

A Good Moral Teacher Must Be a Good Pre-Moral Teacher: On the Pedagogical Limits of US Constitutional Law

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IN HER 2012 BOOK *LAW'S VIRTUES*, Cathleen Kaveny outlines a new framework for wise lawmaking on contentious “life issues” through her model of “law as moral teacher.” Kaveny proposes this framework in order to overcome the limits of two dominant and opposing models of law in the US. The first model, the “firewall model,” attempts to settle fraught “life issues” like abortion and euthanasia through imposing a morally neutral permissiveness toward each in law.¹ The second, the “enforcement model,” attempts to do the same, but through imposing a morally absolute prohibition of each in law. Kaveny criticizes the first for giving “too little weight to the socially important message of law.”² She faults the second for viewing “the moral message as the only relevant factor.”³ In contrast, Kaveny promotes her “third way” as neither indifferent to nor idealistic about the moral message of law. In fact, she argues that her “law as moral teacher” model is “at once optimistic about the effectiveness of moral pedagogy without being utopian, and realistic about moral disagreement without being relativistic.”⁴

In support of her argument, Kaveny claims that her model is able to harmonize better what she calls the dual “legal virtues” of autonomy and solidarity in pluralistic liberal democracies like the US. These two virtues are not simply two among many. In fact, Kaveny asserts that they are the “overarching” virtues of law and social life in the US.⁵ Given the pluralistic character of US moral traditions, she states that the virtues of autonomy and solidarity stand out not only for their

¹ Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012), 1. The phrase “life issues” is Kaveny’s. This phrase, in principle, is expansive. For the purposes of her book, Kaveny uses it primarily in reference to euthanasia, and most especially to abortion. In what follows, I use the phrase “life issues” in much the same way.

² Kaveny, *Law's Virtues*, 1.

³ Kaveny, *Law's Virtues*, 1.

⁴ Kaveny, *Law's Virtues*, 2.

⁵ Kaveny, *Law's Virtues*, 7.

broad-based appeal, but also their apparent ability to promote individual and communal flourishing. To justify the selection of each virtue, Kaveny appeals to two primary sources. The first is Aquinas's treatment of general justice, the second is Alasdair MacIntyre's application of practical reason to political communities.⁶ Going further still, Kaveny then roots the content of each legal virtue in the work of two other sources. Specifically, she conceives autonomy as a "configuration" of the virtue of prudence according to the work of legal philosopher Joseph Raz,⁷ and formulates solidarity as an extension of the virtue of justice according to the work of John Paul II.

With these important preliminaries in place, Kaveny then applies her model to various forms of American law. Importantly, in the context of US constitutional law, she evaluates two sets of constitutional cases on distinct "life issues" to see whether each adequately teaches the virtue of solidarity. In the first set of abortion-related cases, Kaveny argues that *Roe* (1973) and *Casey* (1989) each pay insufficient attention to the dependency and vulnerability of all human beings.⁸ They largely underemphasize, if not outright ignore, the virtue of solidarity.⁹ However, in the second set of euthanasia-related cases, Kaveny argues that *Glucksberg* (1997) and *Quill* (1997) better balance the legal virtues of autonomy and solidarity.¹⁰ In contrast to the former cases, she claims that these latter ones better emphasize the protection of the vulnerable, the constitutional value of federalism, and judicial deference to legislators in hard cases.¹¹

Like Kaveny, I agree that the Supreme Court's reasoning in *Glucksberg* and *Quill* is more adequate morally and jurisprudentially than in *Roe* and *Casey*. I also agree that Kaveny's "law as moral teacher" framework is more adequate morally and jurisprudentially than the "firewall" or "enforcement" models. Nonetheless, I do not think that the solidarity prong of Kaveny's framework can be adequately applied to US constitutional law for historical, internal, and

⁶ See Kaveny, *Law's Virtues*, 28–33, 50–52. Kaveny principally draws on Aquinas' "Treatise on Law" in *Summa Theologiae* (ST) I-II qq. 90–108, and MacIntyre's discussion of practical reason in *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

⁷ Kaveny summarizes Raz's conception of autonomy as "the capacity to be the 'part-author' of one's own life by making a successive series of choices that forge a more or less coherent narrative" (*Law's Virtues*, 53).

⁸ *Roe v. Wade*, 410 US 113 (1973), *Planned Parenthood v. Casey*, 505 US 833, 846 (1989).

⁹ Kaveny, *Law's Virtues*, 75–76.

¹⁰ *Washington v. Glucksberg*, 521 US 702 (1997), *Vacco v. Quill* 521 US 793 (1997).

¹¹ Kaveny, *Law's Virtues*, 163–164.

formal reasons.¹² To be clear, I do not take issue with the application of this prong to US federal law,¹³ nor do I take issue with its application to state law, tort law, family law, or any other type of law.

To understand why, it is important to turn to some of the formal presuppositions of the virtue of solidarity, especially as these relate to the union and distinction of interpersonal encounters. In John Paul II's thought, the virtue of solidarity unites symmetrical *and* asymmetrical interpersonal encounters. That is, it preserves the distinct notions of encounter between equal agents *and* unequal agents. In contrast, US constitutional law has not exhibited the same capacity to unite these two types of encounters. In fact, given its contractarian anthropological presuppositions, US constitutional law has tended to interpret all interpersonal encounters through the controlling ideal of symmetrical or equally agential encounters.¹⁴ Consequently, it has tended to subsume asymmetrical or unequally agential encounters under this ideal. In light of this tendency, I argue that US constitutional law cannot adequately internalize or inculcate the virtue of solidarity. Building on this argument, I further claim that, given its apparent presuppositions, US constitutional law cannot competently address the asymmetrical encounters specific to contentious "life issues" like abortion.

Before going any further, I want to clarify my use of the term

¹² Formally, US constitutional law is concerned with the right ordering and relation of the three co-equal branches of the US government: executive, judicial, and legislative. This is what makes US constitutional law the type of law that it is. Inasmuch as the structure of the US Constitution applies to all articles and amendments, I suggest that there is a distinct tendency in US constitutional law to see legal encounters among persons or branches of government as symmetrical encounters of equals. In what follows, I will say more about how this tendency has played out in the historical and formal presuppositions of US constitutional law.

¹³ Materially, US federal law primarily concerns Acts of Congress. But it likewise includes Senate treaties, regulations issued from the executive branch, and case law from the federal judiciary. Nonetheless, unlike US constitutional law, it is not formally structured according to the right ordering and relation of the three co-equal branches of the US government. In principle, it is open to legal encounters between equal and unequal agents.

¹⁴ This statement certainly does not settle the issue of the anthropological presuppositions of US constitutional law. I think there are *at least* four positions one can take on the issue: 1) US constitutional law has an empty anthropology, such that there is no original or internal priority for symmetrical encounters; 2) it has a malleable anthropology, such that even if it had an original priority for symmetrical encounters, subsequent judicial decisions or amendments can revise it at will; 3) it has an original, but not controlling contractarian anthropology, such that it remains congenial to the inclusion of asymmetrical encounters in its formality; 4) it has an original and controlling contractarian anthropology, such that it remains relatively uncongenial to the inclusion of asymmetrical encounters in its formality. I subscribe to the final position, and I explain why in the first two sections of this article.

competency in the context of law. In her 2018 book *Ethics at the Edges of Law*, Kaveny addresses the issue of competency in making judgments, especially in law. Drawing on the work of Jeffrey Stout, Kaveny characterizes competent judges as those who “are able to appreciate excellent instantiations of the goods internal to their respective practices.”¹⁵ She further elaborates that one “becomes a competent judge by demonstrating one’s ability to make assessments in cases that are increasingly difficult, but that have a clear resolution according to the standards of the practice.”¹⁶ I think Kaveny’s description provides a succinct practical understanding of the issue of competency in making judgments, especially in law. In examining this same issue, I draw primarily on Aquinas’ treatment of the subject. For Aquinas, competency in making legal judgments principally refers to 1) formal notions 2) inherent to specific forms of human law, 3) whose basis rests properly “in” the minds of the law’s authors.¹⁷ In contrast to Kaveny then, in assessing the issue of competency in making legal judgments, I focus more on the *formal presuppositions* of competency in law rather than its *functional effects*. In Thomistic terms, I focus more on the measuring-measure (*mensura-mensurans*) of law itself rather than the measured-measure (*mensura-mensurata*) of the human mind making judgments about it.¹⁸ In this regard, I emphasize that US constitutional law can only competently give or teach to what is outside itself notions internal to itself.

In what follows, I plan to unfold my argument in five parts in critical and constructive engagement with Kaveny’s work. First, I will survey the historical and internal presence of contractarian anthropological presuppositions in US constitutional law. Second, using James Mumford’s work, I will examine how these presuppositions limit the recognition of asymmetrical interpersonal encounters, especially in cases of contentious “life issues.” Third, I will summarize the union of symmetrical and asymmetrical interpersonal encounters in John Paul II’s thought on the virtue of solidarity. Fourth, I will trace the major lines of Aquinas’ thought on competency in making legal judgments. Finally, in sketching two approaches to address better legal protections for the most vulnerable, I will outline how the principle of subsidiarity can not only supplement but strengthen Kaveny’s framework for wise lawmaking.

¹⁵ Cathleen Kaveny, *Ethics at the Edges of Law: Christian Moralists and American Legal Thought* (New York: Oxford University Press, 2018), 76.

¹⁶ Kaveny, *Ethics at the Edges of Law*, 76.

¹⁷ See especially ST II-II q. 60.

¹⁸ For more on this distinction, see ST I-II q. 93, a. 1, ad. 3, and I-II q. 93, a. 4.

