

Corporate Freedom of Religion and the Two Leviathans

Ivan Strenski*

Lord Leviathan and His Tormenters

In the United States, a consistent complaint argued on the part of self-appointed defenders of so-called “freedom of religion” and “religious freedom” is the “vulnerability” of religions over against the state. For them, what is in effect the predatory image of Hobbes’s Leviathan casts a shadow of an all-powerful nation-state holding an absolute monopoly on the use of power across its entire territory, especially over the territory of religion. It is against such an imagined threat to their presumed sovereignty that the *New York Times* reported on May 27, 2018, that “A Christian Nationalist Blitz” was now under way. This series of nationwide “Christian nationalist” legislative initiatives aims to promote “religious freedom,” which the *Times* report correctly identifies as “the latest attempt by religious extremists to use the coercive power of government to secure a privileged position in society for their version of Christianity” (Stewart 2018). In plain terms, the Blitz amounts to a campaign to limit the exercise of civil liberty in the public domain by leveraging its own position of power. In effect, in the United States, the religions, as corporate bodies, seek to cause what might at the very least be called major “indigestion” in the belly of Leviathan. More than that, the religions not only refuse to be digested by Lord Leviathan, they seek, at the very least, to escape from actions of social digestion entirely. Even more than that, however, perhaps at no other time in American history have the religions laid claim to sovereignty—to the right to be the “eaters,” not the eaten—in effect, to exemptions from civic responsibility of their choosing.

Delicious Religion

If all the religions look equally appetizing to Lord Leviathan, religion as such has a special piquancy. He regards it with special suspicion when compared to other members of civil society, because it is potentially more dangerous to his monopoly of power. Religion threatens Leviathan in ways that other members of civil society do not, or perhaps cannot, because religion speaks with an authority (*auctoritas*) that can compete with, if not transcend, that of the State’s. One might even argue that all the religions need to become a polity is territory and the requisite military power (*potestas*)—those “divisions” that Stalin reminded Pope Pius XII he lacked. Thus, the need to control, manage, suppress, or even eliminate religion (and so on) weighs more heavily upon Leviathan than the need to keep the rest of Leviathan’s domain tidy. This is true even though Leviathan’s frequent and effective cooptation of religions is one of the seldom recognized features of the comparative history of religions.

* Ivan Strenski is the Holstein Family and Community Professor of Religious Studies, *Emeritus*, at the University of California, Riverside. A scholar with interests in Buddhism, Emile Durkheim, and the history of religions, he is the author of *Contesting Sacrifice: Religion, Nationalism and Social Thought* (2002) and *Why Politics Can’t Be Freed From Religion* (2010), among other works.

For certain religious devotees, the craven collapse of religious resistance to Leviathan is one of the least edifying spectacles of modern political and religious history. The domestication of the Russian or Serbian Orthodox churches, the established Lutheran churches of Scandinavia, the Church of England, the Protestant and Jewish communities of France, or (until recently, at least) the Islam of Turkey, for example, would serve as contemporary examples of religions safely rendered powerless by their respective governments. All may be well fed, but they are firmly leashed. But by the same token, it is fair enough to have suspicions about the intentions of the religions, building upon their incremental gains in legal "accommodation," to seek fuller freedom in sovereignty, not unlike those of Native American tribes. In this, the churches would, in effect, seek to become laws unto themselves, states-within-states, thus presenting an equally unappealing prospect of pockets of theocracy. Symptoms of this seizure of sovereignty from the nation-state can be found in governments like those hostage to the Roman Catholic Church, such as today's Poland, or those submitting to the Guardian Council in Iran, or like Israel's governments that typically defer to broadly unpopular decisions about Jewish identity, conversion and marriage made by the Orthodox Chief Rabbinate of the state.

But, in principle at any rate, Leviathan still holds the hammer, monopolizes the use of force, and as such compels the religions to behave as it desires, and not the other way around. At one extreme, the religions may be some of the most prominent sources of Leviathan's perennial constant fear—the arising of (or the existence of) a state within a state, or indeed the foundation upon which a secular state may be replaced by theocracy. Whether Leviathan and the religions must necessarily challenge each other—indeed, whether religion's challenge to the authority of the state is itself essentially inherent in the definition of religion—is a question worth pondering. In this vein, it is worth observing that all recent insurgent or revolutionary attempts to replace the Westphalian system where Lord Leviathan rules, have been made in behalf of *religious* social formations; al-Qaeda, the Islamic State, the Islamic Republic of Iran, or Christian Identity nationalists come readily to mind.

