

# Response and Rejoinder: On Voting, Intrinsic Evil, and Ranking of Political Issues

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**Editors' Note:** In volume 60, number 2, we published an article by Kevin L. Flannery, S.J., "Voting, Intrinsic Evil, and Commensuration." Below we publish a response by M. Cathleen Kaveny and a rejoinder by Kevin Flannery.

## Response by Cathleen Kaveny

The civil law has a pedagogical function, even in pluralistic liberal democracies such as the United States. The Civil Rights Acts, the Americans with Disabilities Act, and the Religious Freedom Restoration Act do far more than promulgate a disjointed set of prohibitions and requirements. They also point to, and partially instantiate, a normative vision about how we should live our lives together as fellow members of the same political community.

The point of *Law's Virtues: Fostering Autonomy and Solidarity in American Society*<sup>1</sup> is to explore how law can responsibly exercise its moral pedagogical function on controversial issues such as abortion, euthanasia, and genetic testing in a political context where not everyone shares the same sense of the good life. Its thesis is encapsulated in its title: On the one hand, I argue that the virtues that law should inculcate include the virtues of autonomy and solidarity, which I treat as aspects of the cardinal virtues of prudence and justice, respectively. On the other hand, I contend that sound law must exhibit *other* attributes—other virtues—in addition to encouraging the citizenry to act in a morally virtuous manner. What are these additional attributes? Isidore of Seville (d. 616) identified them in general terms fifteen hundred years ago:

Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good.<sup>2</sup>

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<sup>1</sup> Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012).

<sup>2</sup> Isidore of Seville, *Etymologies*, 5.21, as quoted in Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benzinger Brothers, 1948), I-II, q. 95, art. 3.

Except in a society composed entirely of totally wise and totally virtuous people, these criteria will generate tensions among themselves. What should lawmakers do, for example, if the “virtuous, just” law is not “possible to nature” or “according to the custom of the country”? What should policy makers propose when the citizens in a liberal democratic society have grave disagreements over the contents of a “virtuous” and “just” law on controverted topics? The goal of my book was to wrestle with these questions—and therefore to grapple with the internal tensions in Isidore’s definition of good law.

A fundamental objection that Kevin Flannery has to my book, I think, is that I do not absolutely prioritize the criteria of “virtuousness” and “justice” over the other, broadly pragmatic criteria for good law. Relatedly, he thinks that the normative indicia I develop for choosing among candidates for political office do not promote the common good, because my criteria do not prioritize combatting abortion and same-sex marriage.

Flannery marshals copious citations from St. Thomas Aquinas to illustrate Thomas’s commitment to the essential function of law in promoting justice and retraining acts of injustice. I have no objection to any of those citations; indeed; I cite most of those passages myself. But Flannery is providing only a partial picture of Thomas’s theory of law. Tellingly, one passage that Flannery does *not* quote from Aquinas is the article in which he explicitly endorses Isidore’s definition of good law.<sup>3</sup> Flannery does not acknowledge, much less grapple with, the fact that Aquinas is acutely sensitive to the reality that sound law has to be geared to the capabilities and customs of a particular community. Latin footnotes notwithstanding, Flannery is proof-texting from Aquinas, rather than grappling with the different components of Aquinas’s legal theory in a balanced manner.

## I. The Priorities of Prudence: The Crux of the Disagreement

Kevin Flannery’s basic point in response to my book is as follows: The Roman Catholic bishops (and others) who prioritize opposition to abortion, euthanasia, and same-sex marriage in political activity, including voting, are eminently justified in doing so. They are operating in accordance with the virtue of prudence, which analyzes all actions according to whether they are “in accordance with or repugnant to reason.”<sup>4</sup> Furthermore, precisely because they possess the virtue of prudence, they can see that opposition to these practices is “more important” because they entail “species of sin that threaten the structure of society—and morality—itsself.”<sup>5</sup> Consequently, good (docile) Catholics (and other people of good will) should defer to their judgments on these matters.

Let me note that Flannery does not unpack this sweeping claim, much less justify it with reference to the very different practices of abortion, euthanasia, and same-sex marriage, which play very different roles in American political life. Nor

<sup>3</sup> Aquinas, *ST*, I-II, q. 95, art. 3.

<sup>4</sup> Kevin L. Flannery, S.J., “Voting, Intrinsic Evil, and Commensuration,” *American Journal of Jurisprudence* 60 (2015): 181-97, 187.

