

THE BROOKINGS INSTITUTION

LAW'S VIRTUES: EXPLORING THE TENSIONS BETWEEN LAW AND  
VALUES IN THE UNITED STATES

Washington, D.C.

Thursday, January 31, 2013

**PARTICIPANTS:**

**Moderator:**

WILLIAM GALSTON  
Senior Fellow and Ezra K. Zilkha Chair  
The Brookings Institution

**Presentation:**

CATHLEEN KAVENY,  
John P. Murphy Professor of Law and Professor of Theology  
University of Notre Dame

**Respondents:**

E.J. DIONNE, JR.,  
Senior Fellow  
The Brookings Institution

MICHAEL MORELAND,  
Vice Dean and Professor of Law  
Villanova University School of Law

MELISSA ROGERS,  
Nonresident Senior Fellow  
The Brookings Institution

MARGARET LITTLE,  
Director, Kennedy Institute of Ethics  
Associate Professor, Philosophy  
Georgetown University

\* \* \* \* \*

ANDERSON COURT REPORTING  
706 Duke Street, Suite 100  
Alexandria, VA 22314  
Phone (703) 519-7180 Fax (703) 519-7190

## P R O C E E D I N G S

MR. GALSTON: Okay. I think we can get started. Let me begin by introducing myself. I'm Bill Galston, a Senior Fellow in Governance Studies here at Brookings and on behalf of all sorts of people I'd like to welcome you here. This session is a joint production of the Religion, Policy and Politics Program in Governance Studies at Brookings. A program in which E.J. Dionne and Melissa Rogers, both of whom are here today and will speak shortly, have taken leading roles.

And also, the long running hit series *Governing Ideas*, now in its fifth year. And let me just tell you a little bit about this series. As those of you who are from Washington know, we spend an enormous amount of time talking about politics in this town. Occasionally, we roll up our sleeves and talk about policy but all too rarely do we talk about the broader sea of ideas in which all of this discussion is situated.

Ideas drawn from history, from culture, from philosophy and even religion. And we're gathered today, dearly beloved, to talk about one of the hoariest of these topics, namely the purposes of the law in general, in Constitutional democracies and in this very strange breed of liberal Constitutional democracy in which we find ourselves.

The immediate occasion of this discussion is a splendidly provocative book by Cathleen Kaveny *Laws, Virtues, Fostering Autonomy and Solidarity in American Society*. The observant among you will have noticed that there are -- the book is on sale on the back table. And I am reasonably confident that the author will be willing to autograph it for you if you are willing to buy it.

You have extensive bios in your packets and I'm not going to spend a lot of time on them. Suffice to say that Cathleen Kaveny, our lead presenter, is the John P. Murphy Foundation Professor of Law, Professor of Theology at Notre Dame. Mike

Moreland is Vice Dean and Professor of Law at Villanova. Given my understanding of human nature, Vice Dean sounds like quite a busy job. My question is do you report to the Virtue Dean or vice versa? You're that too? Well, I guess like the rest of the human race.

Margaret Little, who is Director of Georgetown's Kennedy Institute of Ethics and an Associate Professor in Georgetown's Philosophy Department. The aforementioned Melissa Rogers, who directs the Center for Religion and Public Affairs at Wake Forest University Divinity School and is also a Nonresident Senior Fellow with the Brookings Institution. A title that does not begin to do justice to the amount of work she does for Brookings and the contributions she makes to it.

And finally, a man who literally needs no introduction and therefore will receive almost none, E.J. Dionne, yeah, and a bit more, is a Senior Fellow at Brookings. As all of you know a syndicated columnist for *The Washington Post*, the University Professor in the Foundations of Democracy and Culture at Georgetown and a weekly commentator on National Public Radio and a regular contributor to numerous other outlets as well including MSNBC and "Meet the Press".

Now, with regard to procedure, it will be simple but demanding. Our lead presenter Cathleen Kaveny will talk for 15 minutes. Each of the commentators will talk for seven minutes. There'll be a certain amount of crosstalk on the panel. No doubt the commentators will say things that Professor Kaveny may wish to respond to. There will be a bit of time for that. And the last, say, 25 minutes or so will be reserved for a dialogue with you and as I've informed the speakers, there are these handsome two minute signs and then time's up signs that are right there. And if you really run far beyond or too far beyond time up then Grace Wallack will stand up and make you aware of your sins.

And I am done. So, without further ado, Professor Kaveny.

PROFESSOR KAVENY: Thank you very much, Bill.

MR. GALSTON: Oh, one other thing. In order to be heard you must press the speak button.

PROFESSOR KAVENY: Ah, okay.

MR. GALSTON: And when you're not speaking please turn it off so that we don't have reverb in the room.

PROFESSOR KAVENY: Oh, great, thank you. Well, thank you very much for your introduction and I can't tell you how grateful I am to my fellow ethicists, Maggie Little and Mike Moreland, for taking the time to read my book and come to this event. And to the Brookings Institution and Bill and Melissa and E.J. for organizing this.

When you write a book you think that nobody's going to read it and at most your mother is going to put the cover on your refrigerator, on her refrigerator, and it's just nice to have the work of writing a book be rewarded by the possibility of conversation such as this. So, thank you all very much.

And I have to say, thanks, especially to E.J. who has been a long time conversation partner for me in this end. One of the things about E.J. that's most amazing is all that he does. I was going to write a chapter on cloning and then I thought I'd have to deal with E.J. because the only way that I think E.J. can do everything he does so well is they must be three of them somewhere. So, I'm glad that one of them is taking time for this afternoon's event.

Well, the title of the books is *Law's Virtues*. In a way it has a couple of references. What are law's virtues? And in discerning the answer to that question I happened upon a quote from Isidore of Seville that was quoted in Thomas Aquinas. And that's in the preface of the book and it's really, I think, the key to the book. So, let me just

read it to you. He says, "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 and framed for no private benefit but for the common good."

And when I read that quotation from Isidore, I thought that's a pretty good list of what the virtues of good law are. How do we break those virtues down? Well, one thing, one way of breaking it down is to focus first on, well, law has to be virtuous and just. What are the virtues and what counts as the justice that law should inculcate?

I argue in this book that law does have a pedagogical function. All law in any society, in any framework, is always teaching something about how we live together, how we should live together, how we should treat each other. You can't avoid it. So, law is always going to be teaching some kind of vision of human flourishing and of morality.

But at the same time, these other characteristics of good law, you know, suitable to place and time, according to the custom of the country are also virtues of law as well as inculcating a good set of substantive virtues itself. You've got these procedural virtues that matter a lot, too. And any act of lawmaking, in order to be a good, a virtuous act of lawmaking I think has to one, inculcate the right virtues substantively but second, also pay attention to these other characteristics that Isidore of Seville articulated.

Virtuous lawmaking, a virtuous legislature needs to try to do both. And so, what I tried to do in this book is work out what that might mean paying attention to both the substantive virtues and the procedural virtues in our pluralistic liberal democracy. And that's sort of the point of the book. Trying to figure out what that would be.

I'm looking to try to come up with a version of law that's realistic without

being relativistic because I do think that there are virtues and there are good ways of living and bad ways of living and that it's not everything is just open to debate. And I think if you look at our Constitution we've got a frame that actually says that to some degree but also, optimistic without being utopian.

We don't all agree on all the details of what counts as a virtuous way of living. And we're not all virtuous all the time. So, how do you try to be realistic without being relativistic and optimistic without being utopian about our American project and particularly, the American legal project?

