

SOCIAL VISION IS GOAL OF LAW

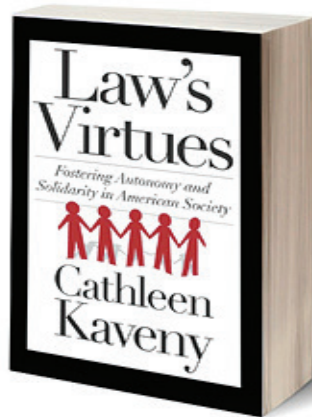
REVIEWED BY KATHY CURRAN, J.D., AND FR. THOMAS A. NAIRN, OFM, PH.D.

Cathleen Kaveny, a professor of law and of theology at the University of Notre Dame, begins this important book by quoting the 7th century theologian Isidore of Seville, who explained that “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.”

Reflecting on this definition, she argues that one should not understand law simply as a police officer, prohibiting harmful actions, but primarily as a teacher of virtue, imbuing a normative vision regarding how people ought to live together in society. She argues her point using Catholic resources from Thomas Aquinas to Pope John Paul II, and also resources from contemporary American legal theory, especially the analysis of autonomy developed by Joseph Raz.¹

The book is divided into three sections. In the first part, Kaveny develops her argument. She explains that American pluralism does not preclude law’s function as a moral teacher. In fact, law can never be neutral regarding morality. Taking her cue from Thomas Aquinas, she investigates law’s underlying normative vision and suggests that a major purpose of law is to lead people to virtue. Even though at times the law may offer only the most elementary lessons of virtue, they are important lessons, nevertheless, regarding living the virtue of justice and expressed through autonomy and solidarity.

According to Kaveny, justice entails both autonomy and solidarity. Autono-



LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY

BY CATHLEEN KAVENY, J.D., PH.D.
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my promotes capacity for choice, protects against manipulation and offers people an array of valuable life plans. Solidarity shapes one’s appropriation of the virtue of justice by attending to the invisible members of society, helping everyone receive their due and acknowledging the social dimensions of human flourishing.

As important as law is for the teaching of virtue, it does have limits. Returning to Isidore’s definition of law, Kaveny notes that law furthers the common good by balancing moral idealism with moral realism. In attempting such a balance, law can “only impose burdens and restrictions that populations can bear, morally and practically,” she says. Law remains a limited though important teacher.

In the book’s remaining two sections, Kaveny investigates practical is-

sues. Part Two is devoted to the way law can function regarding a variety of pro-life issues. These chapters deal with the pro-life movement itself, a critique of the proposed Freedom of Choice Act, genetics, and assisted suicide legislation. In each of these areas, Kaveny suggests that Raz’s understanding of autonomy, together with Pope John Paul II’s teaching about solidarity, allow for “a beneficial blending of sympathetic concern and tangible practicality” as society deals with these often divisive issues.

The third part of the book looks to legal and moral issues around voting. It discusses the U.S. Catholic bishops’ voting guide, “Forming Consciences for Faithful Citizenship,” the misuse of the language of “intrinsic evil” and whether or not voting for certain political candidates should be described as “cooperation with evil.”

Since this work should be a valuable resource to theological ethicists and lawyers alike, we have decided to discuss the book from both points of view.

REACTIONS OF A THEOLOGICAL ETHICIST

The book’s first section is an important corrective to at least two common errors made by many Catholic ethicists. The first is a too-facile opposition between law and morality. A standard explanation Catholic ethicists use contrasts American law as minimalist with an understanding of morality, especially virtue morality, as being above and beyond law. Often moralists simply say, “What is legal is not always moral, and what is moral is not always legal.” Reading Kaveny’s book, one must acknowledge that such facile antipodes are no longer viable.

Similarly, Catholic moral theology in the U.S. often has maintained an opposition between autonomy and solidarity, often contrasting a narrow, libertarian understanding of autonomy with a communitarian Catholic understanding of the common good. Kaveny's vigorous analyses of both autonomy and solidarity make this discussion much more nuanced and, at the same time, much richer.

Most Catholic health care ethicists will probably be intrigued by the last chapters of the book and Kaveny's treatment of the notion of intrinsic evil and the principle of cooperation. In both of these areas, she provides a clear articulation of the Catholic moral tradition and how it should be applied to some thorny contemporary issues. Of particular importance is her insistence that the language of intrinsic evil does not refer to the gravity of the wrongdoing but, rather, informs one why certain actions are wrong and that these actions are always wrong. Intrinsically evil actions, however, are not necessarily more serious than those that are not intrinsically evil. Criticizing recent use of the term, she suggests that "intrinsic evil" has moved beyond its technical theological meaning into the realm of prophetic language, and she warns that reducing the moral tradition to a set of rhetorical tools is problematic.

In the final chapter, her careful analysis of the principle of cooperation offers similar analysis regarding the relationship between voting for certain political candidates and complicity with evil. She reminds her readers that voting presents a person with choices regarding candidates, not with choices about issues. She further explains that the principle of cooperation was developed in the tradition because "to instruct persons to avoid all cooperation with evil, just to be on the safe side, would be wrongly dismissive of their obligations to fulfill role-related responsibilities."