<sup>5</sup> *Ibid.*

does he acknowledge a morally relevant distinction between the first two practices, which involve intentional killing of human beings, and the second, which involves a state-sanctioned life partnership and sexual relationship between consenting adults.

In fact, Flannery's analysis remains at a highly abstract level throughout his essay. He assesses issues from a theoretical perspective, not from a practical perspective. That, in my view, is the key to his misunderstanding of the virtue of prudence. He does not take sufficient account of the fact that prudence is a habit of the practical intellect, not of the speculative intellect. It does not remain at the level of principle, but rather brings things down to ground level; it engages the messy details and contingencies of action.<sup>6</sup> It considers various courses of action and possible outcomes. Prudence is "right reason of things to be done."<sup>7</sup> In the political realm, it involves innumerable practical judgements about what *can* be done in particular cases.<sup>8</sup>

Flannery might respond that while he does not himself bring the discussion down to the level of specific actions, he does give guidance about how to do so, or more precisely, about *who* should do so—the virtuous. He writes: "When a doubt is raised about a person's statement that this issue is of greater significance than that, we ask whether the person making the statement has the virtue of prudence or not, for only a prudent person reliably speaks the truth in such matters."<sup>9</sup> He goes on to emphasize that "Both candidates and counselors must have an 'eye' for justice and virtue. And voter must have an eye for those who have such an eye,"<sup>10</sup> It is not clear to me what follows from this rather cryptic statement. My criticism was directed specifically against the recent voting guides issued by the United States Conference of Catholic Bishops. Is Flannery intimating that their voting priorities merit deference *because* the bishops themselves are paragons of prudence? How, then, does he take into account the rather different ranking of priorities set forth by Pope Francis, who has quite publicly cautioned Catholics not to be "obsessed" with abortion and same sex marriage?<sup>11</sup> I invite Flannery to make his point on this matter more straightforwardly.

Kevin Flannery and I agree upon the importance of the virtues, and particularly the importance of prudence. We do, however, have substantially different

<sup>6</sup> As Aquinas states, "to prudence belongs not only the consideration of the reason, but also the application to action, which is the end of the practical reason. But no man can conveniently apply one thing to another, unless he knows both the thing to be applied, and the thing to which it has to be applied. Now actions are in singular matters: and so it is necessary for the prudent man to know both the universal principles of reason, and the singulars about which actions are concerned." Aquinas, *ST*, II-II, q. 47, art. 3.

<sup>7</sup> *Ibid.*, I-II, q. 57, art. 4.

<sup>8</sup> The eight quasi-integral parts of prudence focus on relating general principles to specific actions done in specific situations. *Ibid.*, II-II, q. 49. Consider, for example, Aquinas's justification of the part of "circumspection": "Since . . . prudence . . . is about singular matters of action, which contain many combinations of circumstances, it happens that a thing is good in itself and suitable to the end, and nevertheless becomes evil or unsuitable to the end, by reason of some combination of circumstances. *Ibid.*, I-II, q. 49 art 7.

<sup>9</sup> Flannery, 188.

<sup>10</sup> *Ibid.*, 190.

<sup>11</sup> Laurie Goodstein, "Pope Says Church is 'Obsessed with Gays, Abortion, and Birth Control,'" *New York Times*, September 19, 2013, A1.

understandings of its requirements, particularly in the political realm. The remainder of this response will flesh out and highlight some of our differences.

## II. Misunderstanding the Critique of Proportionalism

In the introductory paragraphs of his critique, Flannery suggests that I may be a proportionalist,” or perhaps a next-generation fellow traveler, dismissing my own protestations to the contrary. This allegation is unfounded, and if I may say so, nothing more than a convenient red herring. “Proportionalism” is an approach to moral reasoning condemned by Pope John Paul II in 1993 on the grounds that it amounted to an unacceptable form of consequentialism.<sup>12</sup> In Roman Catholic circles, tagging a fellow scholar with that particular label is rather like calling an American journalist a “commie pinko” in the McCarthy era, or even calling a law professor a “legal positivist” in the pages of this journal in the same time period, when the *American Journal of Jurisprudence* was called the *Natural Law Forum* and “legal positivism” was widely perceived by Roman Catholic moralists as rejecting the role of morality in lawmaking.<sup>13</sup> In all three cases, the use of the label functions rhetorically to signal communal disloyalty and moral danger; the users generally aim to control and contain ideas they perceive as destabilizing, rather than to engage them fairly.

