NATIONAL CATHOLIC REPORTER
Published on *National Catholic Reporter* (http://ncronline.org)

Review: Law's Virtues, Part II

Michael Sean Winters | Feb. 25, 2013 Distinctly Catholic

Friday, I began my review of Cathleen Kaveny?s *Law?s Virtues: Fostering Autonomy and Solidarity in American Society* and today we continue looking at this important book. (I had thought to conclude the review today, but I think two more commentaries are required, and we will conclude tomorrow.)

As mentioned Friday, much of Kaveny?s book takes classic Thomastic ideas, a large dose of Joseph Raz?s theories on autonomy, John Paul II?s writings on solidarity, and applies these ideas to contemporary legal issues that have significant moral import. Before getting to my favorite part of the book, let?s look at one more of these applications, Kaveny?s treatment of assisted physician suicide and euthanasia.

Kaveny starts by looking at the Supreme Court?s two 1997 decisions relating to physician assisted suicide, *Washington v. Glucksberg* and *Vacco v. Quill*. The court declined to follow the logic proposed by some, that because the Court had previously admitted there was a right to refuse treatment, there is really no difference between refusing treatment and actively pursuing one?s death, and so there is a constitutional right to physician assisted suicide. The distinction between the two is well known in Catholic moral theory, which has long distinguished between the obligation to take extraordinary means for preserving life and the moral requirement of providing ordinary means of human sustenance. The Court, however, did not go as far as Catholic moral theory goes and proscribe physician assisted suicide. Instead, it left the matter to the states. Kaveny considers these two decisions, along with an earlier decision in Cruzan v. Director, Missouri Dept. of Health, and concludes that together they ?limn a jurisprudential success story regarding one of the most controversial medical-moral questions of our time.?

Critically, as Kaveny explains, the rights-only focus of some liberal legal theorists hits a bump on this issue. She writes:

In virtually no other context is the socially conditioned nature of autonomy clearer than in end-of-life decision making. On the one hand, those who defend the legalization of assisted suicide and euthanasia point out that the laws against such practices impede the autonomous choice of some patients to end their lives with the aid of a physician?s expertise. On the other hand, opponents to legalization also have an autonomy-based argument at their disposal: if assisted suicide (and euthanasia) is legalized, the possibility that other patients will be coerced or manipulated into making that fateful choice for the benefit of third parties (such as family members) is substantially increased. Some might object that patients can always rebuff any attempts at coercion or manipulation. But while the young, healthy and independent might undertake that battle, those whose physical and mental strength are quickly waning might not have the same ability to do so.

This last practical consideration was, in fact, indirectly the source of some of the reasonings put forward by the Supreme Court justices in deciding the cases before them. She notes that, at first, the opinion of Justice David Souter in *Glucksberg* appears to side with the liberal preference to extend rights, including a supposed ?right-to-die,? but that what tips the scales for Souter is the experience of assisted suicide in the Netherlands. There, it

became obvious that some people had been killed who might not have wanted to die, at least not yet. The concern about manipulation and coercion became not a theoretical concern but a real experience. Indeed, as Kaveny remarks, the Court?s opinions largely stayed away from the philosophical arguments about the issue, leaving such considerations to the people and their elected representatives. She writes, ?The justices? refusal to decide the answers for themselves does not imply that the questions were in any way unworthy; rather, the Court was simply acknowledging the limits of its role, not only as the ultimate representative of the judicial branch of our government but also as a moral teacher to our nation. Like any good teacher, the Court has honored the fact that the student herself must ultimately control the formation of her own character.? Here is an understanding of judicial restraint that I can live with!

Kaveny goes on to point out how the law itself, not Catholic moral theory, can and should be applied to reach the same differentiation we Catholics make between actively pursuing one?s demise and the already recognized right to refuse treatment. The law has long forbidden battery, so one does have a right to refuse to be strapped to a gurney and receive medical treatment. The liberty interest ?to live unencumbered by unwelcome medical treatment? does not, however, establish a positive right-to-die. Further, while Catholic moral theory can rightly insist that one can never intend death by, say, taking more morphine, one can take more morphine with the intention of relieving pain, even if one foresees that the additional morphine will hasten the likelihood of death. This difference may be crystal clear to Catholic moral theologians but the circumstances in which the difference is found are usually so murky that they are ill-suited to legal interference even if the Court thought it wrong to intend the hastening of one?s death. What would constitute proof? Whom would one prosecute? In short, the law can go so far but no further. These distinctions Kaveny draws are rich in wisdom and they demonstrate prudence in action in ways that commend themselves to all jurists, thinkers, moral theologians and politicians.

Now, on to my favorites. The last chapters of the book deal with voting, morality and the law. They should be mandatory reading for every member of the United States Conference of Catholic Bishop and for their staff, too. She begins by entering into critical dialogue with the bishops? document ?Faithful Citizenship? issued in advance of the 2004 and 2008 elections, and re-issued with an Introductory Note before the last election. She contrasts these documents with the bishops? 1976 document ?Political Responsibility,? which still reads pretty well. The most obvious shift between the documents is the increasing focus on abortion as the primary political concern for Catholic voters and the justification for this prioritization of abortion because it constitutes an ?intrinsic evil.? She also notes that polls indicate very few Catholics have actually read Faithful Citizenship, which may suggest that the bishops consider a shorter, more pithy statement next election cycle.