Surprisingly, recently deceased Supreme Court Justice Antonin Scalia feared this chaos of competing sovereignties. A thorough partisan of the United States as a Christian nation, nonetheless he felt that if religious accommodations were not reined in, chaos would reign. Writing in 1990 for the majority in the so-called "peyote religion" case—*Employment Division, Oregon Department of Human Resources v. Smith* (494 U.S. 872)—Justice Scalia dismisses the claim by members of the Native American Church for religious exemption from Oregon's controlled substances laws for using peyote in a sacramental setting. Scalia quoted the then-landmark 1878 Supreme Court decision on the Mormon practice of polygamy to the effect that "To permit this [the practice of polygamy] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself" (from *Reynolds v. United States*, 98 U.S. 145, at 167) Scholars have pointed out that Scalia is far from consistent in resisting the expansion of religious accommodations. But this does not weaken the force of the decision as an example of significant judicial fears about the risks of the chaos caused by creeping sovereignty issuing from unrestricted religious accommodations.

How Freedom of Religion May Burden Religious Freedom

Thus far I have not distinguished between two senses of religious liberty that Christian nationalists of the so-called “Christian Blitz” use interchangeably, perhaps for strategic purposes. These terms, “religious freedom” and “freedom of religion,” when confused with one another, play havoc with our ability to think clearly about issues provoked by Christian nationalists. “Religious freedom” refers to freedom of belief, freedom of the individual conscience. “Freedom of religion” denotes quite another thing. It refers to the relative state of the sovereignty or autonomy of religious *institutions*—what the recent literature refers to as “corporate religious liberty” or “religious sovereignty” (see Schwartzman et al. 2016; Hill 2017). The side of individual “religious freedom” is often exemplified by Roger Williams, while Thomas à Becket symbolizes corporate sovereignty or “freedom of religion.” No matter how much our modern media culture—such as T. S. Eliot’s 1935 drama *Murder in the Cathedral*, among others—have cast Becket, in effect, as a Roger Williams of his day, these two men stand for two different notions of religious liberty. The difference? Williams conscientiously dissented from the orthodoxy of the church *institution* of his New England coreligionists, and was thus forced to leave Massachusetts Bay Colony in order to enjoy his own personal religious freedom—to believe as he chose. By contrast, as formal agent of the institutional Church, in 1170 Thomas à Becket asserted the freedom of the Church of Rome against the kingly authority of Henry II. Becket merely stood in for the authority of the Roman pontiff and asserted the autonomy of that institutional ecclesiastical authority against the competing institution of political authority of the English crown. In 1215, in the *Magna Carta*, a duly chastened King John affirmed that very same *institutional* freedom for which Becket died: “First, that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired” (*Magna Carta* 1215” 2008: §1). So exemplary was this conception of the “freedom of religion”—institutional freedom of the *Church*—that the Supreme Court cited this exact clause in a recent decision:

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of *Magna Carta*. There, King John agreed that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” The King in particular accepted the “freedom of elections,” a right “thought to be of the greatest necessity and importance to the English church. (*Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171, at 182; see also Green 2017)

In *Hosanna-Tabor*, the Supreme Court, therefore, forbade the government from applying equal opportunity employment law to the case of a worker fired from her job with the church. The worker had fallen ill, and after recovering, wanted to reclaim the job to which she was arguably entitled by her civil right to fair treatment under the law. But the firing was upheld, and the *sovereignty* of the church—its freedom of religion—to do so was accommodated at the expense of the civil rights of the employee. In effect, the Court granted the Hosanna-Tabor Church an “exit right” on the basis of the “ministerial

exemption," even though the employee, Cheryl Perich, had been absent due to illness and not to any alleged ministerial misconduct.¹

Critically, neither the *Magna Carta* nor the *Hosanna-Tabor* decision affirms individual freedom of conscience, or what I have called "religious freedom." From the Supreme Court's decision it should be clear what (or whose) freedom is being affirmed, both by the *Magna Carta* and the Court: plainly, it is institutional sovereignty and not personal liberty. It is not, therefore, the right to believe according to the dictates of conscience *against* the authority of his religious community; rather, it is the freedom (or sovereignty) of religious *institutions* that is advanced—indeed, often to rein in believers merely exercising constitutionally protected religious freedom.