Flannery seems to believe that opposition to a purely consequentialist moral theory translates into a widespread rejection of consideration any role for the consideration of consequences and circumstances in the moral life in general or in the morality of law-making in particular. But he is not alone in that mistaken belief. Many American bishops have made the same mistake, when they argued that Roman Catholic voters needed to prioritize political opposition to abortion and to same-sex marriage, precisely *because* the acts involved in these practices are “intrinsically evil.”<sup>14</sup> I have long been tempted to reply by quoting Inigo Montoya from *The Princess Bride*: “You keep using that word. I do not think it means what you think it means.”<sup>15</sup>

<sup>12</sup> Pope John Paul II, Encyclical Letter, *Veritatis splendor* (Regarding Certain Fundamental Questions of the Church’s Moral Teaching, 6 August 1993), no. 80. Many “proportionalists” have vigorously denied that the description of the theory included in the encyclical applied to them.

<sup>13</sup> Tensions have abated since that time: See, e.g., John Gardner, “Legal Positivism: 5½ Myths,” *American Journal of Jurisprudence* 46 (2001): 199–227 and John Finnis, “The Truth in Legal Positivism,” in *Collected Essays*, vol. 4: *Philosophy of Law* (Oxford: Oxford University Press, 2011), ch. 7.

<sup>14</sup> The definition of “intrinsically evil” acts with which I am centrally concerned in the book is that found in Pope John Paul II’s *Veritatis splendor*, no. 80. “Reason attests that there are objects of the human act which are by their nature “incapable of being ordered” to God, because they radically contradict the good of the person made in his image. These are the acts which, in the Church’s moral tradition, have been termed “intrinsically evil” (*intrinsece malum*): they are such *always and per se*, in other words, on account of their very object, and quite apart from the ulterior intentions of the one acting and the circumstances.”

<sup>15</sup> The 2008 and 2012 voting guides issued by the United States Conference of Catholic Bishops systematically confuses (and often conflates): 1) intrinsic evil; 2) grave evil; and 3) violations of justice. See, e.g., United States Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship*, para. 34: “Catholics often face difficult choices about how to vote. This is why it is so important to vote according to a well-formed conscience that perceives the proper relationship among moral goods. A Catholic cannot vote for a candidate who takes a position in favor of an

The “because” is the problem. It is here that the matter of proportionalism comes in. The Roman Catholic tradition has long held that a moral act is to be evaluated according its object, its end, and its circumstances. For an act to be morally acceptable, *all three* components have to be morally acceptable. The contemporary Roman Catholic moral tradition refers to an act that is wrong by reason of its object as an intrinsically evil act. In *Veritatis splendor*, John Paul rejected the views that sympathetic circumstances or a good end could justify performing an act that was wrong by reason of its object—which picks out the human act that the agent is actually doing.<sup>16</sup> He labeled the rejected views as “consequentialist” or “proportionalist.”<sup>17</sup>

At this point, some readers may be asking themselves: is there anything at stake here that is relevant beyond an intramural debate in Roman Catholic theology? In my view, yes. The underlying ethical and jurisprudential question is this: What are the jurisprudential ramifications of a view of morality that holds in principle that there are in fact some actions that are always wrong to perform? Is it possible to affirm both 1) that some acts are always wrong to perform, and 2) that the question of how such acts are to be treated by law and policy-makers involves additional considerations, including the likelihood that laws prohibiting such acts will be effective, and that their enforcement is an appropriate way to further the general good of the community?

I believe that holding this position is not only possible, it is also morally sound. Moreover, I think that Flannery’s charge against me of creeping proportionalism in fact depends upon him drawing illegitimate inferences from the condemnation of proportionalism. So before engaging Flannery’s critique in its particularities, it is worth highlighting some common illegitimate inferences from the proposition that there are some acts that are always wrong, no matter what the circumstances or larger purposes of the agent.

1. To say that there are intrinsically evil acts does not settle the question whether a particular type of action is intrinsically evil. So a moralist can simultaneously hold that 1) there are intrinsically evil acts; and 2) that a particular action, such as usury, contraception, or torture is not, in fact, an intrinsically evil act.<sup>18</sup>

intrinsic evil, such as abortion or racism, if the voter’s intent is to support that position. In such cases a Catholic would be guilty of formal cooperation in grave evil. At the same time, a voter should not use a candidate’s opposition to an intrinsic evil to justify indifference or inattentiveness to other important moral issues involving human life and dignity.”

