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7. Gay Marriage and Religious Freedom

Lessons from Hobbes

Amy E. Wendling, Creighton University

Abstract

Wendling argues against a religious exemption from participating in gay marriages guaranteed by the civil body. To do so, she recalls the history of the social contract tradition in its pre-revolutionary form, and especially in the texts of Thomas Hobbes. Writing against the backdrop of religious civil wars, Hobbes argued that in environments of religious pluralism, positive religious freedoms must always be subordinate to negative religious freedoms and to the interests of a peace-seeking state. Without this subordination, positive religious freedoms would not even be possible. Wendling considers the import of this dialectic for the Free-Exercise Clause of the U.S. Constitution, arguing that the clause may be incompatible with this truth of the modern state.

Keywords: gay marriage, religious freedom, Hobbes, social contract, Free-Exercise Clause

Introduction

In the United States in the summer and fall of 2015, national news outlets covered the Kim Davis case. In the wake of the *Obergefell* U.S. Supreme Court decision, a decision that a fundamental right to marry is guaranteed to same-sex couples, Davis, a county clerk from Kentucky, refused to issue marriage licenses to gay and lesbian couples, and for a time refused to issue marriage licenses altogether. Davis spent five days in jail in September for contempt charges (Bittenbender; Stephenson).

As an Apostolic Christian, Davis argues that she cannot act against her belief that gay marriage is a sin. Davis cited her conscience as a reason for the refusal, and cited God's authority as the determinant of her conscience. Politicians interested in her case referred to the protections for freedom of religious practice enshrined in the First Amendment to the U.S. Constitution (Margolin).

Seen in light of a newly penned Supreme Court decision, the case may appear to have something new or different about it. But what is actually interesting about the case is how entirely uninteresting it is. Far from indicating a new figuration, the case instead rehearses debates that have been a staple of the modern political landscape. The way these debates came to have their characteristic structure is, however, of great interest. To see this structure as a general tension between the demands of sovereignty and the demands of religious freedom is to see it falsely. Instead, it is a tension internal to the demands of religious freedom itself: a tension that sovereignty stepped in to solve.

Two Senses of Religious Freedom

As social contract theorist Thomas Hobbes understood best, there is a dangerous equivocation at the heart of the meaning of the phrase "religious freedom." A number of important German critical theorists have explored this equivocation and its history in their works, including both Hobbes' great interpreter, Reinhart Koselleck (1985; 1988) and Hans Blumenberg. This essay draws on those accounts, tailoring them to explain the contemporary debate in the United States over religious freedom.

On the one hand, religious freedom means "freedom from religion." Freedom from religion is a negative freedom: freedom from being forced to practice or adopt religious norms that are foreign or aberrant to us. Freedom from religion is particularly important as an antidote to an environment in which religious norms and practices are enforced by the state as a qualification for participation in civil life. Henry the IV's Edict of Nantes protected Protestant rights to occupy, work, and own property in Catholic France. Cast in this historical light, it is clear why the negative freedom, the freedom from religion, has been of particular importance for groups who are numerical minorities.

On the other hand, religious freedom means "freedom of religion." Freedom of religion is a positive freedom through which the norms and standards of a given religion are permitted practice.

When invoking religious freedom, the negative and the positive senses of the term are usually intended simultaneously. But it is not at all clear that both the negative and the positive senses of the term can be maintained, simultaneously, without fracture. The reason

is rather simple and appears in two cases. First, it appears in cases where the positive freedom and the negative freedom come into conflict with one another, or where practicing the norms and standards of our religion forces others to practice or adopt religious norms that are punitive or aberrant to them. Religious pronouncement is seldom solely self-regarding. The moment that, implicitly or explicitly, religious pronouncement seeks to regulate the conduct of others, it becomes political and has the potential to step on sovereignty's toes. Second, it appears in cases where the positive freedom comes into conflict with the state in a way that criticizes its policy or procedures. The Davis case, unsurprisingly, exhibits both of these fractures.

The great sovereigns of the sixteenth century understood this: Elizabeth I in England and Henry IV in France both stabilized their states with policies of religious toleration, but policies which extended only so far as religious practices did not overstep and come into conflict with these states. They enabled negative religious freedom by curtailing positive religious freedom. For example, as Koselleck reminds us, prophecy was roundly persecuted since it often forecasted ills for protected groups, and potentially interfered with the ability of a stable state to set an unchallenged future course (1985: 11).

Hobbes and Sovereignty

The social contract theorists of the seventeenth century still understood this fracture. Pre-eminent among them was Hobbes. Hobbes's political theory was written against the backdrop of the Catholic-Protestant conflicts of the English Civil Wars (Koselleck 1988: 23). In light of this, Hobbes's theory of sovereignty steps in to solve several hundred years of bloody religious conflict that had been destabilizing the English states in particular.