Historians from the early 20th century to the present have commented on the different genealogies of these two notions—(institutional) freedom of religion and religious freedom (of individual conscience) (see Figgis 1907 / 1998; Figgis 1913 / 1997; Berman 1983; Nussbaum 2008). The so-called "Papal Revolution" conducted in the 12th century during the papacy of Pope Gregory VII asserted the freedom of the Church, of religion, while the value of religious freedom (of conscience) arose in the liberality of the 17th century Dutch Republic and the colonial experiments of men like Roger Williams. It has become commonplace, however, in the West to regard religious liberty as identified exclusively with *sacralty of conscience*, the right to believe whatever one chooses. Historically speaking, this conception of religious liberty ignores that sense of religious liberty understood as the freedom of an *institution*, people, nation and such, recently recognized in the *Hosanna-Tabor* decision. Worst of all, such confused usage falsely collapses the two notions of *institutional* freedom and freedom of belief or *conscience*. As we have seen, this eventuates in the irony of Becket being held up as a paragon of religious freedom or independent conscience when, in fact, he was serving as the institutional voice of the Roman Church against the English state of Henry II!

These two notions of religious liberty, then, differ deeply from one another. A fair measure of the profundity of this difference can better be appreciated by the frequency with which the rights of *religious* conscience are asserted *against* the authority or freedom of religious institutions, rather than on their behalf. While institutional freedom of religion may indeed "protect the individual" from a predatory State, it may also disadvantage the individual with respect to her general civil rights, all in order to affirm the institutional freedom of the church. In the *Hosanna-Tabor* decision, the State's siding with the church over against the rights of an individual demonstrates just such conflict within the notion of religious liberty. Sometimes freedom of religion, freedom of a church, for instance, demands the compromising of the individual's freedom—religious or otherwise—or well

¹ That this decision to support the Church's right to exit its obligations to an employee was based on the so-called "ministerial exception" seems an egregious misapplication of the principle that the state should not presume to rule on ecclesiastical matters. The sickness and subsequent absence from work are hardly issues in which theological considerations apply. The state was not, for instance, asked to reinstate an employee who had advocated allegedly heretical views during the course of her employment. Surely a person's health is a matter lying well outside the realm of the "ministerial," and squarely within that of general welfare. Although the recent literature on *Hosanna-Tabor* raises some issues similar to the ones I have raised here (see Lupu and Tuttle 2017), it overlooks the obvious fact that theological issues and judgments about them are simply inapplicable!

being. For instance, any number of theologians critical of the Roman Catholic Church, trying to assert theological *Lehrfreiheit* at Catholic institutions—as well as others, like Roger Williams, William Robertson Smith, Galileo Galilei, Bishop Nicholas Ridley and Bishop Hugh Latimer, Michael Servetus, Thomas Moore, Hans Küng, or the Network organization’s “Nuns on the Bus”—might complain of being oppressed by the ambitions of their churches to assert sovereignty. In these cases, the State has stood by, exposing individuals and their sacred consciences to the predations of their religious institutions. In such cases, I think we can fairly say that freedom of religion militates against religious freedoms.

Burdening Civil Rights in the Name of Religion’s Rights

Distinctly worrying are the increasing number of cases where the freedom of religion—that is, the freedom of religious *institutions*—disadvantages the individual enjoyment of *civil* goods. Two recent and quite different decisions—*Burwell v. Hobby Lobby Stores, Inc.* (573 U.S. 682, 2014) and *Zubic v. Burwell* (578 U.S. 3, 2016)—exemplify rulings in which judicial exemptions granted to religious institutions disadvantage individual enjoyment of legitimate civic goods. In order to appreciate the harm done to civil right, one need not, of course, reject out of hand that the federal mandate to offer contraceptive support to women employees of Hobby Lobby Stores, the Little Sisters of the Poor Catholic order, or others, might put these organizations into moral straits. Indeed, governmental officials did try to accommodate the scruples of the religious plaintiffs by providing their women with contraceptive services from non-religious, public sources. Still, despite such attempts to honor the claims of all concerned, the women entitled to contraceptive services were, in fact, “burdened” by being kept waiting through periods of uncertainty and deprivation of their legitimate civic goods while this matter was being litigated. Guarantees to them under general law paid little actual heed to their civil rights.