THE EMERGENT IDEAL OF SYMMETRICAL ENCOUNTERS IN US CONSTITUTIONAL LAW

Historians have long recognized the presence of social contractarian presuppositions in the US Constitution and constitutional law.¹⁹ In *The Social Contract in America*, Mark Hulliung documents how seventeenth century political philosopher John Locke's social contract theory played a decisive role in shaping the US Constitution.²⁰ Hulliung details how Locke's theory, laid out in his *Second Treatise on Government*, influenced notable framers like Alexander Hamilton, Thomas Jefferson, and James Madison. Additionally, he makes clear that Locke's theory did not just influence the early American elite. In fact, he notes that, in the immediate pre-Revolutionary period, Locke's theory was so revered that "Loyalists sometimes plotted to steal the *Second Treatise* from the rebels."²¹ Turning to other social contract theories debated in pre-Revolutionary America, Hulliung highlights the distinctive content of Locke's theory. In so doing, he emphasizes at least three important contrasts between Samuel Pufendorf's and Locke's theory. First, he notes that Locke bases his theory on the "natural asociability" of human beings in the state of nature.²² Second, in light of this "natural" independence, he writes that Locke maintains that government arises through ongoing acts of consent of, by, and for the people.²³ Finally, in light of the primacy of these acts, and these acts *alone*, he summarizes that Locke presents the social contract as a "revocable trust," and not as an "irreversible contract of submission."²⁴ For Locke, then, through acts of symmetrical interpersonal consent, the people put the government on a type of "permanent probation."²⁵

Legal scholars have similarly recognized the presence of social contractarian presuppositions in US constitutional law.²⁶ Michael

¹⁹ Bernard Bailyn, *The Ideological Origins of the American Revolution*, fiftieth anniversary edition (Cambridge, MA: Belknap, 2017), 58–59; Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill, NC: The University of North Carolina Press, 1969), 282–291; Steven Dworkin, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, NC: Duke University Press, 1994); Thad W. Tate, "The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument," *William and Mary Quarterly* (1965): 375–391.

²⁰ Mark Hulliung, *The Social Contract in America: From the Revolution to the Present Age* (Lawrence, KS: University of Kansas Press, 2007).

²¹ Hulliung, *The Social Contract in America*, 18.

²² Hulliung, *The Social Contract in America*, 20.

²³ Hulliung, *The Social Contract in America*, 35.

²⁴ Hulliung, *The Social Contract in America*, 18.

²⁵ Hulliung, *The Social Contract in America*, 35.

²⁶ See David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); Richard B. Stewart, "The Reformation of American

Dorf, for example, affirms that “social contractarian political theory” has “deep roots in American legal thought,”²⁷ and draws attention to a variety of court decisions in support.²⁸ Anita Allen likewise argues that “social contractarian thought” has played a significant role in American case law.²⁹ Going further than Dorf, she cites at least two dozen other court cases throughout the history of US constitutional law to shore up her argument.³⁰ Additionally, Richard Garnett echoes the respective judgments of Dorf and Allen in his own examination of the influence of social contractarianism in US constitutional law.³¹ Unlike Dorf and Allen, he focuses much more on the influence of its anthropological presuppositions. Garnett notes that, in social contractarian thought, the human person is conceived as originally “un-tethered, un-situated, and alone.”³² He finds this vision “flawed” for a number of reasons. Yet despite its flaws, Garnett concedes that US constitutional law historically rests upon this “unsteady foundation.”³³

Finally, in his recent book *What It Means to Be Human*, O. Carter Snead has gone further than any other legal scholar in describing the characteristics and implications of this very foundation. In this work, Snead evaluates the “anthropological frame” underlying much of American law, and US constitutional law in particular, on “vital conflicts” like abortion.³⁴ He calls this frame “expressive individualism,” and then elaborates at length on how it has advanced a significantly attenuated vision of human identity and flourishing. Like the legal scholars above, Snead traces “expressive individualism”

Administrative Law,” *Harvard Law Review* 88 (1975): 1667, 1718; Gerald L. Neuman, “Whose Constitution?” *Yale Law Journal* 100 (1991): 909, 923–927.

²⁷ Michael Dorf, “Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning,” *Georgetown Law Journal* 85 (1997): 1774.

²⁸ Dorf, “Integrating Normative and Descriptive Constitutional Theory,” 1774, footnote 41. For Dorf, these decisions include, but are not limited to *Chisholm v. Georgia*, 2 US (2 Dall.) 419 (1793); *Calder v. Bull*, 3 US (3 Dall.) 386 (1798); *United States v. Verdugo-Urquidez*, 494 US 259 (1990).

²⁹ Anita Allen, “Social Contract Theory in American Case Law,” *Florida Law Review* 51 (January 1999): 2–40.

³⁰ Some of the cases she cites deal with sovereignty: *Kawakoba v. Polybank*, 205 US 349 (1907); Congressional non-delegation: *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 US 264 (1996); Public health: *Jacobson v. Massachusetts*, 197 US 11 (1905); Civil forfeiture: *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396 (2d Cir. 1993). For a more complete list, see Allen, “Social Contract Theory in American Case Law,” 6–9, n. 17–40.

³¹ Richard Garnett, “Christian Witness, Moral Anthropology, and the Death Penalty,” *Notre Dame Journal of Law, Ethics and Public Policy* 541 (2003): 541–558.

³² Garnett, “Christian Witness,” 555.

³³ Garnett, “Christian Witness,” 555.

³⁴ O. Carter Snead, *What It Means to Be Human: The Case for the Body in Public Bioethics* (Cambridge, MA: Harvard University Press, 2020), 5.

to the thought of social contract theorists like Locke.³⁵ Similarly, he notes that, like social contractarianism, “expressive individualism” characterizes human identity and flourishing as fundamentally transactional. In such a frame, Snead writes that human relationships are reduced to “agreements, promises, and consent for the mutual benefit of the parties involved.”³⁶ Likewise, he asserts that human encounters are reduced to the binary option of “collaborative or contending wills, pursuing their own individual goals.”³⁷ Shriveled as this frame is, Snead nonetheless acknowledges that it underwrites much of American law on “vital conflicts,” and most especially in constitutional jurisprudence on abortion law.³⁸

In her own work, Kaveny seems to suggest that social contractarian presuppositions inform the origins of US constitutional law. In her 2016 book *Prophecy without Contempt*, Kaveny examines the interchangeable uses of “covenant” and “contract” in early Puritan New England.³⁹ She charts how the meaning of these two terms developed culturally and legally. In particular, she comments on how the shift from a more theological to a more natural rights-based framework influenced the meaning of these two terms. Quoting seventeenth century preacher George Walker, she notes that a contract was conventionally understood in Puritan New England to involve “a mutual promise, bargain, and obligation between two parties.”⁴⁰

In Kaveny’s account, the growing legal use of contracts in seventeenth-century Puritan New England can be considered important for at least two reasons. First, it seemed to inform and even re-interpret the theological notion of covenant. Kaveny notes that, through the analogy of the common law of contracts, the notion of

³⁵ Snead, *What It Means to Be Human*, 74–75, 90.

³⁶ Snead, *What It Means to Be Human*, 6.

³⁷ Snead, *What It Means to Be Human*, 6.

³⁸ In his section on the “Anthropology of American Abortion Law,” Snead states that this area of law “proceeds from the assumption that the core unit of reality is the atomized and isolated self, lacking any unchosen constitutive attachments, along with the obligations and benefits that might flow from them.” Thus, it “reduces the person to a lonely agent of desire, defined by the will and the capacity to make choices, whose highest thriving is self-definition and the pursuit of economic and social aspirations” (*What It Means to Be Human*, 168). Despite this deficient assumption, Snead nonetheless argues that US constitutional law can be reformed through the integration of what he calls a more adequate “anthropology of embodiment.” In section five below, I outline my agreement with Snead on the goal of US constitutional law recognizing the greater adequacy of this “anthropology of embodiment.” In the same section, I acknowledge my disagreement with Snead on the means to achieve this goal.

³⁹ Cathleen Kaveny, *Prophecy without Contempt: Religious Discourse in the Public Square* (Cambridge, MA: Harvard University Press, 2016): 135–235.

⁴⁰ Kaveny, *Prophecy without Contempt*, 169, quoting George Walker, *The Manifold Wisdome of God* (London: Hodgkinson, 1641), 39.

God's covenant came to be reconceived as God's free entry into agreement with humanity, albeit in such a way as to bind, but not compromise his sovereignty.⁴¹ Second, it seemed to promote a new ideal of interpersonal encounter. Regardless of inequalities in other areas, Kaveny remarks that increasingly "in the realm of bargained-for-exchange" even "the prince and pauper could meet as equals."⁴² Thus, through the growing legal use of contracts in Puritan New England, these two developments seemed to advance a symmetrical ideal of interpersonal encounter.

The re-conception of contracts and covenants in terms of this symmetrical ideal was no doubt a significant intellectual and historical development. But in an important caveat, Kaveny acknowledges that, even though this re-conception presented the two parties in a contract as *theoretically symmetrical*, it did not necessarily presume them to be *naturally symmetrical*. In fact, Kaveny notes that, in English common law, the legal notion of a contract or covenant was "unique in its capacity to accommodate a negotiated relationship between vastly unequal parties."⁴³ Nonetheless, over the course of the eighteenth century, the idea of a natural asymmetry in covenantal or contractual relations seemed to fade in accounts of interpersonal encounter. In Kaveny's account, the waning of this idea seemed to involve three distinct developments. First, in the seventeenth-century, covenantal relations between God and human beings were increasingly characterized in Puritan preaching in "transactional images."⁴⁴ Second, throughout the eighteenth century, these relations were increasingly subordinated in Puritan New England to the transactional interests of commerce.⁴⁵ Third, by the Revolutionary era these relations were effectively displaced in American political life through "the Lockean framework of natural rights and the social contract made in the state of nature."⁴⁶ Kaveny does not explicitly discuss how this final development impacted the drafting of the US Constitution. Given

⁴¹ Kaveny elaborates that "God's sovereignty was protected by the federal theologians' claim that He had voluntarily entered into this pact. God's essential unknowability was safeguarded by their insistence that the covenant did not describe God's internal life but only His freely chosen pattern of behavior toward humanity" (*Prophecy without Contempt*, 138–139).

⁴² Kaveny, *Prophecy without Contempt*, 137.

⁴³ Kaveny, *Prophecy without Contempt*, 135.

⁴⁴ Kaveny, *Prophecy without Contempt*, 168.

⁴⁵ Kaveny, *Prophecy without Contempt*, 179, 202–203. In concert with this growing focus on commerce in the eighteenth century, Perry Miller claims that "covenant theology, having conceived and cradled the principle of voluntary consent, set the New England mind at work destroying that theology" (*The New England Mind: From Colony to Province* [Cambridge, MA: Belknap, 1953]: 267), quoted in Kaveny, *Prophecy without Contempt*, 202.

⁴⁶ Kaveny, *Prophecy without Contempt*, 222.

the thrust of her account and the work of the scholars like Hulliung mentioned above, it seems fair to suggest that the emergent ideal of symmetrical interpersonal encounter likely informed it.