Interestingly, Hobbes was no atheist, and this was certainly already an option for seventeenth century intellectuals. In fact, he has a body of developed, if idiosyncratic, biblical interpretation. However, like the sovereigns whose rules he theorized, he was a child of religious conflicts so fraught that they degenerated into civil wars. As a result, he came to believe that the primary duty of the sovereign was to insure stability. Religious practice, of whatever stripe, could not be allowed to destabilize the sovereign state.

Rather than given, guaranteed, or maintained by God, Hobbesian sovereignty is self-generating. Part of the logic of sovereignty is its necessary singularity, and the dialogue between whichever God and the Sovereign is already one too many, particularly if a pope gets involved. Hans Blumenberg writes that, for Hobbes, the religious interest is integrated into the public interest "for the purpose of reducing the number of authorities taking part in consciousness." Blumenberg goes on to advise: "conflict disappears for the almost scandalously simple reason that there cannot be two absolute authorities" (95-96).

Hobbes builds up the legitimacy of the absolute sovereign from radically democratic premises. He asks, given that we are all basically equal in body and mind, what rights are we willing to give up to protect ourselves from one another? That question generates a rather long list of answers: the ability to insist upon positive religious freedoms that affect others are on it.

This solution decides the equivocation of religious freedom, emphatically, in favor of the negative freedom, or freedom from religion, the same way the absolutist state in its

perfected form decided it. First, in those cases where the positive freedom infringes on the negative freedom, the negative freedom must prevail. That is, in those cases where allowing religious practices forces others to practice or adopt religious norms that are aberrant to them, the former is not allowed. Second, in those cases where the positive freedom comes into conflict with the state in a way that criticizes its policy or procedures or otherwise violates a compelling state interest, it is also not allowed.

The solution is logical, since it is the negative freedom that conditions the positive one in the first place. In absolutely any environment where religious doctrines are multiple and opposed, negative freedom must outweigh positive freedom or peace will be threatened. Religious doctrines have always been multiple and opposed in the modern state: in certain ways, there is no theory of modern sovereignty that is not a response to this multiplication and opposition. This set of concerns that began with the Reformation continues today in the debates that surround Islam.

Hobbes simply absorbs without remainder, and without apology, the consequences of his theory for appeals to the conscience of all types. If the conscience were what it claimed to be, an internal set of thoughts, it would pose no problem. However, Hobbes notes that the appeal to conscience nearly always masks a bid for power. As Koselleck puts it, “whoever refers to his conscience wants something” (1988: 23). For this reason, appeals to conscience as a justification for illegal action are, in general, suspect as a type. Appeals to religious conscience against the law are particularly suspect.

In controversies of religion, subjects can think whatever they like. However, in their capacities as a subject they are not bound to follow the judgment of religious authorities if these authorities do not tally with the judgments of the law. Even when they do tally with the judgments of the sovereign power, it is for this reason, and not any other, that they are to be followed. This has had the effect, as Koselleck has documented in both his works, of setting off the private person from the subject, and setting separate duties for each (1985; 1988).

This becomes significant in those cases where the duties of the private person and that of the subject collide. In such cases, the duties of the subject prevail. This is why Hobbes claims, in the *Elements of Law*, “that subjects are not bound to follow their private judgments in controversies of religion” (1640: Chapter 25). Not only can the conscience be ignored: there are circumstances where one should and must ignore it. One must ignore, in particular, any proposed call of the religious conscience to action that disturbs the peace and defies the state. Conscience that becomes illegal action oversteps.

This is because, as Koselleck puts it in his gloss on Hobbes:

Mere conscience which presumes to mount the throne is not a judge of good and evil; it is the source of evil itself. It was not just the will to power that kindled civil war; those flames were fanned equally by appeals to conscience without outside support. Instead of being a cause of peace, the authority of conscience, in its subjective plurality, is a downright cause of civil war (1988: 28-29).

When the stakes are as high as civil war, ignoring our conscience is not simply the lesser evil: it is the very condition of possibility for the peaceful society that we need in order to develop conscience in the first place.¹ This is the importance, in Hobbes's theory, of the negative freedom of religion – freedom from religion. It is also why it is not quite correct to contrast Hobbes's political theory with natural law theory. In fact, Hobbes's political theory is a species of natural law theory, in that it is designed to preserve peace and to honor the commands of reason in doing so. Hobbes propounds, however, a natural law theory that entertains the idea that the commands of God might disrupt the orders of peace and reason rather than insure them. Identified with God, as Aquinas does, could cause reason to come into conflict with itself.