So, the first thing I look at is sort of the substantive question. What virtues should law teach? And in order to answer that question I draw on kind of two sets of sources, secular legal theory on the one hand and I'm also a theologian Roman Catholic theology on the other. Now, what I'm doing here, though, although I am a theologian isn't just trying to do a narrow bit of Roman Catholic theology. What I'm trying to do is draw on sources in a pluralistic environment. There are these sources; there are other sources, to try to make an argument.

And in a pluralistic society we have available to us sources from all sorts of writers and all sorts of traditions and I think one of the fruitful ways of trying to move our common life forward is to see where they converge. And where I saw a convergence, believe it or not, is with a secular liberal legal philosopher named Joseph Raz who taught for many years at Oxford and is, I think, at Columbia now full-time. And Pope John Paul II, the late Pope, Roman Catholic Pontiff.

How in the world would these two have anything in common, you might ask. Well, Joseph Raz is what's called a perfectionist liberal. What he says is we are a liberal community. We value freedom, autonomy, not because there's nothing that's valuable in the world, there's no choices that are valuable but because there are so many

valuable and incompatible ways of living. And what liberalism properly does is make room for some of that variety rather than forcing everybody into one narrow conception of a way of living.

And so, for somebody like Joseph Raz, what you need to foster autonomy is well, kind of a program for how we treat other people. You need to provide people with basic food, shelter, education so that they can make their own choices. Autonomy means self-rule. You need to make sure that they're kept free of coercion and manipulation. That's a second thing that you have to do because that isn't consistent with honoring somebody's autonomy.

And you need to provide them with a reasonable range of morally worthwhile options from which to choose in putting together their life. No society, including ours, can make every option available to every person because a lot of options are actually not just individual options but they're socially supported and enabled.

So, not everybody, and nobody in our era, can be a medieval knight. You know, you might try but you just can't do it. You can play at being a medieval knight but we don't have the horses, the castles, the moats and everything, the whole way that goes along with that. So, that's not an option that's supported in our society. But there are a wide variety of options that are supported in our society. So, that's Raz's understanding of autonomy.

What John Paul II does that I think is valuable to bring in conversation with this is this understanding of solidarity which says in some sense we're all really responsible for all particularly for the more vulnerable members of the community. That we have a responsibility to kind of enable and what I argue is the autonomy understood as Raz does it, in situations where people don't have those kind of options just by virtue of their birth or their talent or their situation.

So, I think you can bring together the notion of autonomy understood by Raz together with the understanding of solidarity as enabling and moving us together so that we are all autonomous in the way understood by Raz and we take care of each other's vulnerability when we're not.

And that's kind of the big structure of the book. Those are the values I think that we embody in our own culture. And I try to suggest that actually American law does that at some points in time. And my big example is the Americans with Disabilities Act. That's the example I use to suggest that if we look at American law in the right way we can see we've got these values of autonomy and solidarity working for us.

We have -- I start by looking at a very different type of law. They were called the "ugly laws" and they were on the streets of some Midwestern cities up until the early 1970s. So, the city of Chicago prohibited people with obvious disabilities from manifesting themselves on the public streets of Chicago. So, that's really the anti-Americans with Disabilities Act isn't it, right? What it says is if you are a person with disability, not only do we have no obligation to help you; you have an obligation not to put yourself in the way of the so-called normal people.

How different is that from the ADA which says we have to have public accessibility? Restaurants need to try to include, we need to have curb cuts, we need to have buses that make it possible for people who have difficulty moving around to be in our midst. And what I argue is that that's a very different normative vision of law, of life together, than say the ugly law had. That the Americans with Disabilities Act is teaching just like the ugly law taught. And the values that we're teaching with the ADA are in my view and in most of our view a much better set of values, autonomy and solidarity.

So, I try to say if we look in the right places we can see that in American law. Are there limits to the possibility of law teaching virtue? Oh, yes. Law has to be set



for ordinary people not saints. Law has to be according to the custom of the country so you can't just have your idea of a perfect vision of how we should all act and just simply try to legislate it. And I try to look at what this might mean in the context of three very difficult issues in our society, abortion, if you've got tenure you can talk about things, abortion, euthanasia and genetics.

And so, I kind of see how autonomy and solidarity and the law would work with respect to those three topics. And then in the end, I look at the question more focused on some of the Catholic Bishops' issues and issuing voting guides and thinking about what voting means as an act, as an American citizen and as a believer in how you think about those two sets of claims on yourself.

The way I approach, I'll just end with this, the way I approached writing the book I think shows, if I have to summarize my philosophical system in contemporary terms in just a phrase I'd say, I'm kind of Alasdair MacIntyre on Prozac. What do I mean by that? Well, I mean, MacIntyre talks about the historically situated nature of moral claims, moral traditions. He talks about justice and prudence being embedded in particular traditions and that you can't get to a point that's totally beyond that for an Archimedean and neutral perspective on which to deliver your moral norms.

And so, I don't think we can do that either. And so, I try to be honest about what the sources of my own norms are and try to reach out to people who disagree with me on say, issues of abortion or euthanasia or genetics. Because I think that it's possible to advocate certain positions, I'm Pro Life. I think that human -- I believe in protecting human dignity and that extends for me from the unborn life to people who are dying. But I don't think we need to talk about these issues in the culture war way that we've been proceeding to discuss them. I think if we open up the discussion, there's more room for a better conversation.

Thank you.

MR. GALSTON: Well, thanks so much. And now, for our first comment, Mike Moreland.

MR. MORELAND: Thank you, Bill, for moderating. Thanks to Brookings for the invitation to participate and to Cathy Kaveny for writing this book.

A brief personal note, in 1998, 15 years ago when I was first thinking about going to law school, I contacted Cathy for advice and she took me to breakfast at Notre Dame and encouraged me. Now, I'm a bit more conservative than Cathy in some respects and I went on to work in the White House for President George W. Bush, so she might regret having encouraged me. But I owe her a great deal of gratitude and it's nice to be able to say so at this platform.

And I am grateful for this book which brings Cathy's range of interests and insights to bear on so many of our contemporary problems. In this brief response, let me offer a brief note of reservation though, and then commend the book's treatment of a particular issue while still wondering how my reservations apply to that issue.

So, first my reservation. The book celebrates autonomy, a particular and highly technical view of autonomy to be sure, owing most to the important work of Joseph Raz. Now this probably isn't the place nor do we have the time to parse Raz's views about autonomy and pluralism. Suffice to say that many people have read *The Morality of Freedom* and others of Raz's central works several times and have a difficult time sort of figuring out the key aspects of the position. But I want to make two quick points about it here one, a conservative of a kind objection and the other a liberal of a kind objection.

The conservative hesitation is that American law and culture today celebrates autonomy Razian or otherwise too much. We don't need more boosters of autonomy. Raz and Kaveny have ways to be sure of circumscribing autonomy and

hemming it in with values like solidarity. But I would have liked to have seen here a more thorough consideration of the dark side of autonomy, consumerism, libertarianism of various kinds, economic and otherwise and so forth. Surely the Catholic tradition from which Cathy writes has, not to put it mildly, been a great booster of autonomy and actually for important theological reasons that we can set aside for now.

But I think the suggestion in the book that Razian autonomy overlaps significantly with Aquinas' understanding, say, of prudence takes things just a little too easily and I would have liked to see more by way of what those points of convergence are. We need, I think, a fuller account of how a distinctively modern and liberal, in the classical sense of liberal, account of autonomy sits alongside traditional accounts, many of them religious, of authority, paternalism, revelation and the good.

Raz, for his part, endorses a deep pluralism on account of this autonomy as he writes "incompatible forms of life are morally acceptable and they display distinct virtues, each capable of being pursued for its own sake." Thus the conservative reservation, but of course, Razian autonomy has been subject to criticism, much of it persuasive to my view from competing accounts within liberalism. As Martha Nussbaum, a critic of Raz on this score, points out "Raz's account of autonomy and pluralism is a view that the major religious and secular comprehensive doctrines in most modern societies," she writes, "would refuse to endorse."

