Opinion
Culture

(Unsplash/Sebastian Pichler)

by Michael Sean Winters

View Author Profile

Follow on Twitter at @michaelswinters

Join the Conversation

Send your thoughts to *Letters to the Editor*. Learn more

April 27, 2020

Friday, I began my review of Cathleen Kaveny's book *Ethics at the Edges of Law: Christian Moralists and American Legal Thought*. We spent a fair amount of time looking at the first chapter, in which Kaveny examines two concepts central to both law and ethics, tradition and development, and how the work of John Noonan demonstrated the advantages to both disciplines of mutual engagement. And, true to the methodology she outlines, Kaveny pushed further than Noonan had in defining the relationship between generally applicable legal and ethical norms and the particularities of persons to whom those norms apply. Today, we will more briefly survey the rest of the book which follows this methodology.

In Chapter 2, Kaveny engages Stanley Hauerwas, who seems an odd choice. "Throughout his career, Hauerwas has tirelessly protested all efforts to embed Christianity, as either an intellectual system or a social group, into the framework of worldly power," she writes. He worried such efforts would "corrupt the thought and the practices of Christians." So, why bring him into dialogue with a secular legal tradition? She notes that Hauerwas is the man who condemned William James for trying to "resize Christianity to fit the nascent liberal-democratic project, which can admit no moral authority higher than human consensus." He is the disciple of Karl Barth who insisted the Christian witness to the world was bound to fail as often as not in worldly terms, that "a true Christian will be considered by the world to be 'a strangely human person.' " How, then, to witness to the Risen One, which is an undoubted obligation of the Christian too?

Kaveny pulls together Barth's emphatic covenant theology, which deeply influenced Hauerwas and sees a potential dialogue partner in the common law of contracts. "[T]here is considerable historical and conceptual overlap in the development of the theological and legal ideas of covenant and contract," she notes. What is more, "the norms embedded in and illustrated by the cases of contract law would bear fruitful consideration by Christian ethicists." For example, such consideration would highlight the value of narrative theology, like contract law, "not limit[ing] its moral evaluation of promise-making and promise-keeping to the moment of commitment, but would instead view that obligation in a broad temporal frame that relates past, present, and future." Think of how this broader temporal frame might impact the way Catholic moral theology views an issue like second marriages!

"Normatively, Christians are centrally a people who have learned what it is to rely upon a promise — the divine promise that we are, and will always be, God's people," Kaveny concludes. "Relying on God's promise, Christians try to become reliable ourselves. A conversation about what communal and individual habits and practices are necessary to encourage us to be persons who can rely upon one another's promises is something about which both contract law and covenant theology have a great deal to say."

There follow chapters in which, for example, she brings political theorists like Jeffrey Stout into the mix, dialoguing with Alasdair MacIntyre and contract law on the subject of examples and rules. The chapter on "Neighbor Love and Legal Precedent" starts with a reflection on the parable of the Good Samaritan — it begins, recall, with lawyers trying to put Jesus into a bind! — and then brings Protestant ethicist Gene Outka into dialogue with the contemporary American common law tradition, especially a notorious case, *Watts* v. *Watts*, that dealt with common law marriage. The chapter "Compassionate Respect and Victims' Voices" considers the role of victim impact statements in determining sentences, and takes ethicist Mercy Sr. Margaret Farley as her dialogue partner: Kaveny's examination of "approved categories" of victimhood — the pathetic or the heroic — and how these fail to capture the often reduced freedom in which the victim finds him or herself is profoundly enlightening.

(Unsplash/Giammarco Boscaro)

The chapters do not always yield earth-shattering, facile responses to the perennial "so what?" question. Part of Kaveny's contention is that a hyper-focus on outcomes has impoverished intellectual discourse when it finds itself in the public square and that our culture would be better served by attending to methodologies and authoritative sources, and what methodology is used to define a source as authoritative, not only to outcomes. The kerfuffle last week over the Supreme Court's decisionon unanimous jury verdicts in *Ramos* v. *Louisiana* highlighted this difficulty perfectly: Liberals who liked the outcome criticized Justice Elena Kagan who dissented in the case, but her concern for the overturning of precedents is something those same liberals may soon be concerned about too.

Only in the chapter entitled "Covenant Fidelity and Culture Wars," in which Kaveny brings Paul Ramsey back to the center of the story, does the analysis seem off-key. Kaveny surveys the different periods of Ramsey's career.

"Recall that in his first period, exemplified by *Nine Modern Moralists*, Ramsey embraced gray areas and ambiguity in the law, viewing them as necessary for deliberation, discussion, and the gradual unfolding of insights about love and justice," she writes. "In this third period [exemplified by *Ethics at the Edges of Life*], by contrast, he views these very same phenomena as dangerous for both Christian ethics and secular law." His "radical revision" in this later period consists in "the substitution of a more rigid medical indications policy in place of the Christian tradition's more flexible distinction between 'ordinary' and 'extraordinary' means of life-prolonging treatment," Kaveny observes. "Ramsey does not propose the substitution because he believes his proposed policy is more nuanced and accurate. Instead, he believes it is safer; it offers a more reliable bulwark against invidious quality-of-life judgments."