Forgetting Hobbes

It took social contract theory less than twenty years to forget this lesson. In the *Two Treatises of Government* first published in 1690, John Locke will complain about the absolutist state's offenses to the conscience, to natural law, and to authentic humanity, and he will use religious language to do so. Locke and other intellectuals will attract the anti-absolutist political loyalty of newly re-evicted Protestants and atheist Freemasons alike, even if this is not their primary aim (Koselleck 1988: 53-123). The generalized complaints against the absolutist state will then be made without regard to how this state enforced limitations on the conscience precisely to stabilize itself and bring peace. The absolutist state that authorized the Edict of Nantes in the first place will be forgotten, and only the absolutist state that revoked it remembered. Claims against the absolutist state will thus also be made without recognition of what can be accomplished by curtailing the positive freedoms of religion and conscience.

Under the influence of these forces, it took everyone else about a hundred years to forget Hobbes's lesson. First, the accomplishments of the absolutist state are buried by the revolutionary fervor against its authoritarian structure. The great continuities between the pre-revolutionary and post-revolutionary states are forgotten and minimized by historians. After the beheadings, it is year zero in France even if most of the bureaucratic personnel of the absolutist state remains intact, along with much of its structure and its many, many accomplishments. De Tocqueville, with his habitual good sense, gives a more accurate picture of the many continuities between the pre- and post-revolutionary state in *The Old Regime and The Revolution*.

Second, as Koselleck shows us, the concept of "revolution" rehabilitates the idea of civil war even as it resumes its logic and the intra-state violence it names (1985: 53). The eighteenth century becomes comfortable with the violent conflicts that the sixteenth and seventeenth centuries eschewed and averted: cloaking, in Koselleck's words, "the awfulness of civil war that lay behind the mask of radiant revolution" (1985: 46). Again in opposition

¹ For Hobbes, bifurcations of society and conscience are best avoided so that the problem outlined here will not present itself. Hobbes subscribes to the Aristotelian – and, later, Nietzschean – theories of conscience. These hold that the conscience is in fact quite permeable to the norms of society and shaped by it, both from its origins and afterwards. This is why for Hobbes the sovereign is the sole judge of the doctrines that are fit to be taught to subjects in the first place (1994: 113).

to this trend, de Tocqueville charts the continuities between the French Revolution and the earlier religious conflicts (24-28).

Finally, in the midst of this revolutionary fervor, and concerned to distinguish itself from what came before, eighteenth century political theory overemphasizes the importance and legitimate extent of subjective rights (Honore: 113). In this overemphasis, subjective rights appear to be without the very limits, restraints, and conditions that produced their conditions of possibility in the first place. One clear example of this is the change of property rights into the kind of thing that confer only entitlement, and not also duty (Honore: 113). The same is true of religious rights and freedoms: they appear to be without the limits, restraints, and conditions that produced them. Remembering these conditions would require preserving the memory of the very absolutist state that the revolutionary tradition is working so hard to forget.

This forgetting is even worse in the United States, an eighteenth century nation founded by Protestant immigrants, where Locke's theory rather than Hobbes's was the one Thomas Jefferson happened upon. Neither England nor the nations of continental Europe were able to forget it so resoundingly. France is the country that can perhaps be said to have perfected the absolutist state. There, for example, the banning of the hijab in public school retains the preference of freedom from religion over against freedom of religion. Of course, Etienne Balibar is quite right to point out that in order for the law to be applied with perfect, non-racist, consistency, the crucifix also has to go (325).

This history of forgetting in the United States, and the overstatement of the subjective rights, including religious rights, that accompanies it, allows us to understand the U.S. Bill of Rights as a raft of contradictions. Recall the text of the first part of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." If the free exercise of religion includes positive freedoms of religion, then the amendment is simply unsustainable as written. Positive freedoms of religion will always be conditioned by the negative freedoms, and when the two come into conflict, the positive freedoms will have to be curtailed. The first amendment's free exercise clause may actually be an overstatement of the kinds of religious freedoms that any modern state – that is to say, any state with significant religious diversity – can really allow. This is why we see the same tensions erupt around it again and again.

Hobbes knew that we were going to forget, and he knew that even before we did, we would complain of the rights we have had to give up. To this he gives the following answer in his *Leviathan*: those who complain that subjects are miserable for having to give up some of their positive freedoms have forgotten that the stakes are civil war, and that civil war would be very much worse. However, we are myopic, likely to see all the little grievances, and lack the kind of glasses that might allow us to see clearly what miseries we avoid by them (1994: 117-18). Against this reminder, it is clear why Kim Davis was compelled to sign some marriage licenses, resign, or – a neat solution that causes no contradictions – stay in jail in the way Socrates himself insisted upon. This is the cost for the ground of her beliefs, since it is why the Apostolic Christianity she currently espouses was not burnt at the stake, several times over and for various reasons, by early modern Catholicism.