?Faithful Citizenship? is an issues-focused document. Perhaps the bishops were mindful of the fact that they cannot, by law, endorse particular candidates for office. But, as Kaveny writes, ?It would have been wise for the bishops to focus on what it means to vote for a candidate rather than an issue? and that they should help Catholic voters reflect on ?the general qualifications of a candidate, in terms of his or her competence, collaborative abilities, connections and character.? The fact is that no one should feel a moral obligation to vote for a pro-life candidate if one suspects the candidate is only giving lip service to the cause, or if the candidate seeks an office that might not have any appreciable impact on the issue. As well, Kaveny explains the limits regarding the concept of intrinsic evil. She writes, ?The Church teaches that abortion is both an intrinsic evil and an infamy. It is not, however, an infamy because it is an intrinsic evil.? In short, the fact that abortion is an intrinsic evil, and the fact that a given candidate opposes or supports legal abortion, these facts do not exhaust the necessary considerations appropriate to casting one?s vote in a moral way.

Additionally, as Kaveny points out, ?a second distinction the bishops might have helpfully drawn was between those issues that were ripe for intervention by those serving in higher political office and those that were not.? She notes that the issues of universal health insurance, the legality of ?enhanced interrogation,? and federal funding for embryonic stem cell research were all ?ripe? in the 2008 election. These issues all lack the fundamental character of the abortion issue, but that does not make them extraneous or devoid of significant

moral consideration.

Conversely, Kaveny asks if the abortion issue really was ripe in 2008 or if it is so today. ?The bishops justifiably consider the legal status of abortion a fundamental issue in that it goes to the basic question of who counts as an equally protectable member of our political society. Why not, then, make it an absolute priority in voting? A key difficulty with doing so stems from the fact that changing that status does not score nearly as high on the scales of urgency, amenability to improvement, or ripeness, at least at the federal level.? I can hear the cries of objection, and so could Kaveny. She continues: ?By suggesting that abortion is not an urgent federal issue, let me emphasize again that I am not implying that it is not important or even fundamental. I mean only to say that its status does not threaten the current stability of the government or the society?s ability to function?.part of the reason abortion is such an intractable issue for the pro-life movement is that social patterns have crystallized around the fact that abortion is a readily available and widely used option ? a legal option ? with which to address an unwanted pregnancy.? That this fact is dreadful does not erase its reality. We must make abortion unthinkable if we ever hope to make abortion illegal without courting social instability or a huge backlash that might yield entirely unintended and yet worse consequences for the ?culture of life? we all seek. And, using ?intrinsic evil? as a rhetorical device, and making it the centerpiece of a prophetic stance against the culture, is deeply problematic. Kaveny is especially strong on the limits of the prophetic stance.

The advocates of voting only on the basis on intrinsic evils are engaged in a shell game. The posit that some issues, because they involve intrinsic evils, are ?non-negotiable? while other issues, which require prudential judgment, permit a wide variety of opinions by Catholics. But, even if we are convinced that abortion is both and grave and an intrinsic evil, and even if the issue were seen as ?ripe,? we still need to think prudentially about what can be done to stop it. What backlash do we foresee? What are the penalties if abortion is made illegal? Who goes to jail? Pro-life advocates more or less acknowledge this need for prudential judgment insofar as they have largely abandoned the effort to pass a constitutional amendment to ban abortion and have, instead, advocated electing officials who will appoint judges who will overturn *Roe*. Conversely, while issues like federal funding of programs that assist the poor require prudential judgment, the moral obligation to assist and protect the poor is no less grave than the moral obligation to protect and assist the unborn. Prudence, too, is a virtue. There are right or wrong answers to issues that require prudential judgment. Prudential judgment is not, in Meghan Clark?s memorable phrase, a ?get out of jail free? card.

Kaveny recognizes how the failure to get these concepts right can lead to dangerous ecclesiastical consequences. She writes:

Even Catholics who agree with the teaching that intrinsically evil acts are always wrong may reach different conclusions about which situations pose the greatest immediate threat to the common good, and the best way to alleviate the danger. Threatening situations can be posed by intrinsic evils (e.g. abortion), nonintrinsic evils (the threat of war escalating to nuclear conflagration), or even natural evils (a catastrophic tsunami or major earthquake). In a representative democracy, disagreement about the nature of threats to the common good, and the appropriate response to those threats, will lead to political divisions. It should not lead, however, to ecclesiastical divisions. To suggest that Catholics must politically prioritize opposition to intrinsically evil acts simply because we should all agree that those acts are wrong comes dangerously close to substituting political unity for ecclesiastical unity.

This, especially, should give the bishops, and others who over-emphasize the intrinsic evil argument, and put it to prophetic purposes, pause. One of the greatnesses of the Catholic intellectual tradition is its capacity to maintain unity in part by permitting legitimate diversity. Key theological concepts can be rigorous and useful, but when misapplied, threaten the endurance or relevance of those key concepts, with potentially disastrous ecclesial consequences.

Last year, the USCCB decided not to amend its core document ?Faithful Citizenship.? In the event, most of us on the left could live with that decision because of the fear that any amendment would make the document worse. But, the bishops need to seriously consider the analysis of the concepts of intrinsic evil and prudential judgment that Kaveny raises. Simply put, the way the bishops currently employ these terms does not honor their original meaning in classic Catholic moral theology.

Tomorrow: Kaveny?s analysis of cooperation with evil.

Note to readers: Despite assurances to the contrary from the rental agent, the apartment we are renting here in Puerto Rico does not have wifi. In the morning, the closest place that does have wifi is a nearby Subway shop, but there is something so grim about the picture of a gringo like me sitting in an outpost of US commercial imperialism while on vacation, I can only run in, post the item I drafted off-line, and depart. Besides, it is a vacation. Ergo, I will not be putting up links throughout the morning as I usually do. Enjoy the break. I shall.

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