching and research background in law and moral theology at the University of Notre Dame and now Boston College, Cathleen Kaveny is uniquely situated to write at the intersection of these two disciplines. As she explains, her book's title, *Law's Virtues*, has a twofold meaning. First, law should pedagogically guide citizens toward virtues, notably autonomy and solidarity (xi). Second, law itself ought to manifest certain traits. As the seventh-century archbishop Saint Isidore of Seville states in a refrain that Kaveny quotes frequently, "Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good" (xi, 3, 30, 97, 166–67). In the course of her argument, she examines and defends these two theses.

In the first part of the book, Kaveny lays the groundwork for her argument by delineating between two conceptions of the role of law: as police officer and as moral teacher. The first approach, associated with the late American political philosopher Joel Feinberg, suggests that the goal of law is to inhibit people from causing wrongful harm to others, not to foist a particular morality on them (19–22). The second perspective, put forth by Saint Thomas Aquinas more than seven hundred years ago, claims that the pedagogical end of law is to "make those to whom it is given, good" (which does require some restraint) but also recognizes, as Isidore did, that the ability of law to do so is limited by what is "possible to nature" and "according to custom" (28–33, 49–50). Kaveny supports the latter position: she does not deny natural law, but her argument focuses on custom and culture. As she demonstrates, viewing the law simply as a police officer runs counter to human intuition as manifested in current civil and criminal laws that privilege homeowners over renters and are especially punitive toward hitmen and bigoted murderers due to their particularly nefarious motivations (47–48). In fact, by their very nature, laws indicate that certain activities are worthy of approval while others are not. In her memorable words, "Always and everywhere, law teaches a moral lesson. . . . Political communities need to acknowledge the fact that law teaches and to take responsibility for what it teaches" (17; see also 2).

So what exactly should law teach? Most obviously, it ought to promote the virtue of justice, which involves giving others what we owe them, maintaining "right relations," and punishing violations of the law. But, Kaveny adds, since we cannot be just unless we keep unruly emotions in check and are able to figure out the right thing to do in specific instances, law must also inculcate the other three cardinal virtues: temperance, fortitude, and prudence. One way law can do this is "through publicly funded programs of education and service, especially those targeted at young people" (31–33, 50–52). Moreover, "cultures such as that of the contemporary United States" should specifically teach the virtues of autonomy, along the lines of political philosopher Joseph Raz's "capacity to be the 'part-author' of one's own life," and solidarity, as in Pope (now Saint) John Paul II's sense of devotion to the common good and appreciation of our "neighbor" as our "helper." For Kaveny, autonomy is an instantiation of prudence, and solidarity is a correlate of justice (33, 37–38, 52–54).

Overall, Kaveny cogently and charitably articulates the superiority of the law-as-moral-teacher approach. At the same time, her analysis prompts a few questions. First, she specifies that it is societies "such as" the United States that should foster autonomy and solidarity in particular. But why the qualifier here? If the law-as-moral-teacher perspective is correct, all nations would seem

to have a duty to promote these two virtues, even if their success in doing so is somewhat limited “according to custom.” Second, for Aquinas and other Christians, both the cardinal and theological virtues are central to the moral life. In light of this, should law also teach the theological virtues of faith, hope, and charity, at least in a non-coercive way that respects religious freedom? If not, why not? In fact, although Kaveny does not explicitly consider law as a teacher of charity, her own analysis would appear to open the door to this possibility. More specifically, while *Law’s Virtues* tends to portray solidarity within the confines of justice, the appreciation of one’s neighbor as helper seems better understood as a manifestation of charity, which involves love of God and neighbor (and thereby requires justice but also transcends it). Indeed, the *Catechism of the Catholic Church* conceives of solidarity as “social charity” and “friendship.”