For Nussbaum, and here she is in all important respects following John Rawls, "Razian autonomy bites off too much and gives insufficient place to equality and respect for persons, whatever comprehensive views Razian liberals, conservative Catholics, they happen to hold." Against my usual instincts, I think Nussbaum and Rawls are right about this.

As Nussbaum writes, "It is evident that the major religions can, in fact,

accept Rawlsian political liberalism but they cannot accept Raz's perfectionist liberalism. Roman Catholics," Martha Nussbaum writes, "for example, can agree with Rawls that we must ground toleration in a view of equal respect for persons. Such a person will still think her religion is true and others' false but respect for person still requires protecting the space in which each lives by her own lights. So, we get," Nussbaum concludes, "wide toleration but without expressive subordination."

Moving to a contemporary controversy in this area, the book includes two deeply thoughtful chapters on moral and legal aspects of euthanasia and physician assisted suicide. Like Cathy, I regard physician assisted suicide as wrongful. I was heartened when, just this past election season, Massachusetts narrowly rejected a ballot initiative to legalize physician assisted suicide, most especially when a wide range of voices and public debate, the Catholic Church and other Churches, the Boston Globe editorial page and Center to Kennedy's Widow, spoke out against the initiative.

Amid so much of the cacophony and the contemporary culture war, the debate over physician assisted suicide, which will of course continue, might present an opportunity for the book's ideals of autonomy and solidarity, a richer and nuanced account of the relation of law and morality and most especially as it pertains to the weak to be realized.

But one person who seems to think that a commitment to Razian autonomy would require a moral right to physician assisted suicide is Joseph Raz. In a lecture delivered last year, Raz while qualifying his endorsement of active euthanasia a great deal writes "that the power to decide the time and manner of one's death when widely used would contribute to the value of various episodes in one's life. The main positive effect I have in mine," he says, "is the full, guiltless acceptance of the power itself."

And so, I wonder in the end how the parts of the argument of the book in the first half on Razian autonomy and its importance sit with the deep concern that I share with Cathy about physician assisted suicide. It may turn out that physician assisted suicide depends on adopting a moral norm that has been taught authoritatively by religious traditions but how again that sits with autonomy is, I think, an unresolved question.

There is much, of course, I haven't touched upon including many arguments such as those at the beginning of the book on law's pedagogical function that I much admire and at the end of the book on the ethics of voting. There are novel contributions to the literature and law and religion. There are some gaps that I would have liked to have heard more on such as considerations of federalism and the distinctively American structural legal framework within which debates over law and morality are played.

But notwithstanding some of these reservations this is a scholarly but accessible treatment of many important issues in contemporary law and morality. And forges, I think, new and very important ground. And so, I end where I began. Thank you, Cathy.

PROFESSOR KAVENY: Thank you.

MR. GALSTON: And thank you. Margaret Little.

MS. LITTLE: Thank you so much. It is such a pleasure to be here. I have to say from the outset that I'm a huge of Cathy's. And I say that, I love how they've ordered us because in contrast to Michael I am a Pro Choice Feminist, super liberal, who actually wrote Pro Choice stuff from Georgetown before I got tenure and still got tenure. So, go Jesuits. That's all I can say.

Cathy and I have met before and have been on a podium before talking

ANDERSON COURT REPORTING  
706 Duke Street, Suite 100  
Alexandria, VA 22314  
Phone (703) 519-7180 Fax (703) 519-7190

about abortion which is one of the issues she and I both are passionate about. And one thing she said to me at one point was she thinks she's trying to do on the Pro Life side what I'm trying to do on the Pro Choice, which is to have more productive conversations that engage with the world as we find it instead of just having clashing ideologies at ever ascending levels of hostility.

What I want to talk about are two things. One, Cathy's, I think, fascinating broad view of what law is and second, how that ends up applying to abortion. You'll see that there's a lot that I admire here and a lot of questions that I still have. I'm sure that shocks everybody that you didn't answer all of them in this book.

So, first for the broad view of law. So, one of the things Cathy talks about is a received view in America about what the law's function is and a replacement view she wants to provide. The received view, she says, is best put in heuristic terms as law as the police officer. Where in a liberal society that values freedom you don't pass any law unless you're keeping somebody from hurting another person. So, it's only keeping people from harming others. And that the law is there to criminalize all the things, those few things that we can judge from the legal point of view.

So, we're supposed to leave everybody alone as much as we can. If there are any moral disagreements we're supposed to be morally neutral until we reach the stage where I'm actually harming another. Like John Stuart Mill says, "My right to extend my fist ends at Michael's nose." But until we get to those levels of actual concrete harm, the law needs to be silent and neutral and impartial. And when we are dealing with those harms, the law gets to throw us in jail. And that's the full extent of American law.

And Cathy, in this book, notes all sorts of limitations to that heuristic. First of all, she points out, "law," and this is where she does look to Joseph Raz and Obama has echoed some of these same sentiments, "law is not just about keeping us

from messing with each other. Law is about having a set of agreed on rules to build a community to live together." That part of law's function is to help facilitate its individual members being able to live good and flourishing lives, not just not hurt each other. And to do that it needs to build institutions and structures and possibilities for its citizens.

Okay, so there's a positive view of law going toward the good and aspirational function of law. Now, if law were only about tossing you in jail that would be a problem because you shouldn't toss people in jail for not being virtuous enough or not yielding the good enough. But that's where Cathy makes her second claim which is, "law is not just about criminalizing and throwing people in jail." There's a lot, in fact that's a small sliver of the law. A lot of laws about doing things like passing legislation that makes things possible like funding Civic Centers. That's not about criminal law.

Laws about passing regulations that tell people standards of professional activities that even if you don't meet then you're not tossed in jail. You just might be delicensed. Law has lots and lots of resources at its disposal for, and so here comes the replacement heuristic, law is a moral teacher. That part of what law, again understood broadly not just criminal law, but law in all of its modes of legislation, regulation, incentivizing, paying for, building common good, that law is and should have at its heart teaching us to be better than we are.

So, making it possible for us to have good lives and inspiring and promoting us to do so. Okay? So, first of all, I just think that's a very beautiful vision and much richer way to frame conversations about law's function.

Another theme that is a deeply important corollary for Cathy is that as law teaches, and this is taking seriously what that metaphor brings, it needs to take its people as it finds them. So, I actually am literally a moral teacher. I mean, my professional, like on my business card I teach ethics at Georgetown University. What I

do is teach students about morality. And I do hope that they know not just about the great books but that they leave the class being better people. It's the hope.

And one of the things that people who do morally pedagogy know is that you can't just paint the ideal and say, okay now you're going to become it. You need to take people at the developmental stage they are, so what it is to teach a 15 year old is different than a 20 year is different from a 50 year old. You need to teach them finding them where they're at in terms of their own beliefs and then try to stretch them. Right, to cantilever out their moral vision and one of the things that Cathy talks about then and now I'm going to abortion is, whatever your views on a topic, because we are a pluralist society that deeply disagrees about some things. We can't pretend it away.

But whatever your views about something like abortion, she's Pro Life, I'm Pro Choice, instead of putting all the effort into a sort of black and white solutions, so a battle of Constitutional rights interpretations, okay? Criminalize abortion, no. Be free from abortion and morally neutral. We need to take abortion situation as we actually find it in the world, which law in the past has not been very good at by the way. Law and moral and political theory were never designed with gestation in mind.