THE PRE-MORAL LIMITS OF THE IDEAL OF SYMMETRICAL ENCOUNTER

No one has examined the ethical implications of theories of interpersonal encounter more than James Mumford. In his 2013 book *Ethics at the Beginning of Life*, Mumford evaluates the influence of two major theories of interpersonal encounter in ethics, medicine, and law. In particular, he assesses how each theory has informed these areas, especially in debates about beginning-of-life ethics. Mumford calls the first major theory of authentic interpersonal encounter the “contractarian” model and the second the “empathetic” model. He traces the first to the work of Locke in his seminal *Second Treatise* on government.⁴⁷ He attributes the second to the work of twentieth century dialogical philosopher Martin Buber in his influential “I-Thou” and “I-It” schema of interpersonal encounter.⁴⁸

Though different in origin, Mumford claims that both models tend to idealize symmetrical interpersonal encounters in ethical reflection. He notes that the “contractarian” model regards interpersonal encounters as authentic so long as they are mutually arranged and equally willed. He likewise remarks that the “empathetic” model regards the same as authentic so long as they are mutually open, reciprocal, and suffused with rich emotion and inter-subjectivity. Each model then judges interpersonal encounters as authentic *if and only if* they are symmetrical, voluntary, foreseen, and highly agential. Encounters falling short of these characteristics are not only deemed inauthentic, but sub-personal and even sub-human. In Buber’s schema, they belong to the I-It polarity. In Mumford’s account, the limits of each model of interpersonal encounter are important for at least three reasons.

First, it seems that the two models above have not only proposed symmetrical encounters as ideal, but have become entrenched as a controlling ideal in much of legal and ethical thought, especially on contentious “life issues.” In the “contractarian” model, Mumford notes that the prioritizing of symmetrical encounters has made the status of fully-fledged agents normative for all other encounters.⁴⁹

⁴⁷ James Mumford, *Ethics at the Beginning of Life: A Phenomenological Critique* (Oxford: Oxford University Press, 2013), 82–90.

⁴⁸ Mumford, *Ethics at the Beginning of Life*, 31–42.

⁴⁹ In his critique of the “anthropological frame” of expressive individualism, Snead seems to find this same norm operative in much of American law. Key to this frame

That is, it has set forth the arranged encounter of two equal agents as the measure for all encounters. In this transactional model, symmetry obtains inasmuch as both agents mirror each other in their distinct capacities of willing, deliberating, and promising. Similarly, in the “empathetic” model, Mumford notes that the equivalent prioritizing of symmetrical encounters has accomplished much the same. He elaborates that it has put forth the inter-subjective encounter of two mutually-awakened agents as the norm for all encounters. In light of these two models and their near-identical measures, it is no surprise that encounters between unequally-capacitated agents have been accorded lower status in much of legal and ethical thought, especially on contentious “life issues.”

Kaveny seems to agree with the thrust of Mumford’s first point. In her criticism of *Roe*, she asserts that the Court’s lack of emphasis on positive obligations toward unequally-capacitated subjects like pre-natal children is no mere “legal anomaly.”⁵⁰ In fact, she claims that *Roe* is the “logical end” of “those strands of American law that content themselves with negative prohibitions that suffice for those in the full vigor of life.”⁵¹ Kaveny makes clear that the lack of positive obligations toward the weak and vulnerable in American law is a serious deficiency. In response, she proposes the inclusion of a compensating “vulnerable person” standard in US law.⁵² Kaveny argues that this standard would not only better address current inequities in US law, but would provide a more comprehensive standard for acting. She concludes that the inclusion of a “vulnerable person” standard would pave the way toward evaluating how “solidarity should be legally instantiated” in the US.⁵³

I do not dispute that a “vulnerable person” standard can be included in areas of law like US federal and state law. I am skeptical that it can be included in US constitutional law without distortion to the concept of vulnerability and the necessary relations of dependence and non-reciprocal care inherent to it. Inasmuch as constitutional law seems to

is an “image of the human person” “fully formed” and “at the height of his cognitive powers” (*What It Means to Be Human*, 90).

⁵⁰ Kaveny, *Law’s Virtues*, 79.

⁵¹ Kaveny, *Law’s Virtues*, 79.

⁵² Kaveny, *Law’s Virtues*, 80–81. In line with her effort to build bridges between American legal theory and the Catholic moral tradition, Kaveny appeals to the respective work of Alasdair MacIntyre and Martha Albertson Fineman on the status of vulnerable persons. Though each differs substantively on contentious “life issues,” they both share a commitment to advancing something like a “vulnerable person” standard in political communities. See MacIntyre, *Dependent Rational Animals* (Chicago: Open Court, 1999): 73–74 and Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism*, no. 1 (2008): 1–23.

⁵³ Kaveny, *Law’s Virtues*, 80.

admit contractarian presuppositions, it seems to suppose a derivative controlling ideal of symmetrical interpersonal encounter between independent, fully-fledged agents. Inasmuch as this is the case, it seems to be internally uncongenial to standards of encounter between those who are unequally-capacitated either temporarily or permanently.⁵⁴

Second, it seems that the controlling ideal of symmetrical encounters has fostered a restricted vision of human encounter in much of ethical and legal thought, especially on contentious “life issues.” Mumford argues that this ideal has served to obscure the actual “working of things” in the vast and varied range of human encounters.⁵⁵ In other words, he argues that this ideal is not only theoretically insufficient, but descriptively inadequate. The contractarian and empathetic models are each attuned to see human encounters in the full vitality of mature adult life. Like those who are at once far- and near-sighted, they are each limited in seeing less than fully-capacitated agents at the edges of life. Moreover, as these models

⁵⁴ In her discussion of vulnerability and its application to American law, Kaveny draws on Alasdair MacIntyre’s critique in *Dependent Rational Animals* of the normative view of human persons as “autonomous, independent,” and “self-contained” (*Law’s Virtues*, 79–80). In his own discussion of the same, Snead draws even more so on MacIntyre’s critique. Specifically, in his appraisal of the anthropological frame of expressive individualism, Snead indicts it for failing “to respond to the reality of embodied human lives regarding their mutual dependence, integrated constitutive goods and histories, and shared unchosen obligations to one another.” In response, Snead seeks to correct this frame through the inclusion of a more thoroughgoing “anthropology of embodiment” in American law. Drawing on MacIntyre, he states that in such an anthropology “the virtues of acknowledged dependence” like generosity, hospitality, and misericordia can be better cultivated and practiced. He concludes that one thereby becomes “capable of the relationships of giving and receiving that characterize human flourishing” (*What It Means to Be Human*, 94, 99). In their own ways, Kaveny and Snead seem to suggest that the implied anthropology of US constitutional law can be enlarged and reformed through greater attention to human vulnerability. Nonetheless, given the apparent formal contractarian lens of US constitutional law, I think it less likely that this implied anthropology is enlarged through such attention, and more likely that the full reality of human vulnerability is once again obscured from view through being re-interpreted along the lines of symmetrical encounter. In section five, using the principle of subsidiarity, I propose that the resolution of contentious “life issues” in American law might be better addressed through delegating such issues to those areas of law more internally congenial to the recognition of symmetrical and asymmetrical encounters like statutory and family law.

⁵⁵ Mumford, *Ethics at the Beginning of Life*, 80. Snead seems to endorse this point in his analysis of the Supreme Court’s abortion law jurisprudence. There he states that “the anthropological assumptions of the Court obscure from view the networks of relationships in which the parties are embedded—relationships of family (including, but not limited to maternal-fetal biological kinship), community, and polity—that could and should be responsive to the basic needs that arise from unwanted or unplanned pregnancy” (*What It Means to Be Human*, 169).

control the vision of much ethical and legal thought on contentious “life issues,” they in turn control its application to considerations of who is and who is not subject to ethical and legal concerns. In sum then, paraphrasing Wittgenstein, Mumford claims that much of ethical and legal thought is held “captive” to a picture that prevents it from seeing what it ought to see.⁵⁶

In *Ethics at the Edges of Law*, Kaveny seems to agree with the thrust of Mumford’s second point. In fact, like Mumford, she explicitly endorses Wittgenstein’s warning against distorted pictures in the context of legal and ethical thought. Using what she calls “Wittgensteinian therapy,” Kaveny cautions against intellectual impediments to seeing the world as it is, especially “in hard cases” in law.⁵⁷ Quoting Stout, she affirms that considerations of these cases should “direct our attention away from our subjective states to how things and persons are in the world.”⁵⁸ They should direct our attention to “how things and persons would be if we revised our norms.”⁵⁹ I agree that those making judgments in law can and should revise their norms and pictures to better fit the world. I am not convinced that forms of law like US constitutional law can always do the same. Given the apparent contractarian presuppositions of US constitutional law, it seems like this form of law is held relatively captive to a picture of symmetrical interpersonal encounter.

In the ethical and legal realm, nowhere do the limits of this “picture” seem more evident than in its application to human emergence. Mumford asserts that, in the “extraordinary encounter” between a mother and what he calls her “newone,” the contractarian and empathetic models of human encounter each cannot see the pre-natal child as he or she really is.⁶⁰ To justify this point, he notes that the transparency of agents appearing to each other is a key threshold condition of each model. This very condition is lacking in pregnancy, inasmuch as the relative “hiddenness” of the newone is an essential feature.⁶¹ Turning to the work of Luce Irigaray and Iris Marion Young, Mumford notes that in pregnancy “the newone is hidden from the world and from the mother” at the same time.⁶² In fact, the newone

⁵⁶ Mumford, *Ethics at the Beginning of Life*, 79.

⁵⁷ Kaveny, *Ethics at the Edges of Law*, 75.

⁵⁸ Kaveny, *Ethics at the Edges of Law*, 75, quoting Jeffrey Stout, *Democracy and Tradition* (Princeton, NJ: Princeton University Press, 2004), 276.

⁵⁹ Kaveny, *Ethics at the Edges of Law*, 75, quoting Stout, *Democracy and Tradition*, 276.

⁶⁰ Mumford, *Ethics at the Beginning of Life*, 69.

⁶¹ Mumford, *Ethics at the Beginning of Life*, 25–26, 72.

