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Contra Kaveny

Michael Sean Winters | Jan. 14, 2013 Distinctly Catholic

I do not lightly take issue with anything written by Cathleen Kaveny. For starters, she is so much smarter than I am. Secondly, I admire her work immensely and just received a review copy of her new book ?Law?s Virtues: Fostering Autonomy and Solidarity in American Society [1],? which I hope to start later this week and review for this column shortly. I can scarcely say how much I am looking forward to reading it. Third, I consider Professor Kaveny a friend and after a couple of years of exchanging emails, we met for lunch this summertime and I can safely say she is one of the most engaging and enjoyable luncheon partners I know. All this must be said so, in part, people can understand what seems so difficult to understand here in Washington these days: People can like each other, admire each other, and still disagree without challenging the other person?s motives, without condemning the other as an enemy of the Church, etc.

Kaveny, however, has published an essay at Commonweal [2]about the HHS contraception mandate that, I think, misses the mark in important ways. Her argument, in a nutshell, is that the HHS mandate is not unprecedented in any meaningful way but represents the latest in a series of necessary attempts to balance the interests of religious groups with the objectives of government policies, all in a pluralistic society in which such balancing is more complicated than it seems. So far, so good.

It is true that some of the histrionics coming from certain quarters, including the Chairman of the USCCB?s ad hoc committee on religious liberty, Archbishop William Lori of Baltimore, have been misplaced and overwrought, failing to recognize the history of the last half century in jurisprudence regarding the religion clauses of the First Amendment, in which the courts have been all over the place. After years of focusing on the establishment clause, the courts seem to have recognized that their rulings had come to burden the free exercise clause. They are still trying to figure out how to strike that constitutional balance. So, this ?fight for religious liberty? did not start with President Obama and the HHS mandate, this is just the first time people like Archbishop Lori noticed.

The histrionics, though, are only half the story. The other half is that, in this decision, the Obama administration failed to meet the key criteria set down by the Religious Freedom Restoration Act. That law, passed overwhelmingly in both houses and signed by President Clinton, requires that government policy only burden religious freedom when there is a compelling state interest and, importantly, that the means chosen to achieve that state interest be the least burdensome to religious freedom. When asked about these constitutional niceties in sworn testimony before Congress, HHS Secretary Kathleen Sebelius said that she did not consider the constitutional issues before issuing the HHS mandate. Sorry Madame Secretary, but the law requires you to consider those constitutional issues and, as I have written ad nauseum, there were a handful of ways to achieve the government?s interest in free, universal coverage of birth control that would have been less burdensome to religious institutions.

Professor Kaveny argues that the Supreme Court?s decision in United States v. Lee is the most ?on-point? case in this matter. I am not so sure. That case involved Amish who did not want to contribute to Social Security

taxes. In the light of last summer?s solitary, yet controlling, opinion by Chief Justice John Roberts to uphold the individual mandate of the Affordable Care Act, perhaps the Court will also uphold the HHS mandate (which is different from the individual mandate) as an exercise in the taxing authority of the government. But, Professor Michael Moreland of Villanova Law School has argued [3] that Lee is not the most analogous case. I will leave it to these two fine scholars to adjudicate that.

The difficulty I have with Kaveny?s argument is different. She writes, ?The bishops rightly note that faith-based employers have a religious-liberty interest at stake in the mandate. They sometimes forget, however, that the *employees* of these institutions also have religious-liberty interests.? And, so they do. But, when one takes a job, there are all sorts of freedom that are surrendered as a condition of employment. You may not be able to wear anything you want because the institution requires a uniform. You may not take your lunch when you want but coordinate with your boss as to the timing. A person?s free speech rights may be circumscribed by the need for a company to maintain secrecy regarding its policies and products. It would be wrong of Catholic University or Notre Dame to fail to disclose that they do not provide contraception coverage to prospective employees, but I think they should have the right not to do so.

Here is where a Catholic university is different from a Taco Bell. The Catholic university teaches that contraception is wrong. That teaching may be accepted, it may be honored only in the breach, but it is taught. So, requiring that institution to fund something it simultaneously teaches is wrong turns that institution into a hypocrite. That is the problem here. I do not think the Church?s teaching on contraception is central to the faith and nothing made me crazier during the past year than to hear Sean Hannity describe that teaching as a ?core belief? of the Catholic faith. The Creed contains our core beliefs. But integrity is essential to the life of faith and the mandate requires a Catholic school to teach one thing and do something contrary to that teaching. That strikes me as untenable.

For me, whatever the legal ramifications, this fight has always been about the integrity of our Catholic institutions. They may govern themselves badly or govern themselves well, but they should be permitted to largely govern themselves. They will be different from their secular counterparts, to be sure, but why is homogenization a good thing? I thought liberals liked diversity? There are certainly overriding government interests that should bind religious institutions: They should not be able to discriminate on the basis of race, after all. And, protecting women?s health is, like preventing racial discrimination, and clear and compelling government interest. But, there are easy alternative methods for meeting the compelling government interest of providing free access to contraception and I do not discern any such corollary in terms of preventing discrimination. HHS could, at very reasonable expense, provide this coverage to women who work at exempt institutions through the exchanges that are being set up, or through a government website. In fact, devising such an alternate route would achieve what women?s groups say they want, universal coverage, which is something that they do not have now and will not have under any iteration of the final rule. It is vital that the decision makers in the White House see this: Instead of fighting over the scope of the exemption, they should be finding a way to keep a robust exemption and deliver the desired coverage by a different means.

This would not burden the religious liberty, or other, interests of the employees of Catholic institutions anymore than seeing a crucifix on the wall might burden them. A non-Catholic who works at Catholic University could access the coverage she wants. The university would play no part. Everybody happy.

I hope for the day when civil society in the U.S. will be fuller and richer than it is today, in which more government social programs are entrusted to churches and other charities. I hope that soon there are more Catholic schools helping more disadvantaged children. And American civil society desperately needs our Catholic colleges and universities to help the nation address some of the truly challenging issues facing the country, and for which modern ideas of rationality may be less useful than traditional Catholic ideas of reason as open to, and conditioned by, the transcendent. Frankly, I do not know that our modern liberal democracy is up

to the most basic challenge our nation faces: 70% of our economy is based on consumption and that is not sustainable economically, environmentally or morally. It seems to me that only the Catholic intellectual tradition, with its key concepts such as the universal destination of goods, strikes me as up to the challenge of even framing the right questions about how to address such a problem. But that tradition is not abstract, it is realized in living breathing institutions. The HHS mandate, whatever its legal issues, is a challenge to the integrity of our institutions. It needs to be changed.

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