While these are not cases where the interests of (institutional) freedom of religion conflict *directly* with religious freedom (of conscience), they are cases where (institutional) freedom of religion does “burden” the enjoyment of legitimate civic goods. Here, it is not freedom of conscience that suffers, but simply the enjoyment of common civic goods ensured by general law. An individual citizen’s legitimate enjoyment of civic goods has thus been “burdened” by the claim of a religious institution to have been “burdened,” in turn, by general law. The courts have commonly tried to balance these burdens upon the general citizenry over against those of religious plaintiffs. In the case involving the Little Sisters of the Poor, for instance, the federal government provided the contraceptive services from which the nuns sought exemption. The “burdening” of the general citizenry seems to be the social cost of freeing religious institutions from “burdens.” In light of such asymmetrical outcomes, it might be worthwhile to give the equity of such civic burdening further scrutiny.

Legal “Accommodation,” a Prelude to Sovereignty?

The history of fights over legal exemption or accommodation for the purpose of insuring free exercise of religion is long. But, long as it is, it is equally well understood that the history of fights over freedom of conscience is equally long as well. Martha Nussbaum

locates the American origins of such an individual, interior sense of religious freedom in the struggles of Roger Williams, who held that "the capability of conscience requires protection of the widest possible space that is compatible with the safety and survival of the state." Only the extremes of ultimate "safety and survival, could possibly justify any diminution of the space within which conscience exercises itself" (Nussbaum 2007: 44). Nussbaum argues that it was Williams's spirit of the freedom of individual conscience that most deeply touched the Founders.

But, what if accommodations principally result in empowering religious institutions, at the expense of individuals? What if institutional accommodations turn out to be more consequential, especially in terms of influencing the outcomes of political contestation? What, as well, if institutional accommodations weaken conceptions fundamental to the values of national integrity, such as the value of the individual conscience? While individual accommodations may threaten conformity or (at best) induce pluralism into the body politic, institutional exemptions that seek exceptions from general law, in fact, challenge the integrity of the polity at large. At what point do these institutions' exemptions or accommodations enable the establishment of a state within a state? At what point do these exceptions to the rule accumulate enough substance to become the foundations of a new rule; that is to say, the grounds of sovereignty; that is to say, virtual secession?

We need not join skeptics of that congeries of notions that pass under the label "religious liberty," who sometimes focus upon possible violations of the "No Establishment" clause of the Constitution. Rather, we might instead issue a warning for the use of the free exercise clause to enable movements of religious *sovereignty* or *secession*. Seen this way, the accommodations sought on behalf of the freedom of religious institutions pose arguably greater threats to national public order because they, in effect, tend to secession from the support of civil rights, at least. In so far as they constitute efforts to opt out of acknowledging certain civil rights, legal accommodations made to institutions, such as in *Hosanna-Tabor*, may constitute the first steps on a journey whose final destination may be sovereignty itself. In *Smith*, Justice Scalia feared that permitting the kind of *individual* liberty from prevailing law that the plaintiffs sought would "permit every citizen to become a law unto himself." By extension, we could argue that legal accommodations to religious institutions may be hastening their achievement of being such "laws unto themselves."

If we take seriously Scalia's fears in *Smith* of the potential anarchy should "every citizen" become a "law unto themselves," how much greater is the risk to the nation and to the individual conscience that is posed by the gradually expanding accommodations made to religious bodies? Professor B. Jessie Hill reminds us that "religious sovereignty is a claim to the same people and the same geographical space that the political sovereign controls" (2017: 1196). She argues further that, *in principle*, there are no limits to the increase expansion of religious claims to sovereignty (*ibid.*). Indeed, Hill argues that the movement pushing for these exemptions is "problematic because it has no logical stopping point, and that the lack of limitation is inherent to sovereignty claims" (1179). To boot, Hill claims that these institutional religious "claims of entitlement [are] not just to deference, but to almost complete non-interference with certain aspects of institutional life" (1191).