<sup>16</sup> I suspect that one key dispute between Flannery and me is how to define the object of an act. In my view, the object cannot be described in purely physical terms, focusing on an external or causal account of the agent’s act. As *Veritatis splendor* recognizes (no. 78), in order to determine the object of an act, one has to put oneself in the perspective of the acting person, picking out the close-in or immediate purpose in acting. For example, suppose Jack the Ripper and a heart transplant surgeon make the same basic cuts, viewed externally, into the chest cavity of another. They are not engaged in the same moral act with the same object, although with different ends or ultimate purposes. Rather, they are engaged in different moral acts, defined by different objects. One is performing surgery, the other murder.

<sup>17</sup> Pope John Paul II, *Veritatis splendor*, no. 75.

<sup>18</sup> So from a logical perspective, one can dissent from the proposition that contraception is an intrinsically evil act, while not being a proportionalist. One would simply believe that although it is *not* intrinsically evil to use contraception, there are other intrinsically evil acts—say, murder or

2. To say that there are intrinsically evil acts does not settle the question about how to define any particular intrinsically evil act. Lying, for example, has long been treated as intrinsically evil by the Roman Catholic tradition. The first edition of the Catechism of the Catholic Church (1994) defined lying as “to speak or act against the truth in order to lead into error someone who has the right to know the truth.” while the second edition, based upon the official Latin text, defined it as “to speak or act against the truth in order to lead someone into error” (no. 2483).
3. To say that an act is intrinsically evil does not tell us anything about the gravity of that act. An intrinsically evil act may not be a gravely evil act.
4. To affirm the category of intrinsically evil acts does not entail believing that they exhaust the realm of acts that are wrong, or even seriously wrong. Actions can be wrong by virtue of their circumstances, or their larger purpose or motive. A properly targeted bombing strike may be vastly disproportionate under the criteria of just war theory.
5. To say that an act is intrinsically evil tells us nothing about how the act relates to the demands of justice. Not all intrinsically evil acts are violations of the virtues of justice. Official Catholic teaching treats masturbation as an intrinsically evil act. It is commonly understood as a violation of chastity, not justice.
6. Conversely, not all violations of justice are intrinsically evil acts. As I argued in my book, and as Flannery himself notes, an incident of driving while drunk is not intrinsically evil—but that does not mean that it is not seriously unjust in most instances.
7. The fact that an act is intrinsically evil does not create a presumption that any other act or intervention designed to stop it is justified.
8. The fact that an act is intrinsically evil does not mean that it is, per se, a proper subject for a legal prohibition, particularly a criminal legal prohibition. While St. Augustine treated adultery and fornication as evil acts, he did not think it appropriate to ban houses of prostitution.
9. It is *not* more appropriate or important for the legal system to target intrinsically evil acts that violate justice than to target acts that are not intrinsically evil, which also violate justice. Adultery is an intrinsically evil act that is unjust to the betrayed spouse. It is more important and more suitable to prohibit drunk driving—which is not an intrinsically evil act.
10. To invoke the importance of pragmatic considerations or consequences in evaluating many courses of action, including the best strategy for managing intrinsically evil acts with the tools of the legal system, does not make one a “consequentialist” or a “proportionalist.”

torture. At the same time, it is important to keep in mind that the debate about “proportionalism” arose initially in Roman Catholic thought in connection with the debates about the morality of contraception. One reason that generations of moral theologians who came of age after that time avoid the label “proportionalist” (and the whole debate about proportionalism) is that it seems to trap them in the ecclesiastical battles of a bygone era. See Aline H. Kalbian, “Where Have All the Proportionalists Gone,” *Journal of Religious Ethics* 30 (2002): 3–22.



11. To say that “the end does not justify the [morally wrong] means” does not only apply to intrinsically evil acts; it also applies to acts that are wrong by reason of circumstance or broader purpose.

In short, Pope John Paul II’s reaffirmation of the teaching that there are some actions that are wrong by reason of their object, not by reason of their broader circumstances or motive, is important. But it is not a universal solvent for all debated and debatable questions in the contemporary era.