We don't have theories built up adequate to it. But Cathy in her book talks about what does it really mean even if for a Pro Life person you think the fetus is a person, a premise I respectfully disagree with. But if you like, think of the later stages of pregnancy when it does have status, even then if you want to protect the fetus you have to take into account the fact that that fetus has to, if it's going to be delivered, has to be sustained through a woman's body and her efforts.

So, whatever else you think about abortion, even if you think the fetus is a person, it's not just garden variety then it must be homicide. You need to think of what would the law do to protect the fetus but also understand the women who are in the



difficult situation of facing it.

MR. GALSTON: Thanks so much. Melissa. Melissa Rogers.

MS. ROGERS: Thanks so much. And I appreciate all the comments and especially Cathy and the work that she put into this book which I very much enjoyed.

I come at these issues not as an ethicist but rather as a lawyer and also as someone who has worked with and for religious organizations in Washington and beyond on various public policy and legal issues. So, I'll speak from that perspective.

First, I think without getting into all the fine detail that the ethicists did, I would say that I, like Cathy, believe that our legal framework should not be seen as value free or value neutral. And that often laws can and should reflect moral commitments that are widely shared across different cultures and different beliefs about religion. And I applaud Cathy for spelling that out in the detail that she does.

And I specifically want to thank her for lifting up laws like the American with Disabilities Act and the Civil Rights Act and talking about the deep morality that those laws reflect and how they teach us not only about what each person is due as a person of dignity and worth in the world but also about what our communities should look like. Drawing on Maggie's comments about an aspirational view of inclusion in our public spaces together as Americans.

As Cathy explains, these laws help to draw us together and to keep us from being isolated. And I applaud and value that very much. One of the notable facts about each of these laws that she describes is that they were backed by large interfaith coalitions. And those interfaith coalitions partnered with very diverse secular coalitions. And it was sort of a beautiful experience to see these coalitions coming together from so many different standpoints and rallying around the common good as they understood it through these laws.

And I would even say that to bring it to the present, a similar sort of coalition seems to be forming now, for example, around the drive for comprehensive immigration reform. It's in the papers this week, of course. Last week, Roll Call magazine noted that reform in this area is backed by an unusually diverse coalition of unions, corporations, law enforcement and religious and community groups. And that their strategies included praying over Biblical passages, registering Latino voters, mobilizing major demonstrations and organizing private meetings with members of Congress.

So, it looks like they've got a lot of bases covered. Of course, there's some really complex and sensitive issues for these coalitions to address. And they're not settled yet. But I would say that I hope that one day soon that this kind of incredibly rich coalition will cross the finish line too, with a kind of law that brings us together in a new way and appreciates and teaches about the common good to our fellow Americans.

At the same time, another point I want to make is Cathy properly notes that there should be limits to law. And the limits she talked about, some of them are pragmatic, some of them are Constitutional or at least constitutionally related and I just want to focus on one for a minute. She recognizes, for example, that there are spheres of activity that lie entirely beyond the proper authority of the State.

For instance, she says, "No Government has the authority to compel religious practice or belief." And I assume here that she means things like the law could not compel somebody to go to Mass or adopt a belief about the Trinity. And that's obviously right.

But I wonder if we might touch on some of the thornier related questions in this area. And one of those questions is how should the State respond when some religious individuals and organizations dissent from a law including one that is trying to

assert a certain moral vision and those religious individuals or dissenters, if we can call them that, believe that complying with that law would compel them to engage in practices that violate their religious convictions.

How do we address that question? I don't think Cathy took on that particular issue in this book but I know she's touched on it in other settings. And I just wonder if we might draw her out on that. As many of you know, the United States Supreme Court has spoken on this issue. Actually it's spoken on this issue several different times and in several different ways. Most recently, in a 1990 decision Justice Scalia wrote for a narrow Court majority and basically said that the claims of these dissenting minorities do not merit constitutional protection in most cases.

He said, and I quote, "We cannot tolerate a system in which each conscience is a law unto itself." At the time the decision was issued it didn't draw a lot of support. And indeed Congress strongly differed and it subsequently responded by enacting the Federal Religious Freedom Restoration Act. A law that applies to the Federal Governments and as a statutory matter requires heightened, although not absolute, protection for free exercise.

We may want to talk about the details of this law later but suffice it to say for now that riffer (?) sets forth a legal test that balances the State's interest and uniform application of the law against a religious interest in getting an exemption from that law. And so, I think that's an area we need to discuss as well.

Finally, I just want to commend Cathy for the very helpful way in which she discusses as a Pro Life person the issue of abortion and thank her for her interventions on the culture war issues generally. In this part of her book, Cathy coins a very helpful phrase "reasonable but wrong." Cathy say, "Living in a pluralistic society requires citizens to develop not only a sense of moral right and wrong but also a sense of

which views fall within the category of reasonable but wrong." I'll be using that phrase a lot.

I also want to commend Cathy for cautioning against the adoption of rhetoric in the mindsets of culture war. As she counsels, it is difficult to form a more perfect with one who -- one with others when one regards others as moral monsters. Surely we can do better than this and I hope we do in the future. And if we do it will be because people like Cathy Kaveny led the way. Thanks, Cathy.

MR. GALSTON: Thanks, Melissa. And finally, E.J. Dionne.

MR. DIONNE: Thank you very much. I should disclose at the outset I love Cathy Kaveny. I think that her contribution both to legal thought and Catholic thought, her contributions are extraordinary. I'd like her to be a Supreme Court Justice or US Senator or a Pope. Note that all these jobs would make her a virtuous lawmaker. So, I want to -- I am very happy that she is here with us.

I want to focus on three things. I don't want to talk about abortion except to read one sentence from Cathy's book. Because I think this one sentence suggests how troublesome the whole Pro Life Pro Choice dichotomy can be. And this is a sentence Cathy writes. She says, "Lawmakers who want to impose greater restrictions on abortion will need to consider whether, when and why it is permissible to require pregnant women to endure the burdens of continuing a pregnancy in a legal context that places no analogous demands of providing bodily support on parents, mothers or fathers after a child's birth."

Now imagine how different our abortion conversation would be if Pro-Lifers and Pro-Choicers tried to grapple with that sentence. So, thank you for that sentence, Cathy.

I want to focus quickly on three things, the value of her overall project,

ANDERSON COURT REPORTING  
706 Duke Street, Suite 100  
Alexandria, VA 22314  
Phone (703) 519-7180 Fax (703) 519-7190

her specific warnings to Catholics about the problem with using the idea of intrinsic evil as a helpful political category, American Magazine noted that chapter nine, her chapter on intrinsic evil and political responsibility is worth the whole price of the book. And I agree with that. And then lastly, I'm going to end the way Melissa did because I love, if I may put it this way, Cathy's nonviolent war on culture wars.

First, you could say that Cathy is trying either to Catholicize liberal thought or liberalize Catholic thought. But you could also say that she is simply trying to resolve a deep tension within contemporary American liberalism. And that is the tension between liberalism's emphasis on rights bearing individuals and its practical concern in the political realm with acts of charity and justice, particularly toward the neediest. Liberals are both individualists and communitarians and yet in the political debate they, we don't often work hard enough, I think, to explore both the relationship between these two commitments and their contradictions.

And here I think Cathy makes a large contribution by talking about autonomy and solidarity. Just to read one passage, "Together the virtues of autonomy and solidarity acknowledge the dignity of each human being as uniquely responsible for his or her own life and choices while underscoring the essentially social nature of human beings. The goal of any legal system is to promote the common good. The virtues of autonomy and solidarity remind us that the good of the community and the good of individuals that comprise it are intricately intertwined." And as has been mentioned she uses the Americans with Disabilities Act to really show how this works. Civil Rights Laws are another example that she alludes to, our Civil Rights Act.