Legal “Accommodations” to the Religions are Gifts Rather than Inalienable Rights

I raise the prospect of the potentially limitless extent of claims to institutional freedom of religion because I believe it forces us to take a second, more critical, look at freedom of religious institutions. Even if Hill and others in agreement with her overstate the self-seeking of religious institutions, there is nonetheless reason to re-examine the relation of religious institutions and the State.

Consider the case where religious institutions, despite their pursuit of accommodations to (and exemptions from) general law, desire to remain good citizens of the commonwealth, contributing appropriately to the general welfare. What might be appropriate reactions to these grants of exit rights from general law? Indeed, what could one argue *should* be their response to the granting of such exemptions and accommodations? Assuming that accommodations for individual conscience have not been seen as enabling secession or separation, to what extent do plaintiffs recognize that granting accommodations puts them in debt to society at large?

While accommodations to general laws on behalf of religious institutions may be relatively common, we are not justified in regarding such exemptions as “*natural*” or as marking “*fundamental human*” rights. They are instead derived from or extrapolated out of more fundamental rights. Accommodations or exemptions are, therefore, privileges “granted.” They are “gifts.” And, as gifts, they may be returned or rejected. The unfortunate church employee dismissed because of the accommodation (“gift”) to do so that was granted to Hosanna-Tabor Church could regain her job should that ruling be reversed at a later date. Similarly, the decision makes it clear that granting such an exemption is not fundamental in the sense of being “required,” or constitutionally demanded, and (significantly) not “recognized.” Additionally, it is important to distinguish exemptions and accommodations from so called “*natural*” or “*God-given*” rights in other ways. Thus, while it is true that statutory or judicial accommodations may be recognized as *flowing* from or inhering in such pre-contractual rights, their *determination* depends upon legislative or judicial action. As the precise logic of “*granting*” implies, these accommodations or exemptions are, instead, *gifts, grants, awards, bestowals, concessions*, and so on. Again, while “*inalienable*” or “*natural*” rights may be seen as “*God-given*,” as having divine origins, accommodations to general law depend upon specific human agency by courts or legislatures. If, however, we were to grant wider latitude beyond the restricted application of *Smith* to the state of Oregon, the notion of accommodation would seem to be conditioned by language like “allow,” “permit,” “provide,” “confer,” or “grant.” The court speaks always of “granting” an exemption or not. This is the language of *gift*, not an “*inalienable*” right. There is no “right,” strictly speaking, for members of the Native American Church to ingest peyote in the sacramental setting of their devising. No such status is “recognized,” it is either granted or it is not. Were the court to allow such a practice, it would, in effect, be *granting—giving*—the Church an exemption from the general rule against the use of a controlled substance, such as peyote. Thus, because the language of accommodation and exemption is so important to many recent pieces of legislation or judicial determinations, it is even more important to take stock of the logic of gift or social exchange. This logic is freighted with the language of obligation.

Honoring the Gift of Accommodation by Paying It Forward

One of the better-known obligations recognized by those being granted exemptions from general laws and policies is the *obligation* to repay the gift of accommodation with some sort of good-will public or patriotic service. For example, individual citizens granted conscientious objector's exemption from military service commonly perform public service either in civilian life or in non-combatant roles in the military. Religious institutions granted ministerial exception to military service typically provide chaplains to the military in implicit recognition, typically uncoerced, of their obligation to the nation, and in recognition of the gift nature of accommodations.

At the same time, such recognition of the obligation to repay counts as a pledge of patriotism. It is as if Lord Leviathan relents and grants an exemption from his general law, and in recognition of that gesture, so that the religions may serve Leviathan in other ways. The religions may, for example, repay Leviathan's gracious accommodation by enhancing the general welfare—Leviathan, the state, considered in its more providential aspect. Such a gesture, such a gift to the whole, would create a virtuous symmetry with respect to the State for granting its special accommodations to the religions. For example, Hobby Lobby Stores might make a noble patriotic gesture of gratitude for its exemption from offering birth control benefits to its employees by implementing a program to provide free day care to employees. Or the Little Sisters of the Poor Order might repay the grant of being exempted from providing birth control coverage for their employees by, say, funding adoptions of children otherwise hard to place. One can trust the creativity of our public sector and non-governmental organizations ("NGOs") to come up with similarly healing ways to acknowledge the gift of religious accommodations and the concomitant great social debt owing to the society that makes such accommodations possible at all.