### III. Questions about Action Theory

Flannery’s basic critique in the section II of his essay (“Intrinsic Evil and Thomas Aquinas”) seems to be this: Kaveny presents herself as a Thomist, but she does not do justice to his thought. She fails to recognize that “intrinsic evil” is not a Thomistic category. Kaveny may be right that “intrinsic evil” does not mean grave evil, but she does not see that Thomas’s action theory condemns on other grounds a wide range of actions, including but not limited to intrinsically evil acts. In particular, it is important to remember that for Thomas, all wrongful acts violate the virtue of prudence.

I have two points to make in response: As I said in my book, my approach is “broadly Thomistic.” I am using Thomas’s work as a source because his ideas about the nature of law and its relationship to morality continue to illuminate contemporary problems, not because I view him as an authority to which my views are subject. My objection to the use of the term “intrinsic evil” by some bishops and Catholic commentators in contemporary moral and political debates is not that it is not Thomistic—it is that it is not coherent.

I do not object to most of what Flannery says about Aquinas’s way of morally assessing human actions. In fact, I think his argument proves my point. Flannery says: “In a sense, for Thomas, any sin is intrinsically evil. It belongs to a species of sin, and any member of a species possesses the form that puts it into its species as its essence. But there are some species of sin that threaten the structure of society—and morality—itsself.”<sup>19</sup> According to Flannery, therefore, Thomas recognizes that a wide variety of actions can be sinful, and a wide variety of actions can undermine the virtue of justice and harm the common good—not just intrinsically evil actions. Consequently, neither Thomas nor Flannery can in good faith affirm the proposition that opposition to abortion and to same sex marriage ought to be at the top of the legislative agenda *because* they are intrinsically evil acts.

On some level, Flannery seems to recognize the problem. He quickly pivots, now talking about the need within a Thomistic framework to prioritize combatting acts that violate the virtue of justice. Since abortion and same-sex marriage, in his view, entail serious injustices, the bishops’ injunction to prioritize these issues is not incorrect from a Thomistic perspective. Functionally, Flannery is making a “no harm, no foul” argument. In his view, the bishops are targeting the appropriate practices for concern. The import of his argument is that the fact that they

<sup>19</sup> Flannery, 187.

highlight as decisive the “intrinsic evil” involved in such acts is technically incorrect, but eminently excusable.

My response is two-fold. First, terminology matters. Within the *contemporary* Roman Catholic moral tradition, the term “intrinsic evil” does have some determinate content. To say that an action or practice must be legally opposed *because* it is intrinsically evil is to point toward that content as a reason for action. But as I have argued in my book and above, that content does not provide the necessary justification for acting. Consequently, to use it in this manner is to corrupt our common tradition of moral reasoning. To do so in order to achieve the objective of electing politicians opposed to abortion and same-marriage is not only a cynical use of the Catholic moral tradition, it contributes to a widespread view that all attempts at moral reasoning are simply more-or-less transparent efforts to manipulate or dominate others.

Second, Flannery’s approach treats abortion and same-sex marriage as moral shape-shifters. These practices are intrinsic-evil/grave-evil/violations-of-justice/opposed-to-prudence; depending upon the context, one or the other of these categories is brought forward. But this sort of shape-shifting doesn’t facilitate careful moral analysis. Suppose one concedes that abortion is a grave evil and a violation of justice. It follows, then, that abortion must be grouped for moral and political consideration along with other grave evils and violations of injustice that harm the vulnerable. This was, in broad terms, the “consistent ethic approach” proposed in the 1990s by the late Archbishop of Chicago, Cardinal Joseph Bernardin, and reinvigorated by the Current Archbishop of Chicago, Cardinal Blase Cupich. In a recent column in the *Chicago Tribune*, Cupich made clear his opposition to abortion, as well to the cavalier treatment of fetal remains. Nonetheless, he insisted on situating abortion in a broader context of injustice:

While commerce in the remains of defenseless children is particularly repulsive, we should be no less appalled by the indifference toward the thousands of people who die daily for lack of decent medical care; who are denied rights by a broken immigration system and by racism; who suffer in hunger, joblessness and want; who pay the price of violence in gun-saturated neighborhoods; or who are executed by the state in the name of justice.