⁶² Mumford, *Ethics at the Beginning of Life*, 25. In discussing the essential “hiddenness” of the newone from the mother and the world, Mumford draws on Luce Irigaray’s book *Sharing the World* (London: Continuum, 2008) and Iris Marion

remains especially hidden to the mother with whom he or she has a “privileged relation.”⁶³ It is only over time that the newone becomes more apparent to his or her mother. Even then the newone does so only in degrees. In the “extraordinary encounter” in pregnancy, transparency is not so much an instantaneous condition from the very start as the relative fruit of an ongoing relationship. Thus, to make the transparency of agents appearing to each other a controlling norm for pregnancy seems like a category mistake.

Nonetheless, it seems that the Supreme Court still relies, more or less, on the threshold conditions of symmetry, transparency, and reciprocity in its approach to abortion-related cases. To cite but one example, in *Box v. Planned Parenthood* (2019), Justice Ginsburg seems to have relied on these very conditions in her recent dissent.⁶⁴ For the most part, Ginsburg discusses what legal standard to apply in this case. She argues against the majority’s use of the rational basis standard.⁶⁵ In turn, she proposes the use of the stricter undue burden standard outlined in *Casey*.⁶⁶ What is relevant here is that, in defense of this point, Ginsburg seems to rely on the ideal of symmetrical human encounter in her constitutional evaluation of pregnancy. In support of her argument, she asserts without qualification that “a woman who exercises her constitutionally protected right to terminate a pregnancy is not a ‘mother.’”⁶⁷

Unsurprisingly, critics were quick to reject Ginsburg’s assertion on logical, biological, and metaphysical grounds.⁶⁸ Given Ginsburg’s

Young’s article “Pregnant Embodiment: Subjectivity and Alienation,” in *On Female Body Experience: “Throwing like a Girl” and Other Essays* (Oxford: Oxford University Press, 2005), 46–61.

⁶³ Mumford, *Ethics at the Beginning of Life*, 69.

⁶⁴ *Box v. Planned Parenthood* 587 US (2019).

⁶⁵ See *Box v. Planned Parenthood*, at 1 (Ginsburg, J., dissenting).

⁶⁶ *Box v. Planned Parenthood*, at 2, n. 2.

⁶⁷ *Box v. Planned Parenthood*, at 2, n. 2.

⁶⁸ See Ed Whelan, “Contra Michael Dorf on Justice Thomas’ *Box* Concurrence—Part 2,” *National Review*, May 31, 2019, www.nationalreview.com/bench-memos/contra-michael-dorf-on-justice-thomass-box-concurrence-part-2. In his article, Whelan quotes Adam White, who criticizes Ginsburg’s remarks as an “intellectual gerrymander.” He additionally quotes Robert George, who similarly criticizes her remarks as question-begging to say the least. In this vein, George remarks that “if a woman seeking an abortion (and who is therefore by definition pregnant) is not a mother, then a pregnant woman who is happy to be pregnant and is not seeking an abortion is not a mother either. She may think she is, and say she is, but she can’t be. Not if Justice Ginsburg is right.” Finally, Snead joins the others above in taking exception to Ginsburg’s comments. Inasmuch as Ginsburg seems to imply that it is “solely the intention to parent that determines parenthood rather than biological reality,” Snead asserts that such a premise rejects the “anthropology of embodiment” he outlines, for in this framework parenthood is not merely some contractual relationship, but “the most fundamental network of uncalculated giving and graceful

apparent controlling ideal of symmetrical human encounter, her assertion is actually not all that surprising. Insofar as such encounters involve the arrangement and reciprocity of presumably autonomous agents, it is not difficult to see how encounters that fall below these threshold conditions are judged inauthentic. Insofar as they are judged inauthentic, they apparently fail to realize the controlling norm and *relation* of symmetry. In the case of pregnancy, then, any encounter that does not meet the threshold conditions above does not just fall into the realm of inauthentic encounter. More importantly, it does not realize *any relation at all*. Thus, in pregnancy, this controlling model of human encounter maintains that there is indeed no mother-prenatal child relation to consider. In other words, a woman does not ‘exist’ as a mother, and a child does not ‘exist’ at all, until the norm and relation of symmetry obtains between the two. To maintain this picture of human encounter brings us back again to the question of whether arranged encounters, especially as they are apparently formally embedded in US constitutional law and jurisprudence, are theoretically and descriptively adequate or not.⁶⁹

Finally, it seems that the controlling ideal of symmetrical encounters has served to situate all human encounters in a fundamentally “asocial” context in much of ethical and legal thought, especially on contentious “life issues.” The primacy of arranged encounters has fostered a picture of reality wherein agents are conceived as originally isolated. Thus, it is only through equally-capacitated agents forging agreements that social life is brought into being. There is no relation to others prior to the free choice and consent of fundamentally isolated agents. In this sense, social life is not a natural condition for all human encounters, but a posterior artifact of arranged encounters alone. In other words, social life does not take place within a fundamental relation of communion, but through a discrete creation and recreation of arranged relations.

Mumford attributes the controlling paradigm of arranged human encounter in much of ethical and legal thought to Locke’s theory of

receiving essential to life as humanly lived” (*What It Means to Be Human*, 294–295, endnote 146, 181).

⁶⁹ Snead seems to think not, given the anthropology of expressive individualism that these arranged encounters are apparently premised on. He insists that this anthropology “does not supply a justification for the payment of those debts in nonreciprocal and unconditional fashion to others who have nothing to offer by way of recompense.” Applying this point to US constitutional law on abortion, he emphasizes that the “primary relationship that is invisible to expressive individualism, and by extension, the Court’s abortion jurisprudence, is that of parents and children.” Thus, Snead asserts that “the Court’s prescriptive framework” is not just “gravely misguided,” but “indeed, inhuman” (*What It Means to Be Human*, 94, 172).

the social contract.⁷⁰ He notes that Locke grounds society not in terms of an original communion with God and all others, but in terms of trade. In turn, Locke reconceives society in commercial and transactional terms. Mumford claims that Locke's re-conception of society is no mere alternative origin story. In fact, it is nothing less than an inversion of the natural order of human encounters in social life. In particular, Mumford argues that Locke's theory reverses the fundamental status of fortuitous and arranged encounters in the natural order of social life. Given the predominance of Locke's theory in much of modern Western thought, the negative effects are not insignificant.

By raising arranged encounters to normative status, Mumford makes clear that most human encounters are relegated to secondary or inauthentic status. The first encounter to be demoted in this inverted order is our original arrival in the world. Mumford notes that the "extraordinary" encounter between a mother and her newone in pregnancy cannot be characterized as mutually arranged, reciprocal, and transparent. All human beings arrive in the world in a largely fortuitous, radically dependent, and completely hidden way. Thus, in making arranged encounters paradigmatic, the extraordinary encounter between a mother and her newone is not just obscured, it is dismissed as neither normative nor even instructive for any other human encounter.

But this dismissal is far from conclusive. Modernity critics have long contested Locke's "asocial" picture of reality.⁷¹ Mumford enlists a few of these critics in his attempt to argue that in the "real world" fortuitous encounters are "primary" and arranged encounters are "derivative."⁷² Using Heidegger, he states that we are "thrown into" encounters long before we ever arrange them. Nowhere is this made clearer than in "the most fundamentally contingent" encounter of them all: the maternal-newone encounter.⁷³ Citing maternal testimony, Mumford asserts that this originary encounter is not just distinctively

⁷⁰ See Mumford, *Ethics at the Beginning of Life*, 82–102.

⁷¹ Mumford includes the work of several modernity critics across the philosophical spectrum, including Seyla Benhabib's *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (Cambridge, MA: Harvard University Press, 1992); Martin Heidegger's *Being and Time* (1927), trans. John Macquarrie and Edward Robinson (Oxford: Blackwell, 1962); Leszek Kolakowski's *Modernity on Endless Trial* (Chicago: University of Chicago Press, 1990); Alasdair MacIntyre's *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981); and John Milbank's *Theology and Social Theory: Beyond Secular Reason*, 2nd ed. (Oxford: Blackwell, 2006).

⁷² Mumford, *Ethics at the Beginning of Life*, 102.

⁷³ Mumford, *Ethics at the Beginning of Life*, 107.

fortuitous, even if hoped for,⁷⁴ but “*asymmetrical*” throughout.⁷⁵ That is, it is characterized by the radical and particular dependency of one party upon another from origin to arrival. In this light, Luce Irigaray claims that it is only by denying “the help that has been given to us in order to enter the word” that the reduction of authentic relationships to “partnerships” can be idealized.⁷⁶ Mumford likewise concurs that it is only by forgetting where we came from that “the illusion of the asocial” can be sustained.⁷⁷

Once again, Kaveny seems to agree with the thrust of Mumford’s third and final point. In *Ethics at the Edges of Law*, Kaveny states that any “sound institution points toward all forms of excellence as ideals worth striving for.”⁷⁸ But she insists that it should not “base its operational practices on the illusion that most participants in those practices have already achieved the ideal.”⁷⁹ Nonetheless, US constitutional law seems to presume that the ideal of symmetrical interpersonal encounter has in fact been achieved. Furthermore, it seems to presume that even in cases where the ideal has not been achieved, it should still normatively measure them. In this regard, US constitutional law seems to base its own operational practices not just on “illusion of the asocial,” but on the presumptively achieved ideal of symmetrical interpersonal encounter. Given these apparent presuppositions, whether US constitutional law can adequately inculcate or even recognize an essentially social virtue like solidarity seems questionable.

THE UNION OF SYMMETRICAL AND ASYMMETRICAL ENCOUNTERS IN SOLIDARITY

In *Law’s Virtues*, Kaveny roots her discussion of the virtue of solidarity in the thought of John Paul II. In fact, she uses John Paul II’s definition of solidarity as “a firm and persevering determination to commit oneself to the common good” as the departure point for her own treatment.⁸⁰ Kaveny then applies this definition to American law and political life. In so doing, she affirms that the “call to solidarity

⁷⁴ In both natural and artificially assisted reproduction, Mumford affirms that there are “enough contingent factors involved in procreation, even in artificial procreation, that to view the phenomenon as an automatic process, a straightforward instance of cause and effect, is to impose a falsifying vision on the phenomenon” (*Ethics at the Beginning of Life*, 106).

⁷⁵ Mumford, *Ethics at the Beginning of Life*, 107. Italics in the original.