But if accommodations are gifts, what are the implications? In his classic anthropological treatise *The Gift*, Marcel Mauss argues that there is no such thing as a "free" gift. Instead, "obligation" rules: gifts are given out of a sense of obligation; we are similarly obliged to accept the gift; and finally we are obliged to repay it in some manner (Mauss 1950 / 1966).² Many commonly misunderstand the obligation to repay the gift by "reciprocation" in a one-for-one correspondence, from the receiver of the gift to the original giver of the gift. While reciprocation, in the sense of a one-for-one correspondent return of the gift, is one way repayment can be understood, Mauss and later exchange theorists argued that the process was not limited by strict reciprocity. The gift may be repaid by "paying it forward," so to speak. If I give you the gift of a dollar, this *may* mean that you, in return, *reciprocate* by giving me a dollar at a later date. On the other hand, you may "pay it forward" by collecting my mail while I am out of town, or do some other service to yet another party. In acknowledgment of my original act of generosity, the receiver of the gift might be moved to acts of charity to others. This, for instance, is the familiar pattern set up in the Gospels of responding to divine acts of generosity by going forth and being generous to fellow creatures. There are, therefore, many ways to honor being given a gift, and indeed of repaying a gift.

² The original version of *The Gift* ("Essai sur le don: Forme et raison de l'échange dans les sociétés archaïques") was published in *L'Année sociologique* (1925: 30-186); the stand-alone manuscript was first published in French in 1950 and translated into English in 1966.

Legal accommodations ought therefore be seen as gifts that create an *obligation* laid upon religious bodies to “repay” or “pay forward” the gift of such legal exemptions or accommodations. As we shall see, since these accommodations consist in gifts to particular ecclesiastical communities, an appropriate repayment for such specialized gifts might be something that enhances civic virtue. Put otherwise, since these accommodations benefit the self-interest of *particular* members of the overall American community, an appropriate repayment of this exemption from common rules would be something that itself would celebrate the blessings of common civic life, chief among them our civic virtues.

Hobbes, the Mythmaker: Lord Leviathan and Lady Leviathan

Further scrutiny of the burdens that accommodations to religious institutions place upon general citizens leads directly to scrutiny of the State. And scrutiny of the State is scrutiny of Leviathan, because the modern State monopolizes the use of force, and declares its hegemony. Religion chafes against the regulations of the State that Leviathan enforces, and it is that Leviathan from which religious institutions seek exemption. It is from the State, as Leviathan the Enforcer, that the religions petition for exemptions and accommodations.

Well-known as such a scenario is when thinking of Hobbes, many often overlook how Hobbes’s vision is anchored in a complex metaphor or “myth”—what Richard Alexander calls “the non-rational, assumed superstructure in his [Hobbes’] thinking” (1971: 27). Alexander argues this thesis by pointing to Hobbes’s use of

metaphors throughout *Leviathan*, “the body politic,” the “mortal god,” “the soul of commonwealth,” “the first chaos of violence and civil war,” “NATURE, the art whereby God hath made and governs the world.” (31)

But in Alexander’s view, Hobbes’s appeal to mythological thinking says more than that Hobbes, like most writers, has recourse to metaphors and images otherwise deliberately derived from the “new science” of the 17th century. These analogies and figures *control* Hobbes’s thought:

If we pay attention to Hobbes’s metaphors, piece them together, and question the logic that integrates them, I suspect we come close to the subjective assumptions, which, far more than his famous “method,” guide, even control, his thinking. The metaphors arise from an a priori World Picture which his logic and metaphysics do not construct, but demonstrate, elucidate, prove. (32)