But it is precisely that sort of grouping that some American bishops and some Catholic scholars have resisted, because they want to prioritize opposition to abortion (and same-sex marriage). They have invoked the term “intrinsic evil” to justify that prioritization. But no amount of moral shape-shifting can hide the fact that this category does not do the work they have assigned to it.<sup>20</sup> That fact may not matter to political strategists, who may be willing to use any means necessary to achieve their political ends. But it ought to matter very much to moralists.

<sup>20</sup> Blase Cupich, “Planned Parenthood and the Muted Humanity of the Unborn,” *Chicago Tribune*, August 3, 2016.



#### IV. Law, Virtue, and Justice

In the third section of his essay (“Prudential Ranking”), Flannery suggests that issues are not incommensurable, but can be ranked by the politically prudent (and morally virtuous) by those with “an ‘eye’ for justice and virtue.” On these grounds, it appears, Flannery believes that the bishops are correct to urge voters to prioritize abortion and same sex marriage. Later in the essay, Flannery returns to this point, suggesting that I do not take due account of the fact that the point of the civil law is to promote justice, particularly by prohibiting grave acts of injustice. He quotes a well-known passage from Aquinas asking whether the law ought to prohibit all vices. Aquinas responds that the law ought not to prohibit all the vices, from which the virtuous abstain, but only the more serious, from which it is possible for the major part of the populace to abstain—and chiefly [*praecipue*] those which cause harm to others and without the prohibition of which human society could not be conserved; and so prohibited by human law are murder and theft and such things.<sup>21</sup>

But the very passage that Flannery quotes clearly invokes two broad criteria for good law: 1) grave injustice to another person, and 2) possibility of compliance. The real question facing the prudent voter is not whether grave injustice merits legal attention, but how to balance these two concerns. In case of conflict, which trumps?

Not only do I recognize the conflict between practicality and justice in Aquinas’s theory of law, I spend many pages in *Law’s Virtues* puzzling over how the conflict should be resolved.<sup>22</sup> I did not shirk from the hard questions: should we outlaw grave wrongdoing even in situations where such a prohibition is not practically enforceable? I constructed a hypothetical boomtown, “Deadwood,” and asked whether the town leaders needed to outlaw all instances of private lethal violence. I concluded it did not—because such a prohibition would be unworkable in that culture and context. I said: “It is far better for lawmakers not to promise what they cannot deliver, and to build up both their power and credibility gradually. At the same time, however, the law ought not to endorse morally questionable private uses of force by the settlers.”<sup>23</sup>

So like Isidore, Aquinas, and Flannery, I *do* think that the law needs to promote virtue, particularly the virtue of justice. I agree with Flannery that one major way in which the law does so is by prohibiting grave acts of justice. But practical questions and questions of feasibility cannot be left behind even in this situation. The question is: How to manage the tension?

Aquinas himself is not much help here. Seemingly focusing primarily on the criminal law, he does not distinguish between different types of law in his analysis. Nor, for that matter, does Flannery. Part of my argument in *Law’s Virtues*, however, is that the tension between promoting virtue and concerns such as feasibility and enforceability can be obviated, although not eliminated, by paying sufficient

<sup>21</sup> Flannery, 196, citing Aquinas, *ST*, I-II, q. 96, art. 2.

<sup>22</sup> See *Law’s Virtues*, 57–65: “Should the Criminal Law always Secure Fundamental Rights?”

<sup>23</sup> *Ibid.*, 63.

attention to the many different types of tools available in the modern legal system. Law can encourage when it does not require; it can discourage when it does not prohibit. In my chapter on abortion, I argued that the law should inculcate the virtue of solidarity with the vulnerable, including the unborn. But I also acknowledged that this is a challenging task in the contemporary United States, where abortion has been constitutionally protected for nearly half a century.

How, then, should virtuous lawmakers who oppose the exercise of violence against the unborn approach their task? I think they should do so in much the same way that I suggest the lawmakers in my hypotheticals Deadwood should approach theirs. The strictures of the criminal law ought to be deployed in order to reinforce, and perhaps slightly extend, the commitments of the majority without taxing the abilities of persons of ordinary virtue. I think, for example, it is entirely appropriate for states to prosecute persons who kill infants born alive after an abortion, or who flout state laws and regulation pertain to the safety of their patients. . . . It would not be wise however, for our lawmakers to enact criminal sanctions against first-trimester abortions in the current context, for the same reason it was not appropriate for Deadwood's lawmakers to target private killing in the saloons. It is not that the life of the unborn—or the inebriated prospector—is of lesser value. It is that the law is less able to act to protect them, given the practical limitations of their circumstances and society.<sup>24</sup>

My attempt to balance the values of inculcating virtue with other pragmatic considerations in the making of wise law on abortion may be faulty, of course. I welcome engagement on this question. But productive engagement, in my view, requires: 1) acknowledging the tensions between these two values in any sound theory of jurisprudence, including Aquinas's; and 2) paying attention to my own attempt to grapple with those tensions. Unfortunately, Kevin Flannery's response meets neither of these requirements. He ignores my efforts to grapple with the hard issues he identifies.