⁷⁶ Irigaray, *Sharing the World*, 117 quoted in Mumford, *Ethics at the Beginning of Life*, 117.

⁷⁷ Mumford, *Ethics at the Beginning of Life*, 117.

⁷⁸ Kaveny, *Ethics at the Edges of Law*, 134.

⁷⁹ Kaveny, *Ethics at the Edges of Law*, 134.

⁸⁰ Kaveny, *Law’s Virtues*, 54, quoting John Paul II, *Sollicitudo Rei Socialis*, no. 38.

supports justice by pressing lawmakers and citizens to attend to the unseen members of their community whose lives will be affected by their actions.”⁸¹ Yet, given the apparent controlling ideal of symmetrical interpersonal encounter in US constitutional law, it is questionable whether this form of law has the adequate internal resources to see these “unseen members” as they are. Furthermore, as just mentioned, given the asocial presuppositions of US constitutional law, it is questionable whether it has the adequate internal resources to inculcate the virtue of solidarity. In order then to further evaluate Kaveny’s treatment of the virtue of solidarity and its application to US constitutional law, it is important to turn to John Paul II’s thought on the subject of solidarity.

The range of John Paul II’s thought on the virtue of solidarity is vast. The range of reflections on his thought is similarly vast. Yet, few have focused on the anthropological presuppositions of John Paul II’s thought on the virtue of solidarity.⁸² In turning to this subject, I aim to show how, in his commentary on this virtue, John Paul II unites symmetrical and asymmetrical interpersonal encounters without confusion or separation. By contrast, I intend to highlight how US constitutional law tends to collapse asymmetrical encounters into symmetrical ones.

In John Paul II’s thought, three documents stand out for their thematic attention to the virtue of solidarity. These include *Sollicitudo Rei Socialis* (1987), *Centesimus Annus* (1991), and the *Compendium of the Social Doctrine of the Church* (2004).⁸³ For the purposes of my argument, the substantive contours of John Paul II’s thought are important for at least three reasons.

First, unlike US constitutional law’s vision of interpersonal *origins* as symmetrically constituted, John Paul II affirms just the opposite in

⁸¹ Kaveny, *Law’s Virtues*, 54.

⁸² Notable exceptions include Donal Dorr, “Solidarity and Integral Human Development,” in *The Logic of Solidarity: Commentaries on Pope John Paul II’s Encyclical on Social Concern*, ed. Gregory Baum and Robert Ellsberg (Maryknoll, NY: Orbis Books, 1989): 149, 153–154; Kevin Doran, *Solidarity: A Synthesis of Personalism and Communalism in the Thought of John Paul II* (New York: Peter Lang, 1996), 40–42. Though generally complimentary, Dorr thinks John Paul II needs to supplement his thought on “interpersonal relationships” with a more “affective dimension” (149, 153). For his part, Doran concentrates on John Paul II’s debt to Max Scheler and the latter’s thought on “person-community,” a type of ideal form of solidarity (40–41).

⁸³ Though John Paul II did not author the *Compendium*, he not only formally initiated its development, but greatly influenced its content. In his “Letter” introducing the *Compendium*, Cardinal Angelo Sodano states that John Paul II’s “three great Encyclicals,” *Laborem Exercens*, *Sollicitudo Rei Socialis*, and *Centesimus Annus* “represent fundamental stages in Catholic thought” in the area of “Catholic social doctrine.”

his treatment of solidarity. In the created order, John Paul II sets solidarity in the context of a fundamental asymmetrical encounter between God and human beings. John Paul II was indeed unique in conceiving solidarity as a “moral” and “social” virtue.⁸⁴ Among modern popes, he was not unique in rooting solidarity in the context of the created order. In fact, every major pope from Pius XII, who first explicitly used the term, to John Paul II situated solidarity broadly in this very context.⁸⁵ Even so, John Paul II sets himself apart in his thematic link of solidarity to God’s gratuitous action of creation.

In *Sollicitudo Rei Socialis*, John Paul II notes that our “gift” of being created in God’s “image and likeness” (Genesis 1:26) is a gift given with the task of remaining dependent on the will of God (no. 29). In this light, we are each in turn called to live out this very asymmetrical relation as a “duty” not only to cultivate creation, but to foster the “full development of all others” (no. 30). Only after the basic context and character of this “duty” has been laid out does John Paul II define solidarity as a “firm and persevering determination to commit oneself to the common good” (no. 38). Delimited within the political and social order, it might seem like solidarity would be characterized in terms of symmetrical relations and reciprocal duties. But John Paul II says otherwise. In fact, he makes clear that solidarity is first and foremost a commitment to “lose oneself” for the sake of another and to “serve” without expectation of return (no. 38).

In *Centesimus Annus*, John Paul II builds on this very point. Given our “essential ‘capacity for transcendence,’” he insists that it is only through the “free gift of self” that we “truly” find ourselves (no. 41). To refuse this “capacity” then is not just to fail to live out “the experience of self-giving,” regardless of reciprocity (no. 41). It is to deprive ourselves of “entering into that relationship of solidarity and communion with others” for which God has “created” us (no. 41).

In the *Compendium*, the virtue of solidarity is likewise set within the fundamental asymmetrical relations of gift and gratuitousness. In fact, the entirety of the Church’s social doctrine is set within the context of these very relations. The *Compendium* opens with an explicit discussion of “God’s gratuitous presence” in salvation history and “God’s gratuitous action” in creation (nos. 20–27). To call this presence and action of God “gratuitous” is no mere rhetorical flourish. Rather, it is to express the right and proper response of gratitude found

⁸⁴ For a brief history of the explicit use of the term ‘solidarity’ in papal documents, see the *Compendium*, no. 194, n. 421.

⁸⁵ For representative examples, see Pius XII, *Summi Pontificatus* (1939), nos. 35–36, John XXIII, *Mater et Magistra* (1961), nos. 23, 42, 63; Paul VI, *Populorum Progressio* (1967), nos. 16, 17, 22, 27, 44, 48; John Paul II, *Sollicitudo Rei Socialis* (1987), nos. 9, 29, 30, 38, 39.

in “Israel’s profession of faith” (no. 26). In other words, it is to grasp “the original extent” of the Creator’s “gratuitous and merciful action” on our behalf *from the very beginning* (no. 26). Furthermore, in the practices of the sabbatical and jubilee years, the *Compendium* notes that God’s gratuitous action is not just made manifest, but presented as primary pedagogy for the virtue of solidarity. In this light, it notes that these practices do not just show how solidarity is inspired by God’s original gratuitous action. Rather, they indicate how they must become “normative points of reference” for every generation and in every social arena (no. 25). In sum, the fundamental asymmetry of God’s gratuitousness sets the intrinsic terms not only of solidarity’s horizon, but its pedagogical significance for all social forms.

Once this fundamental asymmetry in the created order is laid out, the *Compendium* discusses how solidarity embraces symmetrical interpersonal encounters. Specifically, it discusses how solidarity embraces these encounters in the contexts of civil society (no. 417), democracy (no. 417), economic activity (no. 351), and international cooperation (no. 448), to name a few. The *Compendium* indicates that solidarity does not collapse the symmetrical interpersonal encounters above into the fundamental asymmetrical encounter between God and human beings. Nor does it separate the two. To cite but one example, the *Compendium* suggests that solidarity unites symmetrical and asymmetrical encounters in the context of political community, an area where persons are “*organically* united among themselves as a people” (no. 385). In elaborating on this area, it first makes clear that insofar as political community originally “comes from God,” it remains “an integral part of the order that he created” (no. 383). This is not to say that the content of the political community is subsumed in this transcendent relation. In fact, the *Compendium* notes that, in the created order, solidarity is realized in the political community, insofar as horizontal relations cooperate to promote the common good (nos. 383, 391). Thus, in the outline and detail of magisterial teaching, and especially that of John Paul II, it seems fair to say that the virtue of solidarity unites symmetrical and asymmetrical interpersonal encounters without confusion or separation.

Second, unlike US constitutional law’s vision of interpersonal *dynamics* as symmetrically constituted, John Paul describes them otherwise in his treatment of solidarity. In the natural order, John Paul II sets solidarity in the context of a basic asymmetrical encounter. In *Sollicitudo Rei Socialis*, John Paul II gestures toward the application of solidarity to the family, “the basic social community” (no. 33). But in *Centesimus Annus*, he makes this application explicit. In this latter encyclical, John Paul II claims that “*a concrete commitment to solidarity and charity*” must begin “in the family” (no. 49). In this

“first and fundamental structure” of society, each of us receives our first formative instruction “in what it means to love and be loved” (no. 39). In other words, we each receive our first formative instruction “in what it actually means to be a person” (no. 39). Inasmuch as this instruction takes place in a setting formally “*founded on marriage*,” it is structured in terms of “the mutual gift of self by husband and wife” (no. 39). Given this formal setting, it is an instruction in life and living always materially initiated in the basic asymmetrical relation between children and parents. John Paul II elaborates that in and through this relation we all “develop” our “potentialities” and “prepare to face” our “unique and individual destiny” (no. 39). Thus, he concludes that it is right and proper to call the family not just a “*sanctuary of life*,” but “a community of work and solidarity” (nos. 39, 49).

Drawing largely upon John Paul II’s thought, the *Compendium* grounds solidarity even further in the context of asymmetrical encounters in family life. The *Compendium* affirms that the family is “the principal place of interpersonal relationships” (no. 211), making clear that these relationships are neither constituted nor idealized in terms of mutual dependence, symmetry, and voluntariness. Family life, the “prototype of every social order,” is not established upon a controlling model of arranged encounter (no. 211), but in terms of an encounter whose essential terms include “disinterested availability, generous service, and solidarity” (no. 221). In other words, it is established upon a model of gratuitous asymmetrical encounter.

Given this model, it is important to reiterate that the *Compendium* insists that solidarity is no added feature to family life. In fact, it clearly maintains that “solidarity belongs to the family as constitutive and structural element” (no. 246). In this regard, solidarity takes shape first in the interpersonal encounter of self-giving, and *not of mutual arrangement*. In other words, it is “not limited by the terms of a contract” (no. 212), because solidarity derives from the very essence and structure of the family. The *Compendium* notes that this structure arises above all else in the fortuitous relationships “following the generation or adoption of children” (no. 212). Inasmuch as solidarity takes shape in such relationships, it is a virtue rooted in asymmetrical encounter, that is, in openness to less-capacitated agents like the vulnerable and dependent. Thus, in its application to all other social forms, the *Compendium* maintains that the virtue of solidarity is able “to bring every situation of distress to the attention of institutions” (no. 246).