Yet, unlike what one might expect, in Alexander’s view nothing arcane clouds Hobbes’s mythologized thinking. Hobbes’s mythologized thinking reflects normal patterns of creativity and vision. “In Hobbes’s myth, I believe we perceive the somewhat unconscious, somewhat irrational field for Hobbes’s thought, the world his system attempts to describe. It is a world built by analogy, not logic” (Alexander 1971: 50). As if to prove how commonplace Hobbes’s mythological thinking is, Alexander claims the central controlling myth of *Leviathan* can be expressed quite tidily:

In the beginning there exist God and the unformed matter of the world. God in His omnipotence commands that this matter take form. He continues to hold the now-formed universe in its order by His Supreme Power. As part of this universe He creates man, an animal like every other animal but for the unique gift of language. By language man achieves reason. But God does not institute governments for men (except in the unique case of the Jews). Men must create their own polities.

In the absence of any such "artificial" polities, men exist in a state of "mere nature" like unto the original unformed chaos. The state of mere nature is a war of all against all, lacking any civilized decencies or commodities, where fear of death pervades. To escape this chaos, men covenant with one another to invest all their separate powers into one sovereign artificial power, the Leviathan, the "mortal god." This Leviathan then establishes order in the social world, building a new social universe in accordance with the Laws of Nature, and holding this new commonwealth together by his absolute power. (33)

Voila! The central theses of one of our greatest works of political philosophy are boiled down into a handful of everyday expressions.

Beyond Hobbes's own mythological thinking that gave us the Leviathan of force and power, there is evidence that he, at least, understood (if not entertained) quite another side to Leviathan as well. Whether this comes from his encyclopedic knowledge of Catholic political philosophy that included everything from the medieval Scholastics to his great contemporary and rival, Robert Bellarmine, one can only speculate. Yet, for the reader willing to stretch beyond conventional wisdom, Hobbes seems to give indications of seeing Leviathan as something else than the imposition of a ferocious ordering power, so commonly thought to exhaust Leviathan's life purpose. While one knows how thoroughly Hobbes rejected any part of Bellarmine's vision of the identity of the ideal state with the papal church (Springborg 1995: 510, 514-515), odd affinities with Bellarmine's vision seem to seep through the cracks of Hobbes's framing of the image of Leviathan.

A closer, if admittedly eccentric, reading of those oft quoted lines from Book XIII about human life being "solitary, nasty, brutish and short" may bring out what has struck me. Hobbes begins by saying that without Leviathan—"without a common Power to keep them all in awe"—humans will be "in that condition which is called Warre." This "Warre" consists in a desperate condition known as the war of all against all, "where every man is Enemy to every man...." Then Hobbes lists, by contrast, the positive benefits of Leviathan's power—in effect, the entire universe of social goods, making up a flourishing civic life. Thus, without Leviathan, in that condition of war of all against all,

there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short. (Hobbes 1651 / 1909: 98-99)

By contrast, Leviathan's power makes possible the safety of property and the creation of wealth, the ability freely to move about our planet, whether by land, sea, or air, the construction of great buildings, harbors, airports, apartment houses and other habitations, the protection of police or other peace-keeping forces, our libraries, the internet, data banks, think tanks, foundations, seminaries, schools or universities, our abundance of art or science, our massive mass media, endlessly streaming music, vast outpouring of the written word, our magazines, newspapers and literature, our common life in pubs, clubs and parks, all our monumental facilities of health and general welfare, from our local clinics to our hospitals to all those parts of our culture saving us from violent death or debilitating disease. Hobbes sees all these made possible by the space of order created and husbanded by the power of Leviathan. Another name for what can be seen as the other side of Lord Leviathan's ordering power might be identified as "Lady Leviathan"—the bounty of civic benefits flowing from Lord Leviathan's conquest of our unruly, self-destructive proclivities, which come primarily from individualism run wild.

Thus, while the State may well "burden" religious institutions—even sometimes unreasonably so—the State, as Lady Leviathan, is more than a *regulating* power, "burdening" human flourishing. Lord Leviathan, as the State, has another providential (feminine?) side—one that reflects the interests in terms of which regulation occurs. Leviathan makes human flourishing a reality. Therefore, complaining *against* regulation surely cannot be the only, or even primary, disposition citizens adopt to legitimate laws and regulations of the State whose benefits they otherwise freely and readily enjoy. As Hobbes tells us, the State regulates as well *on behalf of* all those civic interests I enumerated that under the normal circumstances of democratic government are considered legitimate.