Second point, for many Catholics, in fact, that something is seen as intrinsically evil and of course we're talking most of the time about abortion but not exclusively abortion, this automatically determines that this issue should take priority over

all other issues. Not so fast, says Cathy Kaveny. I quote, "From the prospective of the long tradition of Catholic moral theology, the fact that an act is called an intrinsic evil tells us two and only two things. First, it tells us why an action is wrong because the acting agent's object or immediate aims or purpose is wrong. Second, the fact that an act is intrinsically evil tells us that it is always wrong to perform this type of act. But characterizing an act as intrinsically evil says nothing about the comparative gravity of the act. Some acts are not intrinsically evil, driving while intoxicated, and yet they can be worse both objectively and subjectively than acts that are intrinsically evil. As I will illustrate some homicides are not intrinsically evil and some are."

And she has two wonderful examples which I won't go into in detail but one is if an FBI agent comes to your life and you have information on a terrorist and you lie to the FBI, that's different from lying to your aunt about, I think it was a flower, a particular flower that she happens to love and even though you think is hideous you lie to her. Yet, they're both intrinsically evil. How do you judge those?

Or it is not intrinsically evil if you burn down your business because you're trying to collect insurance money and happen to kill someone because your goal wasn't to kill someone. But it is intrinsically evil if someone whose husband has been suffering for months and months, if a wife finally agrees to help him kill himself. How do we judge those moral acts? And this has a lot of political implication.

And lastly, I just want to praise Cathy for her war against culture wars. I personally hate the culture war and I think it doesn't really speak to us as we are. I think of it in terms of the way we actually behave. Conservative parents of gay and lesbian children will stand up for their kids against bigotry no matter what their theoretical views about homosexuality. Most liberal parents, however open they are in theory to cultural experimentation will lay down the law to their kids on homework, dating practices, the

dangers of drunk driving and all of the rest.

A conservative friend of mine, a line I am never tired of quoting once said that a social conservative is a liberal with a daughter in high school. And to that I would add that a newly minted feminist is a conservative with a daughter in college or graduate school. And I think that's just true. And the culture war does not describe us the way we are, the culture war exploits our discontent and the task of politics is to heal them.

Cathy is a healer and since my time is running out I won't quote a long and wonderful passage she has on the costs of culture wars. I just want to quote one thing at the end. "My implicit hope is to sketch a view of law, moral pedagogy in a pluralistic society that could foster a culture of life without fueling culture wars. My hope is that more Americans will try to be teachers rather than warriors. And so, we should be." And so, I salute Cathy for following St. Francis in trying to be an instrument of peace in a very warlike, political and intellectual world.

MR. GALSTON: Well, this has been, I think, an exemplary panel both substantively and procedurally. I both congratulate you and thank you. I've always wondered what would have happened if Thomas Aquinas had met John Locke and I guess we know the answer now and it would be Joe Raz. Interesting.

MR. DIONNE: It sounds like one of those if they met in a bar jokes.

MR. GALSTON: Right, exactly. But okay. Cathy, I'm going to give you up to five minutes to reply to points of particular interest and concern. Then there will be a little bit of crosstalk and then we'll go to the audience for questions.

PROFESSOR KAVENY: Well, I can tell you how touched and honored I am that you both not only for the compliments but that such a brilliant group of people read my book and took it seriously. I mean, that just gets to the core of what I'm about. And I don't think anything I can say after that should interfere with that main thank you to

all of you on that.

Just a couple of points. And this is just continuing a conversation in a way. Michael was talking about liberty and you know my odd, in a way, merging or trying to merge or affiliate on the one hand the secular liberal legal philosopher Joseph Raz with Pope John Paul II on solidarity. And just a couple of things about that. The Magazine America did a review of the book and I think they were so surprised to see Joseph Raz there. You know, she uses Joseph Raz they didn't know who -- they wrote Joseph Ratzinger.

So, I emailed a colleague of mine John Finnis who's at Oxford and I said, "Joseph Raz for Pope." And so, we think we have to keep our thought in channels that are separate. I don't think we do. I think one of the great benefits of being in a pluralistic environment is that we can draw upon sources where we find them good. And can have a conversation that draws upon the best of them. And so, in my own constructive work that's what I try to do.

On autonomy I know for some conservatives, maybe some conservative Catholics the whole idea of autonomy is kind of a problematic notion. I think it needs to be retrieved. I don't think you can have Christianity; I'll be blunt, without a notion of autonomy. How can you read St. Paul, how can you talk about the freedom of a Christian, how can you talk about the Christian life without some good notion of what freedom is? Now, Augustine distinguished, as we know, between *libertas* which is freedom used for a good purpose and *liberum arbitrium*, you know, free choice which is more neutral.

What I think somebody like Joseph Raz gives us is the capacity to see a wide range of good, free choices living with, in the pluralistic world that we do. So, there are some options that Raz would say you can rule out. You don't have to make every



choice available. But one of the insights from living in a pluralist democracy I think we've got is that the range of good choices is a lot broader than many people have thought it was in the past. And so, I'm committed to that.

On Raz, this is funny, on Raz using Raz against Raz. I've sometimes Raz's views on particular issues don't always follow or don't follow necessarily from his bigger picture. And I actually had a conversation with Raz about his view of how do you understand the limits of law? And I said, well you know this doesn't seem to follow from what you were saying in this part of the book. You're kind of going in a different direction. And he was open to the conversation.

So, I think he's a brilliant thinker and I think you can use his thought in ways that maybe he himself wouldn't necessarily agree with. But it's the thought, I think, that counts. So, that's the first thing.

On abortion, I guess I would say to Maggie, I do think it's an extremely hard issue although I'm Pro Life. And the reason its hard is because there is no other circumstance in where you've got the most vulnerable person, and I do think of the unborn as a person, utterly physically, dependent upon what in many cases turns out to be the second most vulnerable group of people. And that I think is a tremendous, something that we need to take into account in coming to an appropriate understanding of the situation.

Also, American law, we're not very good about making each other take care of the vulnerable. I mean, as a whole. You walk by a two year old tipped over in a puddle and it's not your two year old or your puddle, you can keep walking. That's an aspect of American law that is not terribly congenial to me or to solidarity but how do we think about duties to one another, the duty to provide bodily life support in that broader context? What else would need to change about American law to support women

supporting unborn babies? That's what I would ask.

To Melissa, I think the thing is yeah, the whole HHS regs and the mandate to cover contraception. In a nutshell, my view is that there's a big amount of room between, on the one hand, the establishment clause and on the other hand the free exercise clause where it's an accommodation isn't required but can be good if we can work out a way to protect all of the interests at stake. So, what I would like to see is more negotiation in a pluralistic society about protecting various interests, seeing them as legitimate but trying to protect them. Not all of a sudden a big war and when you start talking about it in very big terms, you know, war on religious liberty, war on women, you're in a situation where you're not going to be likely to get to the nuanced compromise that you need to make or at least the nuanced creative legal drafting that will protect interests to the extent possible.

And what can I say to E.J.? He's been a friend and a role model and somebody who does day in, day out in his work and in his columns and on his television, models the kind of Catholic in the public square that I'd like to turn into someday, a grown up.

MR. DIONNE: No, you don't want to -- I'd rather be you, morally especially.

MR. GALSTON: Well, you know what that reminds me of. I heard this story from the late Paul Tully, a political operative of some note, and he was in a restaurant in Aspen, Colorado in 1988 and Gary Hart and Warren Beatty were having lunch together. And Paul nudged his companion and said, look at that. Gary Hart wants to be Warren Beatty and Warren Beatty wants to be Gary Hart.

