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Review: Law's Virtues, Part III

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Distinctly Catholic

Today we conclude our review of Cathleen Kaveny's *Law's Virtues: Fostering Autonomy and Solidarity in American Society*, specifically the final chapter in which she considers an issue at the heart of the debate over the HHS contraception mandate, cooperation with evil. Kaveny is focused on how this variety of moral analysis applies to voting and political behavior, but it is also helpful in clarifying the Church's response to the mandate.

Kaveny begins her treatment of the issue of cooperation with evil with a quote from a letter written to his parishioners by the Rev. Jay Scott Newman, pastor of St. Mary's Church in Greenville, South Carolina, the week after the 2008 election. Father Newman wrote:

Voting for a pro-abortion politician when a plausible pro-life alternative exists constitutes material cooperation with intrinsic evil, and those Catholics who do so place themselves outside of the full communion of Christ's Church and under the judgment of divine law. Persons in this condition should not receive Holy Communion until and unless they are reconciled to God in the Sacrament of Penance, lest they eat and drink their own condemnation.

Kaveny replies to Father Newman: "While rhetorically effective, this concatenation of "intrinsically evil" and "cooperation with evil" is conceptually unsound. It mistakenly implies that the two qualities, when added together, yield some sort of Total Moral Monstrosity Quotient. A compelling appeal, to be sure? but it is just not true."

I should note here that I especially liked Kaveny's use of this letter to open her discussion because Father Newman is one of my oldest and dearest friends on the planet. Needless to say, we seldom agree on

matters ecclesiastical, and even less often on politics. The fact that a man as smart as Father Newman, and as committed to the Church, could get such fundamental concepts wrong, illustrates one of the great values of the Church's way of doing theology. For Catholics, theology is not a solitary or individual enterprise, we do it together, and correct each other; it is a school, not a private pulpit. And ? God love him ? Father Newman is unlikely to be pope anytime soon so the gift of infallibility does not attach.

Kaveny provides a useful ?primer? on the issue of cooperation with evil, the essential question of which is, as she writes, ?When is it wrong to facilitate or to make use of the wrongful act of another?? She notes the way our legal system approaches this issue, such as laws against conspiracy in criminal law and issues of corporate responsibility in tort law. She locates the roots of the issue of cooperation with evil in the doctrine of original sin, and considers the way the issue has been considered historically, by both Reinhold Niebuhr and the manualist Catholic tradition of providing guidance for confessors. ?The Catholic moral tradition,? Kaveny concludes, ?has developed an elaborate, technical matrix for evaluating cooperation with evil in order to take due account of the complexity of these situations. The matrix is not a computer program; it is not meant to generate undebatable answers to what are undeniably complicated questions?.its function is to illuminate some of the salient issues that potential cooperators should consider in evaluating the moral status of their actions.?

In relation to voting, however, the issue is exceedingly complicated and is inevitably coarse when applied too stringently. She quotes both Archbishop Charles Chaput and Cardinal Raymond Burke who, she argues, apply the concept in just such a coarse way. Kaveny contrasts their application with that of then-Cardinal Joseph Ratzinger. She notes that Ratzinger grasped what seems to have escaped Chaput in cases of material cooperation, as opposed to formal cooperation, with evil: ?the cooperators do not intend to further the wrongdoing of other agents. Instead, the cooperators act for their own legitimate ends, foreseeing but not intending that their action will facilitate that wrongdoing?.material cooperators *do* foresee their facilitation.? Whereas Ratzinger thinks it is wrong to vote for a pro-choice politician because of that politician's pro-choice position, but one may vote the politician for other proportionate reasons, Chaput and Burke, seeing no proportionate reasons, make an absolute of Ratzinger's careful qualified analysis. Again, we have the shell game. There are few evils as great as that of abortion, but in voting, one is casting a ballot for a candidate, not engaging in a referendum. The proper proportionate reason could be, for example, the voter's conviction that the pro-life politician will have little chance of changing the nation's legal regime regarding abortion, or the different but plausible conclusion that no politician can, at this moment in time, greatly affect the issue, while the pro-choice politician is committed to ending a war and is seeking a position like the presidency that will deliver the authority to do so. This calculation is not exactly far-fetched seeing as three consecutive, pro-life Republican presidents have failed to seriously change either the laws or cultural attitudes regarding abortion.

Voting is fundamentally an assessment of, and a participation in, the common good. Cardinal Burke once said:

But, there is no element of the common good, no morally good practice, which a candidate may promote and to which a voter may be dedicated, which could justify voting for a candidate who also endorses and supports the deliberate killing of the unborn, euthanasia, or the recognition of a same-sex relationship as a legal marriage. The respect for the inviolable dignity of innocent human life and for the integrity of marriage and the family are so fundamental to the common good that they cannot be subordinated to any other cause, no matter how good it may be.

Kaveny calls this analysis of the common good ?deeply inadequate.? She notes that he assumes that :the components of the common good are layered, or lexically ordered: that is, the first or ?fundamental? level must be secured completely before we can turn to the second, and so on.? But, as Kaveny notes, voters

could prioritize fighting terrorism after 9/11 or fixing the economy in 2008, seeing as no candidate in 2004 or 2008 appeared likely to do much to actually restrict, still less eliminate, abortion. ?Burke?s view would suggest that between 1776 and the Civil War no virtuous Americans could have considered any other aspect of the common good but the moral imperative to outlaw slavery,? Kaveny writes. ?That position strikes me as too extreme.? I am anxious to know what Father Newman, who is a son of the South, thinks of Kaveny?s observation! I have no doubt that she is correct in her conclusion: ?Ultimately, it is implausible to hold that the common good requires focus upon only one issue at a time.?

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Finally, Kaveny looks at how the issue of cooperation with evil needs to be advanced by our Church?s moral theologians, suggesting new area for investigation and analysis. For example, she notes that while the Catholic moral tradition has a fully conceived analytical apparatus for individuals, and also a tradition of social thought for large organizations, more work needs to be done on the relationship between the two. In the age of multinational corporations, which it is almost impossible for an active citizen to avoid entirely, Kaveny is clearly right that this area needs further study and guidance. While Kaveny does not relate the discussions of cooperation with evil to the on-going debate over the HHS mandate, it is obvious that her book provides insights that challenge some of the more histrionic claims made about the mandate while also challenging those who dismiss such concerns as ridiculous per se. The issue of cooperation with evil is significant and important, even if it is sometimes stretched in ways that distort it.

There is much in this book that I have not considered in these past three days of reviews. Anyone who is interested in the relationship of morality and law should read this book. It would also be interesting to see Kaveny engage in dialogue with a serious and thoughtful canonist about the ways the civil law and the ecclesiastical law differ from, yet complement, one another. Kaveny?s book invites many scholars and non-scholars alike to think and think deeply, about how law intersects with other cultural dynamics in a pluralistic society and what a society that values both autonomy and solidarity should look like. I could scarcely commend this book with greater fervor. It is not often one reads a book about law and you do not want it to end. This is such a book.

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