Now, in emphasizing the asymmetrical dimensions of solidarity in family life, magisterial teaching does not neglect the symmetrical dimensions internal to it. John Paul II locates the basic form of symmetrical interpersonal encounter in the mutual self-giving of

spouses. In *Familiaris Consortio*, John Paul II notes that this form does not just set an ideal, but actively promotes the “authentic and mature communion between persons within the family” (no. 43). Inasmuch as it promotes this “mature communion” within the family, he affirms that it serves to stimulate “broader community relationships marked by respect, justice, dialogue, and love” (no. 43). For John Paul II, then, just as solidarity unites symmetrical and asymmetrical encounters without confusion or separation in the order of social life, so too does it do the same in the natural order.

Finally, unlike US constitutional law’s vision of interpersonal *relations* as contractually constituted, John Paul II denies this very theory in his treatment of solidarity. It is important to note that magisterial teaching firmly opposes all theories proposing to make arranged encounters socially normative, without categorically rejecting the limited use of these theories within law and politics. Nonetheless, it seems clear that it condemns the comprehensive and controlling imposition of such theories to these very areas.

Nowhere does this seem to be clearer than in its pointed criticism of contractarian theories of social order. The *Compendium* affirms that society is rooted in the human person, a being who is essentially relational. In this light, it deems it right and proper for society to be characterized as essentially relational *from the very beginning*. Furthermore, in applying this point, the *Compendium* states that it is “evident that the origin of society is not found in a “contract” or “agreement,” but in human nature itself” (no. 149, n. 297). To think otherwise is not just to commit a logical error according to the *Compendium*, it is to sanction the “false anthropology” of the “ideologies of the social contract” (no. 149, n. 297). To be clear, this is no minor fault. In one of the most searing comments in the entire text, the *Compendium* concludes that magisterial teaching has declared such “ideologies” as nothing less than “openly absurd” (no. 149, n. 297).

THE COMPETENCE OF LAW TO JUDGE INTERPERSONAL ENCOUNTERS

To this point, I have elaborated on some of the historical and internal reasons for why US constitutional law is relatively incapable of addressing asymmetrical encounters. By extension, I have indicated why it is relatively incapable of inculcating the virtue of solidarity. Nonetheless, it is possible for US constitutional law to still be *formally* capable of addressing asymmetrical encounters and so, by extension, be capable of inculcating the virtue of solidarity. That is, the influence of the historical and internal factors mentioned above might just be accidental and contingent. In principle, US constitutional law thereby

remains capable of recognizing and judging asymmetrical encounters as such. If this is the case, then it is reasonable to think that flaws in judging asymmetrical encounters in US constitutional law are attributable to flaws in judgments of the law, *not the form of law itself*.

In her evaluation of current jurisprudence on abortion law, Kaveny indicates that US constitutional law “plays an important role in inculcating solidarity with the unborn—or in failing to do so.”⁸⁶ In turn, she emphasizes how “*Roe* and its progeny” have failed in this role due to flaws in judgments of the law, not in the form of law itself.⁸⁷ In other words, Kaveny emphasizes how these judicial decisions are failures of competent judgments of US constitutional law, not failures of the competence of US constitutional law itself. In response, I would like to consider whether these failures of judgment are more symptomatic of failures of the law. That is, I would like to consider whether the failures of these decisions are primarily attributable to the limited competence of US constitutional law, not just to the flawed competence of judgments of the law. To do so, I now turn to Kaveny’s discussion of competence in law and Aquinas’ treatment of the same in the *Summa*.⁸⁸

To reiterate, in *Ethics at the Edges of Law*, Kaveny characterizes competence in law in more functionalist terms. She describes competence as a judge’s “ability to make assessments in cases that are increasingly difficult, but that have a clear resolution according to the standards of the practice.”⁸⁹ In *Law’s Virtues*, Kaveny elaborates on

⁸⁶ Kaveny, *Law’s Virtues*, 84.

⁸⁷ Kaveny takes special exception to Justice William Brennan’s infamous comment in *Beal v. Doe* (1977) that “abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy” (quoted in *Law’s Virtues*, 84–85). In response, she insists that “the fundamental task facing the pro-life movement now is to demonstrate how deeply mistaken Justice Brennan’s view is” (*Law’s Virtues*, 85).

⁸⁸ In commenting on Aquinas’ treatment on competence in law, I rely on Russell Hittinger’s important article “Thomas Aquinas on Natural Law and the Competence to Judge,” in *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives*, ed. John Goyette, Mark S. Latkovic, and Richard S. Myers (Washington, DC: Catholic University of America Press, 2004): 280–283. There are quite a few considerations of Aquinas’ treatment of authority in law. Some of the more notable include John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980); Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1995); Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006); Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids, MI: Eerdmans, 2010). In my own research and in conversations with Hittinger, it seems that Hittinger’s article is the only thematic consideration of Aquinas’ treatment of competence in law, at least in the English language.

⁸⁹ Kaveny, *Ethics at the Edges of Law*, 76.

the subject, albeit implicitly, at even greater length.⁹⁰ In her discussion, Kaveny first draws attention to Aquinas's appeal to Isidore of Seville's list of characteristics for sound human law. Like Aquinas, Kaveny then comments on several of these characteristics. These include, but are not limited to, Isidore of Seville's insistence that law be "virtuous," "necessary," "useful," "possible to nature," "suitable to time and place," and "according to the custom of the country."⁹¹ Kaveny notes that only after these characteristics have been considered can wise law-making take place. Even then, this consideration remains only a preliminary step.

Kaveny then remarks that a further set of factors concerning a law's prospects for success needs to be considered. These include, but are not limited to, the "power of the lawmaker, the type of law at issue, and the character of the subjects involved."⁹² Wise lawmaking must not just involve the inclusion of sound characteristics, but the implementation of proper means. Even then, Kaveny asserts that there is no guarantee that laws having passed through these two steps will achieve their intended ends. There are simply too many contingent factors regularly in play to ensure a law's complete success. Given these factors, Aquinas offers practical counsel about the limitations of law. He devotes an entire question in the *Summa* to this subject.⁹³

Kaveny distinguishes Aquinas' counsel about the limitations of law into three general types.⁹⁴ The first type is most relevant here, for it pertains to the competence of law. Kaveny locates this type of limitation in Aquinas's discussion of what acts human law is competent to judge.⁹⁵ Gesturing toward Aristotle's dictum that "everyone judges well of what he knows,"⁹⁶ Aquinas claims that human beings only "can make laws in those matters" they are "competent to judge" (ST I-II, q. 91, a. 4). To bring this issue into focus, Aquinas evaluates whether we are competent to judge interior acts, exterior acts, or both. In regard to exterior acts, he answers in the affirmative, for such acts appear to us. In regard to interior acts, he answers in the negative, for such acts remain hidden from us. Aquinas concludes that human law is not competent to judge interior acts, for human law can neither "sufficiently curb" nor "direct" these acts (ST I-II, q. 91, a. 4).

Kaveny does not discuss the issue of the law's competence any

⁹⁰ Kaveny, *Law's Virtues*, 30–31.

⁹¹ Kaveny, *Law's Virtues*, 30–31, quoting ST I-II, q. 95, a.3.

⁹² Kaveny, *Law's Virtues*, 58.

⁹³ See ST I-II, q. 96, "On the Power of Law."

⁹⁴ Kaveny, *Law's Virtues*, 59–61.

⁹⁵ Kaveny, *Law's Virtues*, 59, referencing ST I-II, q. 91, a. 4.

⁹⁶ See ST II-II, q. 60, a. 1.

further in the context of the *Summa*. In this regard, she limits Aquinas' treatment of competence in law to *judgments of the law* and *those things measured by the law* like interior or exterior acts. But Aquinas' treatment of this subject goes further. In particular, Aquinas does not just discuss competence in law in regard to those things measured by the law, but even in regard to *the measure of law itself*. In other words, Aquinas does not just discuss competence in law *ad extra*, but *ab intra*. In reference to the latter, he does so in three important ways.

First, in his discussion of whether human law can be divided into different types, Aquinas answers in the affirmative (ST I-II, q. 95, a. 4). As a general principle, he notes that a thing can be properly divided in and of itself according to whether it possesses a certain formal principle. In the case of an animal, it can be properly divided according to whether it possesses rationality or not. Likewise, in the case of human law, Aquinas states it can be properly divided, for it possesses many different formal principles. To illustrate his case, Aquinas points to the formal division between the law of nations and civil law. He notes that each is divided according to whether it possesses the formal principle of securing agreements necessary to common life. Aquinas claims that the law of nations possesses this principle inherently, but civil law does not. In support, he elaborates on how this principle is derived in each as a matter of human law. In the case of the law of nations, he comments that this principle is derived directly and necessarily like a conclusion from premises. In the case of civil law, it is derived indirectly and contingently through a particular and customary determination. This principle belongs to the law of nations essentially, but to civil law only accidentally. Thus, Aquinas indicates that specific types of human law are more competent in certain matters than others, inasmuch as they are able to apply inherent formal principles more adequately and directly.

Second, in his discussion of whether unjust human laws are binding, Aquinas argues against flawed measures in law (ST I-II, q. 96, a. 4). In this effort, Aquinas identifies three ways a human law can be unjust. These include: 1) laws opposed to the common good (*ex fine*), 2) laws enacted through improper authority (*ex auctore*), and 3) laws imposing unequal benefits and burdens (*ex forma*).⁹⁷ Aquinas makes clear that, if a human law lapses in any of these three ways, it is not a proper law, but a corruption of law. Thus, he insists that no judgment should be based on an unjust law, for the measure of an unjust law is flawed from the very start. In rendering legal judgments then, Aquinas indicates that competence in applying the measure of a law derives first and foremost from the competence of the measure

⁹⁷ For a more extended commentary on this subject, see Hittinger, "Thomas Aquinas on Natural Law and the Competence to Judge," 280–283.

itself.