Conclusion

In conclusion, it remains only to particularize this history to discussions about marriage. Like the demands of religious freedom, disputes around marriage are nothing new: indeed, the two issues have been found often together. The most obvious parts of this history include the celibacy debates at the foundation of Protestantism and the annulment and divorce issues at the foundation of the Church of England. Even within Christianity alone, religious conviction on the gay marriage issue is in fact very diverse at the moment. Gay unions have been long accepted by some denominations and are newly accepted by others; they are controversial within single denominations or even polarizing for single churches spread over geographic regions with different cultural norms. In light of such examples and others we could multiply, it is easy enough to grant Hobbes's point that if free exercise of religion is allowed at this time in history, the toxic matrix of religion and sexuality poses a significant threat to the peace.

To those who might say that the prohibition on homosexuality and homosexual practices is but a minor aspect of Christian doctrine, this might be a good argument for political purposes, but it is not quite correct. The disputes around celibacy or the foundation of the Church of England are famed for their prurience, but they carry the lesson that sexuality in general remains an inescapable difficulty of the asceticism Christianity cannot seem to dispense with. When Apostolic Christians dig in their heels around the homosexuality issue, it is because it stands in for sexuality, in general, and because gay and lesbian persons are easy enough scapegoats for the sins of the species.

Now marriage, as Mark Jordan points out, is an odd bird for Christianity. Christianity, as an ascetic sect, had no marriage tradition of its own and so cobbled one together from Roman and Jewish pieces 400 years into its history (129, 141).

Marriage is an odd bird for another reason: suspended between the regulations of church and the state, both wrestle for control, if for no other reason than the suspension itself. Writing prior to *Obergefell*, Jordan draws attention to this fact in the context of his argument that Christian churches should bless same sex unions. He writes:

The more state regulation accords with church practice, whether prohibiting or approving certain unions, the more important it is to say that the two spheres are not one. Yet as soon as you begin to insist on their distinction, you fall into the first fallacy. Christian marriage has long been constructed by church and state together. . . . Marriage remains the great testimony to the inseparability of church and state (4).

Hobbes would likely disapprove of such inseparability, particularly with respect to an issue with such potential to disrupt or promote the peace. If Jordan is correct, then issues like marriage where the role of the church and state are necessarily commingled will always be weak spots for Hobbesian theory – and, beyond this, for modern society.

This does not mean that Hobbesian theory cannot add to our understanding of debates around marriage and whether there is a compelling state interest in its structure. For we should also consider marriage, in general, and same sex marriage, in particular, as Hobbes would: in light of its potential to further the interests of a peaceful and commodious political

body, without regard to particular religious opinions about the issue. In doing this, at least two interesting anthropological pieces about marriage come to light.

One, legalizing same sex marriage removes an unnecessary impediment to contract, and for this reason should be allowed. Hobbes allows the widest possible scope to contracts, which he believes help a society to flourish. In an environment where all persons are equal in mind and body – as is, in fact, still professed by western democracies – no markers such as race or sexual status should stand in the way of contracting parties. Only markers such as sufficient rationality to contract should stand in the way. Efforts to limit the marriage contract by sex of the entering parties will not pass this test.

Two, while singularity is the most stable form for sovereignty, pairs may be the most stable form for subjects. This may be why sovereignty, at this historical moment, has smiled on gay marriage but continues to frown on group marriages, with their treacherous potential for odd numbers and for even multipliers of the coupled form. In our cultural imagination, pairs are regarded as an extremely stable molecule and are the building block for a stable social formation, one that helps to keep the peace and pave the way for commodious living. And so, pairs are a formation which the state loves and in which it has, for a long time, had a vested interest.

We can leave it to the sociologists and the anthropologists to vet this particular prejudice of the cultural imaginary, and to wonder if the stability of the pairing model is significantly disturbed if the pairing is engaged in serially. We can wonder why the modern state stops short of forcing all single persons to marry, allowing social custom rather than law to enforce the norm of a coupled existence. But so long as the idea that paired subjects will be more stable and peaceful subsists, gay marriage, simply by virtue of capturing the legally paired form for a greater percentage of the population, will be in the state's interests.

How little these kinds of anthropological considerations are attended to in relation to this issue, particularly when compared to the number of considerations of a religious or quasi-religious kind! Hobbes would certainly want to restore this kind of anthropological consideration in relation to this and other issues. Only such considerations can encompass the full interests of the modern state, and not just its amnesic, revolutionary second act.

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