I have all sorts of questions but I'm going to suppress them in the interests of five minutes of unconstrained crosstalk among the panelists after which we'll

go to you. And I'm not going to call on people. Just jump in for five minutes.

MS. LITTLE: Can I jump? Let me mention a reservation about the heuristic of laws teacher. So, I've already indicated everything I love about it but I do worry that it's misleading in the following way. When somebody is a teacher, two things are true. First of all, they tend to have a sense of what they're trying to teach that they have standing to teach. And second, it is sort of one directional that you teach the student. The student ends up being sort of the passive recipient. And both of those worry me as applied to law.

First of all, we are the law. So, the law is supposed to teach us but we're also supposed to be shifting and molding it. And more importantly, given that we are the law, we disagree very profoundly. And even if we all agree on those four virtues, part of the reason we can autonomy, solidarity, justice and there's another one, prudence. We can agree partly because they're stated very abstractly. It's when we get to operationalizing what they mean that we're going to have very deep, very entrenched disagreements. It doesn't have to be a war but so to go, for instance, to whether or not a one day old human embryo is a person or not, that's pretty fundamental, right?

Reasonable people will take different sides. What then is the teacher supposed to do?

MR. MORELAND: And maybe just following up briefly on that about what the law is supposed to do is who the lawmaker is in different contexts. I think one of the nice things the book brings out is by way of comparison with abortion, the way that the physician assisted suicide debate has unfolded over the last couple of decades was then the Supreme Court decided in 1997 in what I think was a great stroke of kind of Oakeshottian pragmatism by William Rehnquist, it said, we're not going to delve into the philosophical sort of debate about assisted suicide. And we're going to leave this to the

political branches.

And that means that in State legislatures or regulatory agencies or other kinds of lawmakers are sources of law. And that, I think, makes law more contextualized as a teacher than when the Supreme Court say tries to resolve an issue and often does so unsuccessfully.

But just to underscore what Maggie said, I agree that it would be interesting to unpack the metaphor of laws teacher and to be attentive to the ways in which different kinds of lawmakers or teachers in different kinds of context for different issues.

MR. DIONNE: The only thing I'd like to raise is perhaps for some people in the audience this whole Catholic argument about intrinsic evil is a very inside the game, and yet it is vitally important to how politics is carried out. Particularly how Catholics are asked to take positions. And it's key, I think, to a lot of disagreements among Catholics. If you do, I went over it quickly because I had seven minutes. I'd love you to talk a little bit about the way your thinking developed on that.

PROFESSOR KAVENY: Maggie, you know, you're right about working through what counts, you know, who is the teacher? I mean I do think that when we, and we're all teaching in different contexts. When the HHS passes regulations, when any kind of regulatory group passes regulations, it's trying to encourage people to act in a certain way. So, the people that are elected that are in the mode of lawmakers are doing their best to convey a normative mission.

Now, they're responsible to the people that elected them and in which case you could say the people at that point are the teachers.

What I would say about division is what I'd like them to say is yes. We've got, what we're doing has a moral message attached to it. We're conveying something

that's normative. How are we going to do that? And that requires for me taking into account how much opposition there is. How good people of good faith from other perspectives mean. And how far you can push even not only pragmatically but even morally, I mean how do you think about convincing?

Now, I don't want to have this beautiful kind of vision that lawmaking isn't about winners or losers. It is sometimes about winners or losers. You pass your law; you're putting in place a vision. But as you think about what it is you're doing it seems to me you have to think about the other people out there who may disagree, who may agree on some points. Who may not be able to go along with what you're saying.

I mean, it's sort of owning responsibility for that, the fact that law actually has a normative message and it's communicating to people how they should live. So, that's I guess what I want to say there.

On intrinsic evil, the nutshell version of this is basically Catholics are roughly a quarter of the population. The Catholic Church is hierarchically organized and that's a very good way to communicate kind of a more or less, not totally, unified message to the population because you've got a structure there that is designed to do that.

There are terms from Catholic moral theology that are hard to understand but sound very impressive. And I would say intrinsic evil, saying something is an intrinsic, that sounds horrendous. It sounds horrible. It sounds like you don't want to go anywhere near it. So, cooperation with evil, you know that sounds like the next Dan Brown movie. What's going on there?

So, we've got these highly technical terms that have a very emotional valence. And people say, well we can't cooperate with evil. Well, we do it all the time, right? Cooperation with evil is making, contributing in some way to somebody else's

wrongful act and it can range from saying, oh you want to kill your spouse, here's the gun just throw it in the lake when you're done. That's really cooperation with evil, to paying taxes and all the things that are done in our name with our tax money. Very remote and not intentional but we sort of have to do it.

So, there's a range of things that come under the category of cooperation with evil. Intrinsic evil is another technical term of Catholic moral theology that says why an act is wrong. It doesn't say how grave it is but it's got a very big prophetic valence. I don't think that it's helpful to use, I mean, as a Catholic moral theologian I think those terms have a lot of good within the integrity of the Catholic system.

So, I think it's important to preserve what they do with the points they make. And I think it's wrong to just use terms in the public sphere in a way that's designed to kind of get people to feel more than they think about what's involved. It's a kind of manipulation. So, it would violate my second Razian criteria to do that. You can make your point, they can make those points in other terms but they haven't.

So, we need to make the points in a pluralistic society even when we're talking to people of the same religion in a way that has some consistency with the broader tradition out of which we're speaking. And that's what I think is important.

MR. GALSTON: Terrific. Okay. Ladies and gentlemen of the jury, it's your turn. And I have a plea. If you please, first of all, when you're recognized, state your name and if you so choose your institutionally affiliation and secondly, short questions are to be preferred to long speeches.

Now, my understanding is that there are a couple of roving microphones in the room? Yes? Okay. So, I will recognize the first question. Where's the first hand? That gentleman right on the row there.

MR. ALTMAN: Hi, I'm Fred Altman. And in terms of current political

ANDERSON COURT REPORTING  
706 Duke Street, Suite 100  
Alexandria, VA 22314  
Phone (703) 519-7180 Fax (703) 519-7190

activities, would it be fair to characterize the budget position of the Democrats as solidarity and the budget position of the Republicans as autonomy?

MR. GALSTON: Welcome to Washington.

PROFESSOR KAVENY: I think that that would be too quick a move. I mean the trouble is, I mean I'm sure that that's how the Democrats would like to characterize it and that's how the Republicans would like to characterize it. Part of what you need to do is look at how the technical details of how things actually operate are working. And I'm not really competent to talk about that particular aspect of that and I'll leave to E.J. and other people on that point.

MR. DIONNE: One of the reasons I like the book so much is because I think that we often think of solidarity and autonomy as opposites where Cathy's argument is very much that solidarity and autonomy go together. And that the acts of solidarity can empower other people to be autonomous.

You can think of something as simple as student loans or scholarships. You can think of a whole series of things where a feeling of solidarity is designed to make somebody autonomous. And therefore, the question which was wonderful is actually probably a mistaken questions, how is it Kavenian terms.

MR. BENDER: My name is Ted Bender. Perhaps the panelists as well as Cathy might comment about a burning contemporary issue. Would it merit legitimacy as a culture war in the deepest profound sense of deliberating, i.e. banning assault weapons and large ammunition clips? I don't want to muddle things but it is, I think, a very painful pressing issue before the country and et cetera.

PROFESSOR KAVENY: I haven't studied the issue of assault weapons or the second amendment. My instinct is to say they should be banned. My judgment about the common good suggests that they should be banned. So, that's where I'm

coming from but what I haven't done and I need to do more before I'm going to write on this is I know that there are a lot of people who feel very differently about what role a gun plays in self-protection, in protecting the people against kind of a tyrannical Government.