Finally, in his discussion of whether judgment is an act of justice, Aquinas sets forth the necessary conditions for right judgment (ST II-II q. 60, a. 1). In answering this question, he emphasizes that these conditions are especially important in the context of law, for judgment “properly denotes the act of a judge as such” (ST II-II q. 60, a. 1). Aquinas identifies two essential conditions for right judgment. These include 1) “the virtue itself that pronounces judgment” and 2) “the disposition of the one who judges” (ST II-II q. 60, a. 1, ad. 1). In reference to the first condition, Aquinas notes that justice is needed to incline one toward right judgment. In reference to the second, he comments that prudence is needed to render right judgment. In the ordering of right judgment then, the first condition is preeminent. For Aquinas, there can be no right judgment unless the virtue of justice or *a subspecies of justice* is present. Aquinas explicitly applies the two necessary conditions of right judgment to those who properly measure out the law. These two conditions seem to apply principally to the measure of law itself, and only derivatively to those who measure it out. Thus, the competence of right judgment in law seems to be based principally on the inherence of the virtue of justice in law itself.

Together, these three points provide an important framework for evaluating whether US constitutional law is relatively competent to judge asymmetrical encounters and inculcate the virtue of solidarity. First, inasmuch as certain formal notions belong properly to specific forms of law, it is best for these notions to be addressed in the most competent forms. If the formal notion of asymmetrical encounters does not belong properly to US constitutional law, it is best for it to be addressed in another type of American law. Second, if justice in law can only be adequately measured out with the proper form or measure of law, then it is necessary for the just treatment of certain subjects to be addressed by the most competent form. Thus, if justice is to be adequately rendered in cases of asymmetrical encounters, and if US constitutional law cannot properly address them internally, the just treatment of these cases is properly considered elsewhere. Finally, even if right judgments are made about certain issues in law, they are subject to instability if not properly assigned to and judged by a more competent measure. Even if the Supreme Court renders more just judgments in cases of asymmetrical encounters, these decisions would likely not be well-settled, so long as they rely on the contractarian measure of US constitutional law.⁹⁸

⁹⁸ Though it is certainly true that partial and provisional justice is better than no justice at all, it is nonetheless a primary purpose of law to settle cases and controversies in an enduring and proper way.

TWO WAYS FORWARD FOR JUDGING ASYMMETRICAL ENCOUNTERS IN LAW

Given the preceding reasons for the apparent incapacity of US constitutional law to address asymmetrical encounters and inculcate the virtue of solidarity, I want to turn, in this final section, to two possible remedies. The first approach aims to break open this apparent incapacity by leveraging other areas of American law more congenial to the inclusion of asymmetrical encounters. In contrast, the second approach seeks to corral this incapacity by delegating the evaluation of asymmetrical encounters to more competent areas like family law. Each approach has its merits and offers distinct ways forward in addressing contentious “life issues” in the context of US constitutional law. In different ways, Kaveny and Snead seem to endorse the first approach. In her attempt to find models in American law capable of fostering solidarity with the vulnerable, Kaveny identifies at least three promising examples in US federal law. These include the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Patient Protection and Affordable Care Act (ACA).⁹⁹ In these three pieces of federal legislation, Kaveny sees not just a series of positive mandates, but an important pedagogy of solidarity at work. She asserts that all three “attempt both to teach and to instantiate the virtues of autonomy and solidarity, with particular attention given to the vulnerabilities that attend to human beings because we are embodied beings.”¹⁰⁰

Kaveny then applies this pedagogy of solidarity to thinking about abortion in the context of American law in general, and constitutional law in particular. As previously mentioned, she emphasizes that the law “plays an important role in inculcating solidarity with the unborn—or in failing to do so.”¹⁰¹ She then proceeds to catalog how US constitutional jurisprudence has largely failed to do so since *Roe*. In response, Kaveny calls for American law to “expand beyond rights talk and move toward the virtue of solidarity—solidarity with the unborn, solidarity with others who are vulnerable, and solidarity with those upon whom these most vulnerable persons depend.”¹⁰² She draws attention to some positive, albeit highly limited, movement toward this goal in *Casey*, wherein the Court explicitly acknowledged the state’s legitimate interest in unborn life from the very beginning. Outside of this decision and the three pieces of federal legislation mentioned above, she sees challenges ahead. In fact, she asserts that much of “American law is sorely deficient in solidarity in that most

⁹⁹ Kaveny, *Law’s Virtues*, 82–84.

¹⁰⁰ Kaveny, *Law’s Virtues*, 84.

¹⁰¹ Kaveny, *Law’s Virtues*, 84.

¹⁰² Kaveny, *Law’s Virtues*, 85.

states do not impose even a minimal ‘duty to rescue’ another person in distress, absent special circumstances.”¹⁰³ Nonetheless, in highlighting positive examples of solidarity in American law, Kaveny seems to suggest they can be leveraged to promote the virtue of solidarity in US constitutional law on abortion.

Like Kaveny, Snead seeks to enlarge the constrained vision of US constitutional jurisprudence on abortion. But unlike Kaveny, he aims to do so through a more exacting critique of the anthropological premises of this jurisprudence. For Snead, the primary problem with US constitutional jurisprudence on abortion is not its inattention to legal models of solidarity external to it, but an apparent lack of any such model internal to it. As mentioned earlier, Snead indicts US constitutional jurisprudence for its underlying anthropology of “expressive individualism.” In such an anthropology, with its reductive emphasis on the will and the capacity to make choices, Snead notes that human embodiment is obscured and even ignored. In light of this, he maintains that US constitutional jurisprudence, especially on abortion, is “blind to the reality of vulnerability, dependence, and natural limits.”¹⁰⁴ Blind to this reality, it “fails to consider the networks of uncalculated and graceful receiving that are necessary for the survival of embodied beings, as well as vital to their development.”¹⁰⁵

To remedy this blindness, Snead seeks to re-envision US constitutional jurisprudence on abortion through a more fitting and complete “anthropology of embodiment.” Within such an anthropological framework, Snead writes that law would better recognize the whole of human life as relatively dependent and vulnerable, and promote practices like “just generosity, hospitality, and accompaniment of others in suffering (misericordia).”¹⁰⁶ Furthermore, it would “seek to strengthen the familial and social ties that serve these ends,” including roles for civil society and

¹⁰³ Kaveny, *Law’s Virtues*, 87. Though it is true that there is no legal obligation to rescue vulnerable others in much of American law, there is a legal duty to care for them in situations where we create the vulnerabilities or dependencies at issue. For example, although there is no legal duty to rescue someone who is drowning, there is a legal duty to care for this person if we have pushed him into the water, and so have created the vulnerability and dependency at issue. Thus, in counterpoint to Kaveny, I think American law might be even more congenial to the virtue of solidarity than she allows, especially in the context of ordinary instances of pregnancy, inasmuch as American law emphasizes positive duties of care for vulnerabilities and dependencies that are caused or created.

¹⁰⁴ Snead, *What It Means to Be Human*, 171.

¹⁰⁵ Snead, *What It Means to Be Human*, 171.

¹⁰⁶ Snead, *What It Means to Be Human*, 177–178.

government.¹⁰⁷ Of all the ties it would seek to fortify, Snead emphasizes that the bond of parenthood would be most central. In the anthropology of embodiment, the law would not just recognize this bond, but affirm it as “the most fundamental network of uncalculated giving and graceful receiving essential to life as humanly lived.”¹⁰⁸ Snead makes clear that this “family and community-oriented framework” is no mere check on the anthropology of expressive individualism in American law.¹⁰⁹ Rather, he maintains that it is a more adequate and necessary precondition for addressing the full range of human needs at issue in US constitutional jurisprudence on abortion. There is much to commend in Snead’s goal of getting US constitutional law to recognize a more adequate “anthropology of embodiment.” But there may be better prudential means to achieve it. The second approach below, with its emphasis on corraling, not converting the current anthropology of US constitutional law, offers another way forward.¹¹⁰

In contrast to Kaveny and Snead, Helen Alvaré seems to endorse the second approach,¹¹¹ through delegating the evaluation of asymmetrical encounters in US constitutional law to areas of American law more competent to treat them. Like Snead, Alvaré sees

¹⁰⁷ Snead, *What It Means to Be Human*, 178. Snead acknowledges the possibility of a “very robust role for government,” especially in situations where “people find themselves with the support and security of networks of giving and receiving” (178).

¹⁰⁸ Snead, *What It Means to Be Human*, 181.

¹⁰⁹ Snead, *What It Means to Be Human*, 184.

¹¹⁰ Like Snead, I agree that an “anthropology of embodiment” better captures the integral reality of human life, and that US constitutional law can and should *recognize* its superior adequacy, especially in its jurisprudence on abortion. I differ with Snead on how US constitutional law can and should be remedied *in light of this recognition*. Again, in response to the deficiencies of the apparent “anthropology of expressive individualism” in US constitutional law, Snead makes the case that US constitutional law “must expand and augment its grounding conception of human identity and flourishing” (*What It Means to Be Human*, 68). In the context of abortion jurisprudence, he argues for a reform of US constitutional law through an *expansion* of its current anthropology. In contrast, in the same context, I argue for a reform of US constitutional law through an *express limitation* of its current anthropology. Inasmuch as US constitutional law can and should recognize the constraints of its apparent contractarian anthropology, it not only can and should limit its evaluation of asymmetrical encounters between mothers and pre-natal children, but can and should delegate this evaluation to areas of law more competent to evaluate them, like family law. In sum, whereas Snead argues for the *scope* of US constitutional law’s current anthropology to be more generous and expansive, I argue for the *application* of US constitutional law’s current anthropology to be more humble and constrained. I say more about this in my analysis of Helen Alvaré’s approach below.

¹¹¹ See Helen M. Alvaré, *Putting Children’s Interests First in US Family Law and Policy* (New York: Cambridge University Press, 2018) and Helen M. Alvaré, “*Gonzales v. Carhart*: Bringing Abortion Law into the Family Law Fold,” *Montana Law Review* 69, no. 2 (Summer 2008): 409–445.

a “flawed “anthropology”” at work in much of US constitutional jurisprudence on abortion.¹¹² She terms this anthropology “sexual expressionism,” and describes it as “valorizing” acts of consent whose content is limited to the immediate desires and interests of the adults involved.¹¹³ Alvaré does not deny that this underlying anthropology affirms “profound and individualized human goods, such as dignity, freedom, equality, and identity.”¹¹⁴ She insists that this “starkly individualistic” framework has obscured family-oriented goods like partner stability, marital status, and relationships of dependence.¹¹⁵ In sum, Alvaré indicates that the anthropology of “sexual expressionism” has made symmetrical encounters normative in US constitutional jurisprudence on abortion, and asymmetrical encounters incidental at best.