## V. Voting and the Common Good

In Section III of his essay, Flannery also tries to repudiate my criticism of the ranking of political issues for voters: He writes: "That brings us obviously to Kaveny's argument that the ranking of issues by certain individuals, their saying, for instance, that the abortion issue is of greater weight than others, erroneously presupposes that the issues ranked are 'commensurable.' As seen above, according to Kaveny, this amounts to 'opening the door to' consequentialism or proportionalism."<sup>25</sup> In contrast, Flannery maintains that issues *can* be ranked by virtuous person with political prudence—and that opposition to abortion and same-sex marriage ought to be at the top of the list.

I fully agree with Flannery that political prudence is essential in dealing with matters in the political realm. My main objection to the idea of ranking issues in the political realm is not that it is consequentialist. It is that the very idea of

<sup>24</sup> Ibid., 89.

<sup>25</sup> Flannery, 187.

an “issue” is itself so vague that it does not facilitate the exercise of political prudence, which has to pay attention to the particularities of the situation at hand, including but not limited to an understanding of what citizens are actually *doing* when they vote.

First some background: Many organizations, ranging from the American Association of Retired Persons to Planned Parenthood to the United States Conference of Catholic Bishops, issue voting guides in connection with national elections. These guides are frequently *issue* guides—they focus on particular issues likely to be of concern to their constituencies in the upcoming election. But this is a problem. In most elections, voters don’t select among issues, they select among candidates—and the relationship between candidates and issues is much more complicated than it first appears.

So the section of *Law’s Virtues* devoted to voting is designed to address a fundamental and relatively untheorized question: from an ethical perspective, what are we doing when we cast a vote? I argued first, that voters needed to evaluate candidates for public office in a multifaceted way: We need to address their *competence* to do the job at hand (e.g., intellectual ability, temperament, experience)? Do they have a good moral *character*? Can they *collaborate* well with a range of other people to get the job done, as is necessary in governing a pluralistic liberal democracy?; and What is the agenda of the groups with whom they are *connected*—including their political party connections? I maintained that these factors operated somewhat independently of each other. One ought not, for example, elect either Mother Teresa or Machiavelli to higher office in the United States (even if they were eligible to run). So I was quite surprised when Flannery brushes by these criteria as if they were an afterthought in my book; he does not seem to recognize that shifting the discussion of voting away from issues and toward candidates was the primary purpose of my analysis.

Flannery criticizes my claim that many political issues are incommensurable. But he does not grapple with a key reason I proffer for this claim, which is that the notion of “issues” is itself too broad to be helpful. I point out that the term can refer to a complex problem with many causes (e.g., hunger or global warming), the working of an entire section of social life (e.g., the economy), morally objectionable practice, whether legal or illegal (e.g., abortion or capital punishment) a particular legislative proposal (e.g., authorizing same-sex marriage), or a fundamental value that operates throughout many spheres of social life (e.g., religious liberty).<sup>26</sup>

In more general terms, a political issue encompasses both 1) a diagnosis of a particular problem and 2) a proposal of a politically feasible solution. At a bare minimum, evaluating a candidate’s stand on an issue involves considerations of these two prongs of his or her viewpoint. A candidate’s ability to affect a particular issue is also crucial. I wrote: “An election is not a seminar; voters should not evaluate candidate’s stances on these issues solely from a purely academic vantage point but also in direct relationship to their ability to affect them . . . . Voters, after all, rightly care about the issues not merely because they reveal something about

<sup>26</sup> Kaveny, *Law’s Virtues*, 201.

the character and qualifications of the candidate. They also care because it matters, in a fundamental way, what is done about them.”<sup>27</sup>

This is what I meant when I said that “evaluating a candidate’s stance on issues must not be performed on high but from an action-oriented and pragmatic perspective.” Flannery mentions my repeated references to voting and “action items” without explaining the context for my position. In fact, his analysis proceeds entirely as if there were no issues about issues, so to speak.<sup>28</sup> In essence, my response to Flannery is that the politically prudent voter needs to consider the particularities that I discuss in casting a vote. The purpose of my referring to action-oriented voting was to focus on the “contingent singulars” that the prudent voter must investigate.

