

## Law's Virtues: A Review. Part I

Michael Sean Winters | Feb. 22, 2013 Distinctly Catholic

About five paragraphs into Cathleen Kaveny's *Law's Virtues: Fostering Autonomy and Solidarity in American Society*, you find yourself wishing you had had Professor Kaveny in college as one of your professors. Her ability to take complicated ideas and make them accessible, all the while probing them to their depths, identifying alluring but ultimately distracting detours, and creating a synthesis of religious and secular ideas, demonstrate a pedagogical expertise that is not often found in the pages of academic books.

This pedagogical expertise is especially important because one of the central theses of Kaveny's book is that law itself plays a pedagogical role in society, a fact too often overlooked but one that, once acknowledged, might temper ideological extremes and help forge consensus in America's often confounding pluralistic society.

Kaveny holds doctorates in both theology and law and her fluency in both schools of thought is prodigious. She opens her book with a quote from St. Isidore of Seville, from the seventh century:

*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.*

Kaveny notes that St. Thomas Aquinas took this description of good law and made it his own. She unpacks each of the qualities Isidore identified and applies them to contemporary issues. For example, she contrasts the idea of law as teacher of virtue with the "law as police officer" model that has held sway in American understandings of law for a long time. She writes of this "law as police officer" approach:

*What you owe to other people is compliance with a list of negative prohibitions: "Do not murder." "Do not rape." "Do not assault." "Do not steal." On this view, the reason such actions are wrong is not that they radically disrupt the fundamental relationship of care and respect that one person owes another by reason of their common humanity. Instead, such actions are wrong because, by engaging in them, one person is grossly interfering with the ability of the other person to pursue an individual life plan. Metaphorically speaking, by engaging in such actions you break down the fence between your land and your neighbor's and trespass on his property.*

Kaveny notes that "This way of understanding the law presupposes a certain idea about human persons, who are seen as fundamentally disconnected from each other, as atomistic individuals who above all prize the ability to pursue their own plans without interference from anyone else." Kaveny does not use the word "libertarianism" but I will. Whether we are talking about law as police officer or human person as essentially a consumer, the libertarian sensibility has infected, and debilitated, our sense of communal commitment one to another.

This section of the book contrasting "law as police officer" versus "law as moral teacher" comes in the chapter in which Kaveny deals with abortion. She argues that both sides in the debate have accepted too readily the "law

as police officer? paradigm, with one side arguing that the law has no place in the decision, and the other side arguing that the police should rush in and arrest any woman who procures an abortion. This stance has led to stalemate. Kaveny instead suggests that the pro-life movement consider looking to the idea of law as a teacher of virtue to give it new strength and ideas. I submit that the main challenge facing the pro-life movement during (and after) the *Roe* regime is to begin discerning how the law can inculcate a different set of values from that commonly inculcated by the "law as police officer" approach. I argue that we need to think about how the law can begin teaching the value of solidarity.

Kaveny explores the ways the pro-life movement can approach this challenge with eminent common sense: "The strictures of the criminal law ought to be deployed in order to reinforce, and perhaps slightly extend, the commitment of the majority without taxing the abilities of persons of ordinary virtue. I think, for example, it is entirely appropriate for states to prosecute persons who kill infants born alive after an abortion, or who flout state laws and regulations pertaining to the safety of their patients. It would not be wise, however, for our lawmakers to enact criminal sanctions against first-trimester abortions in the current context, for the same reason it was not appropriate for Deadwood's [her hypothetical Old West town] lawmakers to target private killing in the saloons. It is not that the life of the unborn or the inebriated prospector is of lesser value. It is that the law is less able to protect them, given the practical limitations of their circumstances and the society." This conclusion will not satisfy those who wish to outlaw abortion tomorrow, but Kaveny is correct to note that the backlash to such a sudden change in the law would be impossible to imagine. As St. Isidore noted, the law must be "according to the custom of the country."

Solidarity and autonomy are the central lodestars for Kaveny's view of what law should achieve and she sets this against the classic liberal idea of liberty as essentially a "negative freedom" or "freedom from" external constraints. She contrasts the legal views of Joel Feinberg, whom she calls "the most rigorous and interesting contemporary representative of this strand of liberal legal philosophy," who espouse the "law as police officer" view with the thinking of Joseph Raz whose writings she deploys to articulate a "powerful critique and corrective of Feinberg's liberal legal theory." The key difference between the two is that Raz rejects the idea that liberty is value-neutral, and instead insists that human freedom "is oriented toward enabling and supporting human beings in living morally valuable ways of life." Put differently, the "ultimate point of negative freedom is positive freedom: the agents' freedom from the restrictions and requirements of others bears fruit only when the agents grab hold of that opportunity in a positive way to help shape their own identities and place their imprints upon the circumstances under which they will live." Here we see a theme articulated in the book "The Unintended Reformation" by Brad Gregory, who traced the change from a positive ethic of the good to a formal ethics of rights through history. It is the central conundrum of the modern state.

For Kaveny, the Americans with Disabilities Act is a perfect example of how law can achieve autonomy as Raz understands the term as well as solidarity, as understood in the writings of Pope John Paul II. She notes the deeply personalistic title of the law: It is not the Disabled Americans Act, which would focus on the disability first. It is the Americans with Disabilities Act, focusing first and foremost on our shared identity as Americans. There is a teaching in the arrangement of the words. Turning to Aquinas she concludes her assessment of the ADA by noting: "Civil law can neither dictate all virtuous actions nor prohibit all vices; in the main, its lessons must be geared to persons of ordinary virtue. Its most severe sanctions, the sanctions of the criminal law, must be applied to reinforce its most basic, remedial lessons. Severe sanctions should be used to reinforce and maintain a moral consensus, not to establish a brand-new consensus. Less severe tools, such as the incentives of tort law, administrative law, and tax law, can be used to direct society in a more morally appropriate direction, without provoking a counterproductive backlash. As Aquinas recognized, sound law must be geared to the customs of the country; the very legitimacy of law itself is threatened if legal sanctions, particularly criminal sanctions, are ignored by large numbers of the citizenry." This is the kind of commonsensical moralism that has always distinguished the best in Thomistic thought. Kaveny brings it to new life throughout this volume.

Monday, I will conclude this review of Kaveny's book. Now, I am off to the airport for my annual pilgrimage to Puerto Rico and the celebration of my birth, so no more posts today. Enjoy the weekend.

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