In the second part of the book, Kaveny applies this theory of the interrelation of law and virtue to specific topics. In examining the question of abortion, she encourages the pro-life movement to move away from a law-as-police-officer stance, which she argues is inconsistent with the commitment to proactively care for the vulnerable at all stages of life (78). In particular, she contends, pro-life citizens and lawmakers should lead their fellow citizens toward the virtue of solidarity. Here she is sympathetic to John Paul II’s call to “ensur[e] proper support for families and motherhood” (85, 89–90). Kaveny discourages an outright legal ban on abortion on the grounds that it would be ineffective, since women have become accustomed to reproductive freedom and would simply resort to chemical abortions at home or travel to states where abortion was still legal. Rather, she claims, pro-life lawmakers ought to concentrate for the time being on an incremental approach, prosecuting doctors “who kill infants born alive after an abortion, or who flout state laws and regulations pertaining to the safety of their patients” (88–89). Her rationale in favor of such an approach is grounded in the views of Isidore and Aquinas that laws must be “according to custom,” Aquinas’s understanding that people are led to virtue gradually and would react to a law to which they are not habituated with “contempt” and “break into evils worse still,” and John Paul II’s comment that lawmakers must “tak[e] into account what is realistically attainable” (50, 60–61, 89–90). Finally, Kaveny also analyzes the proposed Freedom of Choice Act (FOCA) through Isidore’s insight that law must be “clearly expressed,” arguing that FOCA’s ambiguity fails this criterion. More specifically, FOCA does not clarify whether restrictions such as a waiting period and informed consent would be allowed to stand or whether the abortions of impoverished women must be publicly funded. Kaveny argues that given its vagueness and morally controversial nature, such a law would tax the resources of the nation’s judicial system, lead to societal confusion and suspicion, and ultimately fail to teach the citizenry well (97, 101–04, 107–08).

From a pro-life perspective that rejects abortion, along with assisted suicide and euthanasia, as “wrongful killing” (1, 4), a viewpoint that she herself generally affirms, Kaveny’s overall position on its legality seems insufficiently urgent. For instance, most Americans would probably agree that the rapidly instituted nationwide ban on slavery was a good thing, even though it was far from “according to the custom” of the South at the time. I am inclined to think a ban on abortion might be defended if it met two conditions. First, it could be limited to the states that legislate it, a measure that despite Kaveny’s aforementioned qualms would seem to be more or less in line with the gradualist approach she advocates. Second, it could be joined by strong maternal and family support measures, a “hand-in-hand” arrangement that John Paul II proposes in *Evangelium Vitae* and to which Kaveny seems sympathetic (275–76). At least from a pro-life standpoint, such a scenario could be “possible to [the] nature” of pregnant women in difficult circumstances, “useful” in the sense that it might reduce the overall number of abortions from its earlier level within that same nation, and have a pedagogical effect that could make the practice even less common in the future. Furthermore, such a situation arguably would be in keeping with the first and third

precepts of the natural law as enumerated by Thomas Aquinas: to “preserv[e] human life” and to “live in society . . . [and] avoid offending those among whom one has to live,” respectively.

Next, on the very recent ethical questions surrounding genetic testing, Kaveny contends that because of their unreliability and the difficulty of assessing probabilistic data, direct-to-consumer tests do not genuinely promote a consumer’s autonomy. Given these and other drawbacks, including the possibility of parents’ unduly swaying their children toward certain interests and away from others on the basis of their perceived genetic gifts, she suggests that the sale of these tests should not be legal (122–24, 127–31). On end-of-life questions, Kaveny contends that while suffering jeopardizes autonomy, it can be eased when health care professionals and caregivers manifest solidarity toward patients by becoming familiar with their background. Doing so can help the dying “look back upon and reassess their lives . . . in a way that will allow them some closure” (153, 155–56). Here, Kaveny takes as a moral exemplar the life and death of Cardinal Joseph Bernardin of Chicago in suggesting that foregoing assisted suicide can enable one to cultivate one’s relationship with God, inspire those in the midst of difficulties, and provide others with the opportunity to serve (141–49).