## VI. The Particular Good and the Common Good

In section IV (“The Larger and the Local Picture”), Flannery suggests that I am wrongly counseling voters to prefer their own particular good to the common good. He quotes this passage from my book:

Some issues, such as abortion and euthanasia, are important because they go to fundamental questions about who counts as an equally protectable member of the society. Other issues, such as the economic crisis of 2008, are urgent because they threaten the ability of people to provide basic needs for themselves and their families and because they further impair the lives of the vulnerable, including children and the elderly.<sup>29</sup>

On the basis of this quotation, he attributes to me the “position that local issues are just as important as more universal ones.”<sup>30</sup> He also sees my argument in this paragraph as suggesting that voters can prefer their private good to the common good in contradiction to the Thomistic view that “the individual good, even as such, in the appropriate circumstances gives way, in the prudent estimation of justice, to the larger, more universal good.”<sup>31</sup>

My response to this criticism is twofold. First, as a fair reading of the passage he quotes suggests, I am not discussing a conflict between private good and common good, but a conflict between pursuing two different aspects of the common good. The global economic meltdown of 2007 was not merely a threat to the economic well-being of a few people; it threatened to destabilize the entire economic order, with disastrous consequences for innumerable persons.

More generally, my distinction between “important” matters and “urgent” matters was meant to analyze different ways in which the common good can

<sup>27</sup> Ibid., 202.

<sup>28</sup> The relationship of a candidate’s stand on a particular matter and his or her character is admittedly complicated. I indicated that I myself would distinguish between the character of a candidate “who thinks that unborn life has no value whatsoever at any stage in pregnancy” and one “who thinks that American society is too divided over the issue to make fundamental alterations to American constitutional law.” Ibid., 207.

<sup>29</sup> Flannery, 190, quoting Kaveny, *Law’s Virtues*, 10.

<sup>30</sup> Flannery, 191.

<sup>31</sup> Flannery, 193.

be threatened—*not* to prefer the private good to the public good. That was the point of my analogy to threats to a house: an unstable foundation is an important issue, but a roof fire is an urgent issue; the fire must be addressed first or there will be no point to stabilizing the foundation. In 2008, the global financial crisis was an urgent threat to the common good in need of and susceptible to immediate attention. Abortion was important, but not urgent, particularly since it was impossible to make any change in its legal status in the immediate future. The task of prudence was to recognize that in the context of the 2008 election, a morally responsible voter concerned about the common good needed to address the urgent threat rather than the important threat.

Second, I want briefly to highlight an area where my views likely diverge from Thomas's, and possibly from Flannery's as well. I do not believe that one can neatly separate the private good of individuals from the good of the community; the two are deeply interrelated. Catholic teaching on the issue has developed since the time of Aquinas, who was operating with corporatist account of society which threatened to reduce individuals to mere parts fingers and toes of the "body politic." I affirm the definition of the common good proposed by the Second Vatican Council: "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment."<sup>32</sup>

## VII. Conclusion

Kevin Flannery and I agree that the virtue of prudence is essential for citizens making decisions in public life. Prudence, however, is right reason about things to be done. Following Aristotle, Aquinas insists that "prudence does not deal with universals only, but needs to take cognizance of singulars also."<sup>33</sup> The point of *Law's Virtues* is to unpack some of the contingent singulars that those concerned to foster autonomy and solidarity in American society need to think about. Remaining at the level of abstract issues, as Flannery's approach would suggest, does not advance prudence, justice, or the common good.

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## Rejoinder by Kevin L. Flannery, S.J.

In her response to my article on her book *Law's Virtues: Fostering autonomy and solidarity in American society*, Professor Kaveny raises a large number of issues. I cannot address all of these in this brief response. I encourage the interested reader who has not already done so to read the article and also her book in order to

<sup>32</sup> Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, art. 26.

<sup>33</sup> Thomas Aquinas, *Summa Theologica*, II-II, q. 47, art. 3.