I have not looked at that literature yet. I don't understand how the other side from my view thinks about this. And before I wrote on this, I'd have to see to try to at least feel sure I could at least articulate the position to myself. Because I mean I'm from New England and Rhode Island right near Connecticut and I don't understand the other side of the argument yet. And I can't write on something or judge something until I've really kind of absorbed that side.

MR. GALSTON: May I say that Washington would fall silent if they took that maxim to heart.

MR. DIONNE: I was going to say the same thing. Could I say quickly, I think one of the problems with this discussion is that what might be a more open and constructive argument about what kinds of laws on weapons might work get really muddled because they get turned into a culture war argument?

I have very strong views on this issue and get a lot of mail as a result. I'm for the assault weapons ban and the like. And what you realize is that there are many people are there who are strong supporters of gun rights who truly and passionately believe and it's a sincere belief, that people like me who live in Washington, grew up in New England are some kind of cultural elitists who have absolutely no understanding of the role of firearms in certain parts of the country, in rural cultures.

My brother-in-law who supports all of these laws nonetheless said, he's from Nebraska, his family owned a lot of firearms. And he said, you guys got to be careful because you don't understand that this was part of our way of life and we didn't all walk around shooting each other. But the problem is what does a culture war argument



do there? I don't think it does any work for us. It says you don't understand me therefore your views are illegitimate or vice versa, it can happen.

And that doesn't, that's not a very constructive argument as opposed to would we substantially reduce the number of Newtowns and other mass shootings with this that or the other action? And then we can have an honest debate over which actions would work. So, I think it often is a culture war argument but I think in this case, more than most, the culture war frame is particularly let's put it unconstructive.

MR. GALSTON: I'm going to take one more question from the rear of the room and then come up to the front. I think Phil Wallach had his hand up.

MR. WALLACH: Hi, I'm Phil Wallach from Brookings. And I'd just like to ask for some clarification of the law as teacher idea. We had it held in opposition to the law as policeman but then in your responses to the panelists you brought up the example of two years olds drowning in a puddle. And how you seemed disappointed that we don't have laws on the books speaking to that kind of issue. But we don't have an epidemic of people walking by two year olds drowning in puddles in this country either.

And so, in many of the laws that are proposed for that kind of thing would attach criminal liability. So, I'm wondering if you want the law to be acting as a teacher but you want it to be different than law as a policeman where we just throw everyone in jail, what exactly would the law be doing? And if you're saying that law should be on the books but not throw people in jail, whether that introduces a certain kind of hypocrisy into the law where we have something on the books that we don't really expect to be enforced.

PROFESSOR KAVENY: That's a really interesting question. I suppose where I was bringing -- I mean I have a lot of respect for the values that American law teaches and this business about the duty to aid actually came in in the context of looking

at kind of abortion and the context of the broader American abortion law.

So, that's how it came into the book. I don't think every law has to be a criminal law. And they're not all criminal law. Did you all see the end of the Seinfeld, maybe it was 10 years ago now, where they all made fun of this guy who was being mugged and they were laughing at him and then they got arrested for failure to aid.

There are some States that have a duty to aid law. They have it in France. It's on the books. It's part of creating a culture. It's not usually a felony. I think that most of the State's that have a law like this; it's a misdemeanor or a fine. So, it's not necessarily treated in a big way but it's still on the books and it's still enforced and it came up as part of the national conversation actually around the time of the Seinfeld episode and the time of Princess Diana's death. Because they were going to prosecute some of the reporters who basically were snapping pictures of the dying Princess rather than helping her get the medical attention she needed.

So, I do think there would be a way we could deal with this that wouldn't be extreme or simply criminalizing in a harsh way. And I think it's been done in a couple of States and in some foreign countries.

MR. GALSTON: Sir, and then over there.

MR. MITCHELL: Thank very much. I'm Garrett Mitchell and I write the Mitchell report. And I have to say this is one of those panels, Bill is famous for leading them and E.J. participating in them where what I'd really love to have is about two hours to think about all this before asking a question. But let me try something.

When I first read about this panel as I saying to Bill before I ran out and got my copy of HLA Heart and as I sat and listened to this really remarkable conversation, I was thinking to myself it would be interesting to have Jonathan Haidt here today, the fellow who just wrote the book about the *Righteous Mind*.

And so, where this led me was to think about years ago the Presidential Historian by the name of Tom Cronin had a theory about where he compared American politics to drama. And the way he did it was first act, second act and third act players. And in this construct all politicians were third act players which he said, that's not a pejorative. That's their job, that's where they come in.

And so, it struck me that we've been listening this afternoon to a conversation essentially between what I would call first act or maybe second act players. And so, I'm wondering if instead of sitting here today you had been asked to come up and talk to a group that no longer exists, but let's say the Democratic Study Group or some version thereof, what is it that you would say is in this first act book you've written that they could use in a practical way in their third act way in framing legislation? What are the things that you would love to have them take into account whether it's on the gun legislation or something else. I just would love to hear you talk about that.

PROFESSOR KAVENY: Okay. I guess what I would want them to see is that one; they've got to take responsibility for the moral message of the law, not just the criminal law but all of law. Tax code law has a moral message. What do we give tax breaks to? All of law is kind of communicating a message about what is good ways and bad ways to live and to take responsibility for that, first.

Secondly, the idea in the American legal system that what you do is you've got your position and you press as hard as you can to get it legally instantiated. And you know, you might now win on some and that counts as a failure and then you just come back and keep pressing. That involves a fundamental mistake about how good law operates. Good law doesn't just implement a blueprint of a good society in the abstract.

Good law had to take into account the community whose values it's promoting including in a pluralistic society the fact that very good people may disagree

with you about what counts as human flourishing. I think we can move beyond that in some ways, some cases it's going to be very neuralgic. But if we think of ourselves as being responsible to a vision of law that says good law has to respond to practical needs and to real people versus good law has to implement my blueprint of the good like, then I think we'd be on a better playing ground. And you wouldn't go back and say, well we failed because we didn't everything in the way we wanted it.

MR. GALSTON: so, this is a theology of depolarization. From your lips to Congress' ears. There's a question over there.

MR. MORELAND: Could I just add one more thing? Just one minute and I like what Cathy said but I also think one of the problems in American politics today in the third act is that speaking of laws, virtues, the moral teaching, pedagogical function of law, the left is very good when it comes to economics on that and the right is good when it comes to so-called social issues.

And the problem is that they both then have a hard time, I think, those of us who are Republicans have a hard time speaking in moral terms about the economy. And I think Democrats on the left have a hard time talking about the so-called social issues in ways that take seriously the moral arguments that those of us who disagree bring to bear.

I think that kind of taking Cathy's lesson to heart would be a great advance.

MS. ROGERS: Yes, I just wanted because this was a good point to respond quickly to Cathy's response to me and you know the time isn't long enough to see exactly, parse all the free exercises issues and we may or may not agree on what the last does or should require. But I'm very much with you; I wanted to say on the idea of trying to work through these issues as best we can with our rhetoric toned down and in as

much a consensual way as possible. And I'd just note that last year the Obama Administration said that they would open it and they have opened a rule making to try to come up with some rules that bridge some of these gaps.

Now, I'm confident that they won't bridge all of them. But I do think that on issues like the mandate that there can be more agreement if parties come to the table in good faith than there is presently. And I'm also very much with you on trying to encourage that kind of atmosphere for the resolution of many difficult issues of public policy and law.

