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Religious Liberty: The Legal Culture

Michael Sean Winters | Nov. 2, 2011 Distinctly Catholic

I do not share the exorbitant fears that some of my more conservative friends entertain regarding the existence and influence of cultural elites determined to destroy the Catholic Church. I am not sure it is true ? America?s elites have many motives ? and I think this populist concern about elites invites a defensive posture that is thoroughly unhelpful to evangelization. The shadow of elites persecuting the Church seems to me to be, like most shadows, something with little substance but nonetheless capable of producing fear.

That said, there are two areas of American public life where it is true, and one of those areas warrants our attention today: the field of legal scholarship. There, we can discern substance in the shadow.

As lawyers are wont to say, let me stipulate to a key fact before proceeding: I am not a legal scholar. My awareness of the thoroughly secular worldview of much modern legal scholarship came to me via my friendship with, and the concomitant conversations with, two outstanding Jewish legal scholars. To clarify, these men are both scholars of civil law not Rabbinic law, but the need to clarify that fact is itself significant. Jewish religious practice has been built upon a legal framework in ways that are different from Christian religious practice. My friends have a more expansive, more philosophic, more humane understanding of law in their bones. They are alive to the interplay of the law with other important human goals, from happiness to justice, in ways that many secular lawyers are not.

There is a passage in the plurality decision in the Supreme Court case Planned Parenthood v. Casey that has always caused me agita. ?These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one?s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.? My difficulty is with the verb ?define.? As a Catholic, indeed as any believer in a religion built upon a divine revelation, I would prefer the word ?discover? or ?discern.? There is something protean in the way the Court states the essence of liberty that I find obnoxious and, more importantly, untrue to human experience, certainly untrue to the experience of most Americans. For these legal scholars, and we are not talking about a few outlier profs at an Ivy League law school, as these words are drawn from a Supreme Court ruling, everything really is up for grabs. The worldview conveyed is the worldview of Dewey?on steroids. That is not my worldview and it is certainly not the worldview of most Americans, which is one of the reasons there has emerged such a disconnect between the courts and the political life of the nation.

The demands of the modern academy also enter in to the chasm between the world of legal scholarship and the everyday lives and values of ordinary Americans. The modern academy rewards innovation and pushing the envelope. You don?t get published as easily when you take up a conservative stance on any given legal issue. You get published when you bring some new point of view to bear upon a topic, regardless of whether that new point of view is true, or useful, or coherent, still less if it is consonant with something as ephemeral and difficult to measure as humane values. We see something similar, and something equally sad and distressing, in the

world of academic theology although here, thankfully, tradition serves as an antidote and counter-weight, sometimes less effective than others, to the supreme value of innovation the academy worships.

There was a time, not so long ago, when courts and legislatures did not see the need to find rigorous, modern legal scholarship to define their relationship with religious organizations. A few years back, in Connecticut, a state senator irked by the Catholic Church?s opposition to same sex marriage decided to pick a fight. He announced he would hold hearings into the laws under which the Catholic Church is incorporated in Connecticut, which laws dated back to the 1950s when parts of the Connecticut state codes were re-written. I do not know as a matter of fact, but I am pretty sure, that in the 1950s, when it came time to look at how the Catholic Church ? and the other mainstream churches ? would be incorporated, the Governor of our state called the Archbishop of Hartford and said, ?How do you want this to read?? And, so, what was worked out in a phone call without reference to legal scholarship, became the law of the state. I do not know if it is ?good law? or bad, but it works. N.B. To those who rant about the introduction of sharia law, they should realize that many states, like Connecticut, reference the existence on religious laws, in the case of the Catholic Church, canon law, as normative for religious organizations and take a hands-off stance about intramural conflicts. Alas, such easy and more or less satisfying arrangements as that conceived by the Connecticut governor in the 1950s would scarcely be possible today.

The fault line between Church and State is as old as the scriptures and as present today as any political issue. The bishops are quite right to be concerned about how this plays out. And, too, they are right to be concerned that when you have a Democratic administration, you are going to get many staffers who drank, and drank deeply, from the fonts of hyper-secular jurisprudence at law school without so much as a second thought to the fact that they were imbibing a worldview antithetical to the worldview of most of their fellow citizens.

Recently, the Supreme Court heard oral arguments in the case Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission. At issue is the ?ministerial exception? and how it does or does not apply to the facts of the case which involve a teacher who was dismissed and sued under the terms of the Americans with Disabilities Act. As a common sense matter, most Americans, and I suspect most church-goers, want their churches not to discriminate against those with disabilities. But, the Department of Justice delivered a brief in the case that sought to construe the ministerial exception so narrowly that they almost got laughed out of the court at oral arguments. [1] After arguing that there was really no difference between the criteria the Court should employ in evaluating religious organizations from those employed with other non-religious associative organizations, Justice Scalia said:

> "That?s extraordinary?that?s extraordinary?.There?s nothing in the Constitution that explicitly prohibits the government from mucking around in a labor organization. Now, yes, you -- you can by an extension of First Amendment rights derive such a -- but there, black on white in the text of the Constitution are special protections for religion. And you say that makes no difference??