My marginal note to that paragraph asks "what about the didactic function of law?" and, sure enough, Kaveny addresses that issue in the very next paragraph, arguing: "the law has an important pedagogical function, even in pluralistic, liberal democracies such as the United States. Yet moral proclamation is not enough for moral pedagogy. … The nation's experiences with Prohibition, and more recently with the war on drugs, provides ample evidence of the way in which criminal law is not sufficient to control human behavior." All true. But it is also true that certain legal changes have altered our society in profound ways. There is still racism, but civil rights laws changed the behavior of many and opened opportunities for minorities that simply did not exist before. Child labor laws ended a widespread practice. The development of sexual harassment law has affected the way businesses are run.

Let me come at this from a different angle. Surely, law and ethics must attend to the particularities of a situation, but the ambient moral environment is part of the particularity, just as a plant placed in the wrong spot withers, but if moved to a different spot, it will thrive. Nuance is almost always a thing to be desired, but I have seen it used as a dodge. Moral strictures that strike us as severe may seem like a lifeboat in a time of moral laxity or to a person who needs clear boundaries to navigate their moral choices. The moralism of the Irish church during the centuries of British persecution was part of its strength but that same moralism, when brought to the U.S., became a source of moral Pelagianism. Might not moral severity be akin to national identity, the stuff of heroism in the face of oppression but the stuff of nativism and xenophobia in normal times. I am reminded of some lines in the great

Leon Wieseltier's essay "Against Identity":

> Identity in bad times is not like identity in good times. The vigorous expression of identity in the face of oppression is not an exercise of narcissism, it is an exercise of heroism. And those qualities of identity that seem vexing in good times — the soldierliness and the obsession with solidarity, the renunciation of individual development in the name of collective development, the reliance on symbolic action, the belief in the cruelty of the world and the eternity of struggle — are precisely the qualities that provide the social and psychological foundations for resistance. For this reason, it is impertinent to address the criticism of identity to those whose existence is threatened. Still, justice sometimes comes. And when it comes, it is sometimes bewildering, because it proposes peace to selves that have been arranged for war. The identity that altered history yesterday is redundant today. The outer discontinuity demands an inner discontinuity, which is wrenching. Unless a rupture of identity is accomplished, there will be justice, but there will not be peace.

Nonetheless, Kaveny makes an exceedingly important point in wrapping up her dissection of the Ramsey's later work. He was "driven by what he believes to be the temptation to wrongdoing operative in American medical culture in that time: the temptation to devalue the existence of those who are seen to be useless, defective or dying," she writes. "The mistake he made, in my view, is that he failed to recognize that law always has to deal with more than one temptation simultaneously. Law does not only teach, or condemn; it also channels human behavior." It is a fine point and one I have never seen put so well. But it is also likely that Ramsey's core mistake, one made by many then and still, was to think that law or morality could withstand the invocation of human autonomy in our consumer culture.

The analytical hiccup I perceive regarding Ramsey, if hiccup it be, is quickly overcome in a brilliant chapter that engages the thought of German Cardinal Walter Kasper on mercy, and how civil law distinguishes between an ongoing criminal act, a "continuing offense," and one that is clearly finished, an issue at the heart of the

discussion of the moral status of a second marriage. Even more brilliant is the final chapter in which she brings Eastern Orthodox thinker H. Tristram Engelhardt, Jr., into dialogue with Catholic moral theologian Germain Grisez on the subject of legalism. "The general consensus that legalism is unhelpful in a Christian moral framework is not matched by a corresponding consensus about either the exact definition of legalism or by the precise impediments it poses to sound moral analysis," she writes. "In part, this is because Christianity rejects not only legalism but also antinomianism." What follows is a brilliant examination that should give every writer pause before hurling "legalistic" as an epithet ever again.

Kaveny's book is not for everyone: The range of subjects engaged is so great that each discussion starts at about 120 mph when most of us have trouble engaging one that starts at 20 mph. I would have trouble thinking of another contemporary scholar who is so completely versed in two distinct fields of study that a work like this can succeed as this book does succeed. That is a grave indictment of our current academy and its professional ethos and it makes Kaveny's genius shine all the more. At a time when hyper-specialization is prized and demanded, it is easy to forget that some insights can be gained only from the estuaries of life. How lucky we are to have a scholar who swims through them with such ease, carrying the rest of us on her back.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

Editor's note: *Don't miss out on Michael Sean Winters' latest. Sign up and we'll let you know when he publishes new Distinctly Catholic columns.*