Unlike Snead though, Alvaré seems more circumspect about the possibility of enlarging US constitutional law through a different anthropology. Alvaré sees the anthropology of “sexual expressionism” at work in much of US legislative and executive policy on sex and family life,¹¹⁶ being most prominent in US constitutional jurisprudence on the same. She asserts that in the area of sex and family life the Court is “the most prolific and emphatic author of sexual expressionism.”¹¹⁷ In support, Alvaré catalogs how the Court has increasingly emphasized the “sexual rights and interests of the *individual*” in several significant cases over the past half century.¹¹⁸ In turn, she traces how this development in US constitutional jurisprudence can be attributed to at least three factors. First, Alvaré draws attention to historical factors external to US constitutional law like changing cultural values on sex and family life in the second half of the twentieth century. Second, she focuses on historical factors internal to *interpretations of US constitutional law* like more permissive readings of the Fourteenth Amendment’s Due Process Clause. Finally, she emphasizes formal factors internal to *US*

¹¹² Alvaré, *Putting Children’s Interests First*, 103.

¹¹³ Alvaré, *Putting Children’s Interests First*, 2.

¹¹⁴ Alvaré, *Putting Children’s Interests First*, 8.

¹¹⁵ Alvaré, *Putting Children’s Interests First*, 2, 8. Alvaré further notes that this framework has obscured “the reality that children’s family structure is regularly determined at their conception” (8).

¹¹⁶ For various examples, see Alvaré’s thematic discussion of “Sexual Expressionism and the Executive and Legislative Branches,” in *Putting Children’s Interests First*, 30–47.

¹¹⁷ Alvaré, *Putting Children’s Interests First*, 16.

¹¹⁸ Alvaré, *Putting Children’s Interests First*, 26. Alvaré cites several cases, including but not limited to those on contraception like *Eisenstadt v. Baird*, 405 US 436 (1972), on abortion like *Roe v. Wade*, 410 US 113 (1973) and *Planned Parenthood v. Casey*, 505 US 833, 846 (1989), on same-sex relations like *Lawrence v. Texas*, 539 US 558 (2003), and same-sex marriage like *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

constitutional law itself like the apparent absence of two key presumptions found in family law.

The apparent absence of these two presumptions plays a significant role in Alvaré's critique of the Court's relative incompetence to judge asymmetrical encounters. She makes the case for why this is especially true in the context of abortion law. Alvaré identifies the two "axiomatic" presumptions in family law at issue as 1) the existence of a "strong natural bond" between parents and children and 2) the "self-evident" vulnerability of children.¹¹⁹ In reference to the first, she notes that family law has long recognized a *duty to preserve* the parent-child bond in ordinary circumstances. In reference to the second, she notes that it has long recognized a *duty to protect* dependents in the same circumstances. Alvaré posits that the acknowledgment of each presumption is key to larger efforts to balance "individual rights and family solidarity" in American law.¹²⁰ Given the sexual expressionist framework of much American law and its "excessive individualism," she maintains that this balance remains a challenge.¹²¹

For Alvaré, nowhere is this challenge to balance "individual rights and family solidarity" more stark than in US constitutional jurisprudence on abortion. Alvaré claims that since *Roe* the Court no longer presumes a "strong natural bond" between mothers and prenatal children. Rather, it presumes a relation of "confrontation" between the two.¹²² Given this re-conception, Alvaré maintains that the Court has transformed a relation involving the duties to dependents into a contest of interests. Whenever the interests of mothers and prenatal children conflict, separation is not just presented as possible, but desirable. Thus, "in the face of claims that a born child burdens a woman's ability to realize her interests," Alvaré emphasizes that the Court has demonstrated "a preference for terminating relationships rather than preserving them."¹²³

In saying this, Alvaré does not deny that the Court can, in principle, consider the two key presumptions of family law mentioned above. She notes that the Court has employed these presumptions in several pre-*Roe* cases on family life,¹²⁴ and that it has done so in at least one

¹¹⁹ Helen M. Alvaré, "Gonzales v. Carhart," 412–413, 419.

¹²⁰ Alvaré, *Putting Children's Interests First*, 117.

¹²¹ Alvaré, *Putting Children's Interests First*, 117.

¹²² Alvaré, "Gonzales v. Carhart," 420.

¹²³ Alvaré, "Gonzales v. Carhart," 420.

¹²⁴ These cases include but are not limited to *Meyer v. Nebraska*, 262 US 390, 400 (1923); *Pierce v. Society of Sisters*, 268 US 510, 535 (1925); *Prince v. Massachusetts*, 321 US 158, 166 (1944); and *Lehr v. Robinson*, 463 US 248 (1983).

post-*Roe* case on abortion law.¹²⁵ Nor does Alvaré deny that these presumptions can at least be adopted as *extrinsic* principles of evaluation in US constitutional jurisprudence. She even suggests that this jurisprudence remains tentatively open to “an ethic of solidarity, generosity, and even altruism” toward post-natal and even pre-natal children.¹²⁶ Nonetheless, Alvaré seems somewhat skeptical that US constitutional jurisprudence can accommodate such an ethic, especially in the context of abortion law. Among the reasons for this apparent incapacity, she cites the implied anthropology of “expressive individualism” in US constitutional jurisprudence, its internal bias toward autonomy, and its volatility of interpretation.¹²⁷

In the end, Alvaré seems to suggest that, in the context of abortion law, the evaluation of asymmetrical encounters is best delegated to family law, inasmuch as it more adequately balances “individual rights and family solidarity.” Alvaré does not explicitly invoke the principle of subsidiarity, but it seems to be at work in her suggested approach. To be clear, this principle seems to be at work not in the misunderstood sense of simply providing a smaller scale solution to unique social problems, but in the more proper sense of recognizing the unique competencies of specific social forms to resolve unique social problems. Russell Hittinger emphasizes that the principle of subsidiarity does not delegate judgments to the “lowest possible level,” but the “proper level.”¹²⁸ He clarifies that “proper” denotes what belongs to thing, person, or institutional form. He maintains that, inasmuch as this principle presumes “a normative structure of plural forms,” with irreducible functions and competencies specific to each, it recognizes that each form has a “proper” role to play “with regard

¹²⁵ In light of the *Gonzales* case, Alvaré tentatively states that the Court seems to have brought “abortion jurisprudence into greater conformity with family law’s presumptions about parent-child relations” (“*Gonzales v. Carhart*,” 426).

¹²⁶ Alvaré, *Putting Children’s Interests First*, 142.

¹²⁷ In her article on *Gonzales* in 2007, Alvaré admits that the Court’s opinions on abortion are quite “volatile” and subject to change. Despite this concession, she sees in this opinion tentative clues to the better alignment of US constitutional jurisprudence on abortion with the key presumptions of family law. By the time her book on family law appeared in 2018, Alvaré seems to have grown considerably less sanguine about the possibility. The Court’s opinion in *Whole Women’s Health v. Hellerstedt* (2016), making pro-life legal challenges apparently more difficult to survive judicial scrutiny, certainly seems to have influenced her thinking, but this does not seem to be the only factor.

¹²⁸ Russell Hittinger, “The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation,” in Margaret S. Archer and Pierpaolo Donati, eds., *Pursuing the Common Good* (Vatican City: Pontifical Academy of Social Sciences, 2008), 110.

to the common good.”¹²⁹

In the context of law, the principle of subsidiarity can be understood to presume a normative structure of plural legal forms, with irreducible functions and competencies specific to each. Given these competencies, it can be understood to recognize that each form has a role to play in law’s contribution to the common good. Applied to Alvaré’s analysis, it seems that family law, given its two key presumptions, is more *internally* competent to evaluate asymmetrical encounters. Finally, inasmuch as it is more internally competent to do so, it seems that in the world of American law family law is more *formally* competent to evaluate the encounters at issue in abortion law.

CONCLUSION

In applying Kaveny’s dual-virtue framework on wise lawmaking to US constitutional law, I have argued that as currently construed, US constitutional law cannot adequately inculcate the virtue of solidarity. I have based this argument in part on John Paul II’s account of the union of symmetrical and asymmetrical encounters in the virtue of solidarity and the apparent lack of this union in US constitutional law. Specifically, I have claimed that so long as its contractarian presuppositions control its vision, US constitutional law cannot adequately recognize asymmetrical encounters. By extension, I have claimed that it cannot competently judge the asymmetrical encounters implicated in abortion law. In support of this latter point, I enlisted Aquinas’ account of how specific forms of law are competent to judge, inasmuch as they have notions internal to them adequate to address specific legal questions.

In light of this supposed inadequacy, I outlined two possible ways to remedy the apparent incapacity of US constitutional law to address asymmetrical encounters. I noted that the first approach seeks to leverage other areas of American law more congenial to the inclusion of asymmetrical encounters. I further noted that the second seeks to corral this incapacity by delegating the evaluation of asymmetrical encounters to more competent areas like family law. I suggested that the second approach is more competent to address the interpersonal encounters at stake in abortion law. I based this judgment on the key presumptions and competencies of family law. In the wider context of

¹²⁹ Russell Hittinger, “The Coherence of the Four Basic Principles of Catholic Social Doctrine,” 110. Hittinger notes that in Pius XI’s commentary on subsidiarity, the word “functions” translates the Latin term “*munera*,” meaning “having roles to play or gifts to give.” See Hittinger, “Social Roles and Ruling Virtues in Catholic Social Doctrine,” *Annales Theologici* 16 (2002): 391. In his own commentary on the principle of subsidiarity, Johannes Messner translates the Latin word “*munera*” as “competencies.” See Johannes Messner, *Social Ethics in the Natural Law Tradition*, trans. J. J. Doherty (St. Louis, MO: Herder, 1965), 210.

American law, I further supported this judgment through the use of the principle of subsidiarity, with its emphasis on resolving issues on the “proper” level of law, not just on the lowest level.

In the end, I think Alvaré is right to conclude that family law best balances “individual rights and family solidarity.” In Kaveny’s terms, it best balances the legal virtue of autonomy with the legal virtue of solidarity in matters dealing with relationships of dependence and care in family life. I think Alvaré is right to suggest that family law is most competent to address the asymmetrical encounters at stake in abortion law. **M**

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