The DOJ?s brief in the Hosanna-Tabor case scares the livin? bejeezus out of the bishops as well it should. The ?ministerial exception? may have been easy to delineate when our Catholic schools and hospitals were staffed by religious sisters and brothers and ordained clergy. But, in our day, the Catholic identity of our institutions will be carried on by lay people who, though not officially ministers themselves, nonetheless undertake a distinctly ministerial task. One can argue, what does a chemistry teacher have to do with religious identity? Or a nurse at a hospital? Why should a church be able to give preferential hiring treatment to co-religionists, or fire someone who is a competent math teacher but expresses hostility to the religious identity of the school? It is true that a Catholic biologist and a secular biologist must look through the same proverbial microscope, but a teacher in a school does more than instruct in their field. They form relationships with their students and their colleagues. They serve as role models for their students. And while a Catholic nurse and a non-believing nurse must both now how to take a patient?s blood pressure, a Catholic nurse may better be able to see Christ in the

poor patient to whom she ministers. Our Catholic hospitals have a dual role, better to say a single role with two facets: They must give first class medical care and they must carry on the healing ministry of Jesus. Our Catholic colleges must not only provide their students with state-of-the-art research, they must pass on the faith. And, if religious considerations cannot enter into personnel policies, soon enough, those schools and hospitals will lose their Catholic identity. You can?t have a Catholic school, or a Methodist, without Catholics or Methodists. This issue of who is and who is not a minister needs to be broadly construed by our courts as the Church shifts from one whose institutions are staffed and led by clergy and religious to one led by lay people who nonetheless carry on explicitly ecclesial tasks.

I do not know how my concerns do or do not cohere with the requirements of First Amendment jurisprudence. From what I gather, that jurisprudence is a bit of a mess. But, the concerns are real and the Obama administration had better find a way to rein in the lawyers at DOJ who seem unalert at best. It does not matter to me if they are intentionally hostile to the Church. I suspect they are not, but they are creatures of a legal intellectual world that does not know how to handle the Church. If it were up to me - and thank God it is not! ? I should like to see the introduction of the idea of the libertas ecclesiae, the freedom of the Church, find its way into our legal culture. I have called attention before to Lew Daly?s wonderful essay [2]at Democracy that touched on this topic.

There are also steps that the Church can take on her own to meet the challenge, steps that might seem novel but are actually drawn from our long history of wrestling with the temporal power. I am reading a history of the Church in France during the long seventeenth century, 1960-1730, and it is clear that in order to protect the Church?s interests from encroachments by the civil authorities, certain ecclesial posts were assigned to those only in minor orders, not simply to ordained priests, in order to protect the occupants of such posts from secular interference. Why not tonsure our chemistry teachers? Or require that a certain percentage of our hospitals administrators or doctors or nurses be given an explicitly ecclesial status to accompany their ecclesial mission? And, seeing as the College of Cardinals is a completely human institution, in no way tied to jus divina, and therefore can be changed and altered at the will of the pontiff, let me be so bold as to suggest that at the next consistory, Sister Carol Keehan be given a red hat! Among the many blessings of being a Catholic, one of the greatest is that even a cursory familiarity with our history animates the conviction that we have been here before and found creative ways to defend the Church.

Of course, the central issues in religious liberty debates are, as I suggested yesterday, who is being coerced and who is being discriminated against on the basis of their religion. In this latter concern, we have to admit that we think the Church should be able to discriminate in favor of our co-religionists in order to protect these institutions' Catholic mission and identity, and not be penalized by the state for doing so. In the former concern, we believe that we should not be coerced against our conscience into behavior that others deem socially appropriate but which we do not. There are no absolutes here: The government was right to deny Mormons the right to polygamy, for example. But, the Catholic bishops are right to be establishing a committee to look at this issue of religious liberty. They have already attracted first rate advisers to help them, including CUA President John Garvey, Ambassador Mary Ann Glendon, and Notre Dame law professor Richard Garnett, whose blog Mirror of Justice I have turned to frequently for insight and perspectives different from my own.

Tomorrow, I will look at the politics of this issue of religious liberty.

Links:
[1] http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf

[2] http://www.democracyjournal.org/arguments/2011/09/case-against-church-state-separation-from-unlikely-source.php?page=all&print=true