In the middle of the last century, Jesuit ethicist John Courtney Murray used resources from both the Catholic moral tradition and the U.S. political tradition to investigate the related questions of whether Catholicism and American democracy were compatible and whether and how Catholics can function in a religiously pluralistic society.² In this book, Kaveny has shown herself an heir to Murray, using contemporary legal philosophy and the Catholic theological tradition to clarify similar questions regarding the social ethical issues facing American Catholics today.

REACTIONS OF A LAWYER

Lawyers and lawmakers don't often have the luxury of contemplating the philosophical aspects of the law and its function. Practicing attorneys are busy helping their clients navigate the law as it is. Policymakers balancing the demands of constituents, political reality and (one hopes) their sense of what's right for the country have little time to ponder the principles of Razian autonomy or subsidiarity as articulated by Pope John Paul II.

But perhaps they should make the time. That's why Kaveny's book is a must-read for anyone who has a hand in making or shaping law — meaning, in our political democracy, advocates and voters as well as elected officials and officers of the court.

Law's Virtues reminds us to be intentional about the moral goals we seek through the law and to be practical about how we proceed. Kaveny's application of her thesis on the law and its relationship to the virtues of autonomy and solidarity to several difficult moral and legal issues helps the reader develop a deeper appreciation of what the law should aim to achieve, and why. In so doing, she also explores the "how" — the challenge of designing laws that embody serious moral concerns in a way that will move the society to great-

er virtue without provoking a backlash.

Lawmakers may be particularly drawn to the chapters on abortion, genetics and end-of-life decisions. Those who depend on re-election won't want to ignore the sections on voting, either.

The chapters on abortion, genetic testing and end-of-life issues all consider the central themes of Kaveny's argument, but they look at the law from somewhat different perspectives. She turns first to the neuralgic and entrenched issue of abortion. The chapter on the pro-life movement contains perhaps the fullest application of the autonomy/solidarity analysis. For those seeking to protect the unborn, this is also the most challenging ground for the moral idealism versus moral realism debate. Kaveny urges us to look at the totality of the laws and regulations that relate to abortion and pregnancy, not just the criminal law, to move toward a legal and social structure that truly values and protects life.

If the U.S. Supreme Court's *Roe v. Wade* decision were to be overturned, this advice would become urgent for state lawmakers, as it would be up to states to set their own abortion laws. In that eventuality, Kaveny asks "how should lawmakers convinced of the equal dignity of unborn life think about their task? ... On the one hand, human law must attempt to lead people to virtue; on the other, it can only do so gradually."

Before moving on, she examines the controversy over the Freedom of Choice Act, introduced in the U.S. House of Representatives and the Senate several times to affirm abortion rights. She finds there not only legislation with an objectionable moral purpose, but an example of a law that would be too vague and unclear to be effectively operational. She draws the lesson that even laws with a salutary moral message must be capable of being implemented, understood and enforced. This is especially true when the

moral issue is already deeply divisive within the community.

The last decade has seen a revolution in our ability to map the human genome and make information about an individual's genetic makeup readily available. Whether and how to regulate access to and use of this information is new legal and moral territory. Policymakers considering how to approach this question will benefit from Kaveny's chapter on the application of the principles of Razian autonomy to direct-to-consumer genetic testing, even if they don't agree with her conclusion in favor of regulation.

Having largely focused on legislation, Kaveny turns to judicial decision-making in the chapters on end-of-life issues. She takes a detailed look at the cases in which the U.S. Supreme Court determined that the Constitution neither includes a "right to die" nor precludes states from legalizing assisted suicide and assumed without deciding that competent individuals are free to refuse lifesaving interventions. She looks at what lessons the high court may be attempting to teach.

In the chapter on the pro-life movement, Kaveny invokes the lawyer's old friend, the "reasonable person," a hypothetical construct reflecting a community's judgment of how individuals should behave in order to avoid harm to others. The negative prohibitions of a legal framework focused on autonomy are sufficient to allow the "reasonable person" to thrive. But vulnerability and dependence are fundamental aspects of the human experience, Kaveny reminds us, citing philosopher Alasdair MacIntyre. She suggests a hypothetical "vulnerable person" norm would assess society's legal embodiment of the value of solidarity, that is,

to introduce into the law a consideration of "the level of suffering it is reasonable to expect persons to endure without significant assistance from the community."

In a sense, this captures the essence of her message: that the law should embody and teach the values of autonomy and solidarity, but that in many of the more difficult moral and legal issues facing our nation, autonomy, and a particular view of autonomy, has had pride of place. A legal structure that more effectively reflects and teaches the value of solidarity can help our pluralistic society find its way to a more just future, one that draws upon all of its legal tools in appropriate measure to truly protect and support the most vulnerable among us.

Professor Kaveny's book is an excellent resource for understanding the relationship that ought to exist between law and ethics. Furthermore, the book can be a fruitful source for a continuing dialogue between ethicists and lawyers, honoring the integrity of both sides of the conversation.

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NOTES

1. Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986).
2. John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed & Ward, 1960).

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