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Law's Virtues: Fostering Autonomy and Solidarity in American Society

Cathleen Kaveny
Washington, DC: Georgetown University Press, 2012.
292 pp., $29.95

Reviewed by David S. Caudill, Villanova University School of Law, Pennsylvania

In the months prior to the 2012 presidential election, some of those who read *Forming Consciences for Faithful Citizenship*, the United States Conference of Catholic Bishops' (USCCB) guide to voting, undoubtedly felt uncomfortable. Does a Catholic search in vain for the pro-life, family values candidate determined to protect the poor, the rights of workers, and God's creation? Or, does he or she become a single-issue voter, ignoring paragraph 42 ("As Catholics we are not single-issue voters") but following the spirit of the USCCB guide? As Notre Dame Law Professor Cathleen Kaveny describes:

> Nowhere does the document straightforwardly allow a conscientious voter to select a pro-choice candidate if there is a pro-life candidate in the race. In contrast, on numerous occasions [it] affirms the decision to refuse to cast a vote for a pro-choice candidate, even if the only alternative is to refrain from voting altogether…[T]he issues [are] lexically ordered: First consider abortion and then consider everything else. (p. 197)

Law's Virtues is a courageous, well-reasoned analysis of current issues at the intersection of religion, morality, and law. Kaveny wades into our divisive political environment and faces head-on the ongoing controversy over how Christians should try to influence the laws of a pluralistic, democratic nation. Published on the eve of the 2012 election, *Law's Virtues* nevertheless will serve as a primer for the next few election cycles. For readers who firmly side with the targets of her criticism, Kaveny's book may have little impact other than to draw ire. But for readers who want to reflect pragmatically on dif-

ficult questions of faith and law, Kaveny's arguments are both compelling and helpful.

The hint that *Law's Virtues* will be pragmatic—and not idealistic—is found in the preface's epigram, a 17th-century quotation from Isidore of Seville:

> Law should 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. (p. xi; emphasis added)

In the chapters that follow, Kaveny rejects both the view that law should be morally neutral—because law inevitably (in its pedagogical function) teaches moral lessons—and the view that law should enforce morality—because there are too many moral disagreements even among and within different religious communities. Kaveny also rejects the law-as-police-officer, or "negative constraints" image of law, instead seeing law as a positive force in creating the conditions of autonomy (which promote freedom to shape one's life), and in leading "men and women to virtue in order to promote the common good" (p. 29; citing Aquinas, *Summa theologica*, I-II, q. 91 art. 4). Kaveny offers the Civil Rights Act, the Family and Medical Leave Act, and the Americans with Disabilities Act (ADA) as examples of law's moral pedagogy, and, significantly, as illustrations of the limits of law. For example, the ADA "communicates a normative vision…[but] it does not attempt to immediately realize each and every element of that vision by using the coercive force of law" (p. 36). That is, legislators must "consider how [a] law will actually function" (p. 46), which entails a practical evaluation alongside considerations of cost and public support.

The centerpiece of *Law's Virtues* (chapters 3–7) is Kaveny's detailed legal analysis of life issues in courts and legislatures (i.e., abortion, the failed Freedom of Choice Act (FOCA), genetic information, and assisted suicide). With respect to assisted suicide, Kaveny acknowledges that "thoughtful Americans of goodwill have a range of opinions," but she highlights the "danger of coercion or the risk of manipulating vulnerable patients to 'choose' death prematurely" (p. 180). As to genetic information, Kaveny worries about relying on probabilistic information to make decisions about one's life or one's child's life. Moreover, FOCA is Kaveny's example of a law, in Isidore

of Seville's terms, which is not clearly expressed, leading to uncertainty and misunderstanding. Most importantly, in light of the realities that women with low incomes constitute the majority of abortions, that women who want abortions will find a way to obtain them, and that women facing crisis pregnancies are "only slightly less vulnerable" than the unborn, we should attend to Pope John Paul II's insight that the "underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood" (p. 89; quoting *Evangelium vitae*, para. 90). Ending abortion and increasing social support go hand in hand.

The last part of *Law's Virtues* (chapters 8–10) addresses voters, and Kaveny is respectfully critical of the recent bishops' published guides, in which the issue of abortion is prioritized to such an extent that it eclipses issues of the economy, poverty, education, food policy, housing, military expenditures, violence, labor rights, immigration, and caring for the environment. If abortion is made an absolute priority, a difficulty arises "from the fact that changing the status [quo] does not score nearly as high [as other issues] on the scales of urgency, amenability to improvement, or ripeness for intervention" from federal courts (p. 207). No elected official can make an immediate change, and Kaveny questions the effectiveness of a strategy aimed at the president's ability to choose Supreme Court justices. Even if *Roe v. Wade* were overruled, many states would legalize abortion, and women with crisis pregnancies could travel to those states. Therefore, the economy should be a key pro-life concern, because "the number of abortions is correlated…to the economic and social circumstances of women facing crisis pregnancies" (p. 209). Moreover, "staggering" healthcare costs for the growing elderly population renews pressure to legalize physician-assisted suicide (p. 209).

I especially appreciated Kaveny's critique of the extremist discourse in the "culture wars," which leads voters into a oversimplified, binary framework treating actions as either so morally objectionable to be criminally prohibited, or so "morally good [to be] federally funded, and widely practiced" (p. 273). Rhetorical and evocative use of the terms "intrinsic evil" (theologically, an analytically technical term that "says nothing about the comparative gravity of the act" in question [p. 221]) and "complicity with evil" (conceptually unsound in relation to a voter's responsibility [p. 244]) should be tempered. In Kaveny's view, taking into account the common good:

> [A] solitary vote for a pro-choice politician is not likely to make any significant difference to any particular woman's [constitution-

> ally protected] decision for or against abortion…[V]oters might well judge that voting for a candidate who supports a large safety net for mothers and dependent children would be a better way to increase the number of children brought to term. (p. 256)

In any event, these matters deserve a "nuanced, respectful discussion that is not easily facilitated in the rhetoric and mind-set of the 'culture wars'" (p. 275).

My only criticism of *Law's Virtues* is the absence of any detailed analysis of recent controversies over insurance coverage for medical birth control and the legalization of gay marriage, issues that are both divisive among voters and relevant to the scope of Kaveny's study. Others will be critical of her pragmatism, but I take to heart her recommendation that, in the public square, Christians should "try to be teachers rather than warriors" (p. 276).

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