PROFESSOR KAVENY: And I think, just to say, I've got a couple of blog posts on Commonweal about this. I actually saw the Obama compromise as a very important and very helpful step. I saw it as trying to say, look. We think that contraception is a public health issue. It's not just a question of private personal choice. And so, we're trying to make it more broadly available because the wellbeing of women and their children, their unborn children depends upon that.

At the same time, we're going to try to come up with a way to make it so that not only religious group that need a very tight exception but a broader array of religious groups won't have to pay for that. I thought that was a very good step on the part of the Obama Administration.

MS. LITTLE: I did, too.

PROFESSOR KAVENY: So, and I think that's, it was an act of good faith and I'd like to see the conversation with Catholic Health Association when the Bishops go forward on this. But I was heartened by that. I know that a lot of maybe Conservative Catholics were not as heartened by that. But one of the things that most heartened me is in the proposed rulemaking HHS said we are not saying that this broader group of Catholic Colleges and Universities who are not going to get the exemption, the pure

exemption are less religious.

That's not the issue. The issue is that they employ a broader range of people who may not have the same moral objections to contraception. And their interests count too. And I think that that's an important point to make.

MR. DIONNE: Five seconds. I just think what Cathy's -- I very much agree with what Cathy said. I was disappointed that once the Obama Administration realized that at the very least some accommodation needs to be made here, there wasn't a more open hand to say; actually can we work this out? Because there's some very difficult technical problems to try to do it in a way that provides as broad contraception coverage as possible consistent with an accommodation. But I felt that there was very little response, more from the Catholic Health Association than from other parts of the Catholic and religious community. And I still think it's possible to reach that accommodation.

And maybe we'll be surprised in the next, I'm hoping for a surprise in the next two months.

PROFESSOR KAVENY: A good surprise.

MR. DIONNE: Yes. I wouldn't be surprised if it weren't good I guess.

MR. GALSTON: Well, just a procedural note. We are getting pretty close to the end. I would like to recognize that very patient woman sitting in about the third row back. And then I will take the liberty of ending the formal session with a question of my own. And but I suspect pretty strongly that if you want to come up and raise questions afterwards then those who have to leave can leave, and those who want to stay and argue could stay and argue. And those who want to buy books can fork out their money and get their autograph.

MS. RUIZ: The very patient woman is Vanessa Ruiz. You were just

asked to imagine that you were addressing a room full of legislators and I would now like to change your audience to a room full of judges. And you started out by speaking of some of the criteria of what good laws would be. I think you mentioned Isidore of Seville.

PROFESSOR KAVENY: Yes.

MS. RUIZ: And specifically that law should be suitable to place and time. And I was wondering what comments or how, what applicability, if any, you think those criteria and especially that one have in the area of constitutional interpretation. Judges are not like legislatures but they are nonetheless law setters and especially in terms of interpreting the Constitution and originalist interpretation of the Constitution.

PROFESSOR KAVENY: Another hard question.

MR. GALSTON: In other words is Isidore advocating the living Constitution?

PROFESSOR KAVENY: I do, I mean, I don't, I'm not an originalist. And one of the reasons I'm not an originalist is I think is because I don't think that that works as a general account of how law operates. You know, I teach contract law to first year law students and you see development in law. You see the application of principles. You see a deeper understanding. You see the shift of a principle working in one context, in one place in time to a different place in time.

So, I would say that I favor an interpretation of the Constitution that's a developmental interpretation of the Constitution. Not an originalist view and not a view that takes a separate prepackaged theory and applies it to the case law. I believe very much in the case law tradition and in the common law tradition. That's how we've interpreted our Constitution and it has the constraints and the peculiar reasoning that's associated with common law judges. And I think that's a very good thing.

So, I'm not an originalist but I don't believe there's a single hermeneutical

key that can unlock the Constitution either. So, I'm epistemologically humble but I believe in development.

MR. GALSTON: Well, you've taken a side. Now, here's my question. And let me structure it in the following way. I'm going to address my question to Mike Moreland and after I've done that I'm going to invite Cathy to respond to his response. Then we'll see what happens.

PROFESSOR KAVENY: That's like a pool shot.

MR. GALSTON: A bank shot technically speaking. Okay. And back to this remarkable illegitimate offspring of Thomas Aquinas and John Locke, namely Joe Raz.

Now, you make an accurate and important point when you say Raz contends that the reason for protecting freedom stems not from the dearth of objective value but rather from a surfeit of such value. More specifically, he holds that the rationality for protecting freedom stems from the recognition there are a number of mutually incompatible but objectively worthwhile, morally worthwhile, ways of living one's life. All of which deserve protection precisely because they are objectively, morally worthwhile.

Now, as a student and devotee of Isaiah Berlin, I think I know where that comes from and I think I know where Raz got it. So, here's my question for Mike Moreland. From the Catholic standpoint as you understand it, what is the status of the proposition of morally worthwhile but mutually incompatible ways of life? Is that a proposition with which Catholic thought as you understand it is comfortable?

MR. MORELAND: It's a good question. It's a hard question. As I mentioned very briefly in my remarks I cite a non-Catholic authority, Martha Nussbaum, for the proposition that I think it's actually hard to square that with a Catholic view. And of



course, we'd have to qualify what we mean by Catholic view here.

But some of Raz's claims about the worthwhileness of mutually incompatible forms of life as morally compatible, that strikes me is hard to defend on the grounds that Raz defends it. And that's where as Nussbaum points out, I think a sort of Rawlsian view which is much more chaste with regard to what the -- with just respect and equality as the underlying norms is more congenial to Catholic thought.

It's a hard question and a too brief answer.

MR. GALSTON: Well, the reason I'm asking is that my understanding is that Thomas following Aristotle believes in the unity of the virtues and the unity of the good, not the incompatibility of different pieces of the good. So, from the standpoint of that more harmonious Catholic, morally harmonious Catholic teaching, Berlinian pluralism which is based on the idea ultimately of a conflictual universe, finds a very uncomfortable place. Does that make you a Catholic heretic?

PROFESSOR KAVENY: I think we've learned. I think it's possible and one of the things modernity and a pluralistic world have taught Catholicism that's somewhat embodied, not completely embodied, in *dignitatis humanae* is the sense that there is real value in say, other religious traditions, other ways of life, a life set in pursuing the good.

I mean, the Catholic vision of religious liberty is not rooted in a Rawlsian neutrality but it's rooted in the sense -- it's actually rooted in a very Thomistic sense that we are all designed in some sense to pursue the good. Now, designed, I don't want to use this in a heavy way but that human beings are the sort of creatures who pursue truth, beauty and good. And that, if we look around it, we can see in the lives our fellow citizens.

I think Catholicism, coming in contact with a lot of different cultures is not

going to become a relativist tradition but it's going to have to draw on some of its more mystical aspects. Some sense that we do not necessarily know how God has enabled all of this to relate to one another. But I can look at another life, another way of configuring life and see the value, see the fruits in it, see the goodness in it, see the integrity in it. And honor that even if I can't integrate it all within my Thomistic or neo-Thomistic or system.

So, I would say Berlin it's not totally compatible but on a political level it's compatible with a Catholicism that recognizes that what we don't know about God, the limits of what we can say is extremely important as well. And so, that's where I would find the compatibility.

MR. GALSTON: Well, you've all just learned something. This proposition is not a very Washington proposition but negative theology and moral plurality have something to do with one another. Thank you. And with that, please join me in thanking this extraordinary panel.

\* \* \* \* \*

## CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Carleton J. Anderson, III

(Signature and Seal on File)

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

Expires: November 30, 2016

ANDERSON COURT REPORTING  
706 Duke Street, Suite 100  
Alexandria, VA 22314  
Phone (703) 519-7180 Fax (703) 519-7190