When it comes to the legality of assisted suicide and euthanasia, Kaveny maintains that the issues are not “easy to resolve” (166). Noting that both sides of the debate claim to want to protect the autonomy of the vulnerable, she argues that the relevant Supreme Court decisions fulfilled Isidore’s criteria for good law, since the Court did not recognize a right to die but rather left assisted suicide and euthanasia to the “laboratory of the states.” This sounds like an appeal to the Catholic principle of subsidiarity, which is part of justice and involves leaving decisions to lower levels of authority if they can capably handle them, although surprisingly Kaveny never mentions this principle. She further asserts that the Supreme Court promoted the virtue of solidarity by declining to see the dying as a separate class of people, as did the Ninth Circuit, and instead addressing whether people in general have a right to die (163, 165–67, 173–74). She also praises the model adopted by most American states—namely, a ban on assisted suicide and euthanasia along with a reluctance to prosecute violations (170). Here again, many pro-lifers might criticize Kaveny’s stance as being too lenient. She does recognize that opinions more conservative and liberal than hers “are weighty and merit ongoing considerations by legislators and citizens” (170). Still, even if Kaveny is correct here in favoring a “laboratory” approach that generally results in prohibition without punishment, it may undermine her reluctance to countenance individual state bans on abortion, especially considering that there is widespread public support for the legality of assisted suicide and euthanasia as well as abortion.

In the book’s final section, Kaveny focuses directly on the act of voting in the context of certain moral issues. She takes issue with the United States Conference of Catholic Bishops’ document “Forming Consciences for Faithful Citizenship,” released in advance of the 2008 and 2012 presidential elections. According to “Faithful Citizenship,” Catholics may vote for a pro-choice candidate “only for truly grave moral reasons,” and apparently only when there are no pro-life alternatives (196). Kaveny suggests that the bishops should concentrate more on the actual ability of candidates to achieve goals through competence, character, collaboration, and connections (199, 202, 205–06). Moreover, she claims that “Faithful Citizenship” ought to have given more attention to other important matters, such as the economy, and that in fact abortion is correlated with poverty (81, 206–07, 209). Finally, Kaveny responds to two possible counterarguments. First, even if abortion is an intrinsic evil, she maintains that a candidate may not be able to affect policy on this issue, and other issues deserve our concern as well (219–20, 228–29, 231). Second, even if voting for a pro-choice candidate entails “cooperation with evil,” Kaveny contends that this is not morally problematic since each act of voting is far removed from the evil and makes no meaningful impact on it (243, 255–56).

Kaveny's analysis of the morality of voting is thought provoking, and she rightly stresses that the bishops might have emphasized other political issues (such as the economy and health care reform) and highlighted the importance of evaluating candidates' general suitability for office. However, while attention certainly should be given to competence, character, collaboration, and connections, it is worth noting that in many instances, the perceivable discrepancies between candidates in these areas may be relatively small in comparison to their differences on the issues themselves. And whenever this is the case, perhaps it is not wrong for Catholics and others to focus more on the candidates' stances on key issues than their roughly equal suitability for office.

Also, although Kaveny's explication of the concept of "cooperation with evil" is helpful, she does not address one possible line of reasoning of those who think Catholics should refrain from voting for a pro-choice politician. This is the view that a collective refusal by Catholics of such a candidate will "send a message" that might lead to political reform and that voting for him or her would cause "scandal," which in Kaveny's words involves "leading other people to mistakenly think the primary agent's wrongdoing is really nothing to worry about" (248), and thereby bringing them to spiritual harm. In fact, Kaveny generally acknowledges voting's "expressive function," among others (198, 200, 209). However, one of her own ideas may address the aforementioned concern; she briefly suggests that those who vote for a pro-choice politician (presumably for good reasons unrelated to abortion) might "find time to volunteer at a crisis pregnancy center" (263). This solution arguably neutralizes the possibility of scandal from a Catholic perspective, since others who know that a particular person (or Catholics generally) voted pro-choice would still clearly see a sincere commitment to helping the unborn and their mothers.

At any rate, Kaveny correctly concludes that demonizing one's opponents on these controversial matters does not foster healthy conversation and ultimately precludes beneficial forms of collaboration (276). Ultimately, while some may disagree with Kaveny's conclusions on particular points, her clear, thorough, and careful analysis greatly assists our understanding of a set of critical issues and often provides valuable guidance on how lawmakers and citizens should act with regard to them. Accordingly, those who teach graduate and law school classes at the intersection of law and Christian ethics would do well in assigning *Law's Virtues* as required reading.

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