In fact, a critical look at certain later rabbinical texts reveals a Leviathan seen as female (see Hirsch et al. 1901). This "Lady" Leviathan apparently inherits the primordial goddess Tiamat's role in ancient creation narrative. Here, she is the nurturing mother of us all, the original being out of which we all have been created. So intimate is our relation to this Lady Leviathan that such late Jewish lore tells of how God kills Lady Leviathan, feeds virtuous humanity with her flesh, and clothes Adam and Eve in her skin. This myth has roots recalling ancient Babylonian lore of the battle of chief male and female deities, Marduk and Tiamat-Leviathan, respectively. Again, Lady Leviathan is bested, but her dismembered corpse becomes the very stuff of earth and sky. She becomes, in effect, a kind of sustaining mother who, as well, encompasses us all. It is in this, her female aspect, that we can think about Leviathan as civic virtue, the common good, all the while not forgetting her opposite side, the mighty male law-giver, regulator, Lord Leviathan of fearsome power, the storm god, Marduk-Leviathan. It this Lady Leviathan that might be seen to represent mythologically all the blessings of citizenship in our liberal democracies—our rule of law, security, freedom of speech and assembly, clean air and water, property rights, and economic opportunities.

In terms of representing the polity, this female aspect of Leviathan assumes many of the properties of the pre-Hobbesian Catholic representation of the community in the female form of Our Lady of Mercy. Thus, Louis Dumont observes,

Everyone knows that religion was formerly a matter of the group and has become a matter of the individual (in principle, and in practice at least in many environments and situations). But if we go on and assert that this change is

correlated with the birth of the modern State, the proposition is not such a commonplace as the previous one. Let us go a little further: medieval religion was a great cloak—I am thinking of the mantle of Our Lady of Mercy. Once it became an individual affair, it lost its all-embracing capacity and became one among other apparently equal considerations, of which the political was the first born. (1970: 32)

Within the confines of this space, we cannot hope to examine the whole story of the movement from medieval Catholic conceptions of a fundamentally benign polity—mythologically represented as an all-encompassing Lady of Mercy, sheltering the weak beneath her cloak—to our Hobbesian, Protestant individualist vision of all of us warring on all the rest, only held in check by Lord Leviathan's brute force. But a few moments' reflection should throw into relief the assumption of the unrelieved malevolence of the state that typifies the rhetoric of Christian nationalists and other politicized Christian Evangelicals. Their sadly too familiar vision of the state as predatory Leviathan only excites them to greater efforts to execute what Robin West has called the "rights to exit" from, or opt out of, general civil rights typical of the Christian nationalist drive for corporate religious liberty, that is to say, sovereignty (West 2016: 404). West further notes that these "exit rights" do not enhance individual liberty—religious or not—by enabling citizens more deeply to participate in civil society; rather they aim to enable an exit from

our society's legally constructed social contract. In each case in which an exit right is recognized, the individual or corporate entity is given a right to *refuse* to participate, rather than rights *to* participate, in some legally constructed and shared project of civil society. (405)

Civic virtues are the values that enhance our common life together, that increase the general good. These should not be confused with the goods desired by particular communities. Roger Williams had the occasion to address his Massachusetts Bay Colony oppressors on this subject. They insisted that the chief criterion for choosing a political leader was that person's Christian convictions. Williams, however, declared that what was relevant to political office was, indeed, a particular set of moral virtues, but that these virtues are separable from religious convictions. As Martha Nussbaum points out, Williams argues that "Good moral principles are routinely found ... in people who have a religion that one may take to be in error." Our politics should be conducted within that shared moral space, "making sure that it does not get hijacked by any particular doctrine, in such a way as to jeopardize both liberty and equality" (2007: 45).

From these comparative considerations, it might plausibly be argued against the commonplace interpretations of Hobbes and *The Leviathan* that it is out of Lady Leviathan's bounty that the churches enjoy the protections that enable them to flourish at all! Even if various religious bodies sought sovereignty—that is, sought the religious freedom of being laws unto themselves, in effect, to be real sovereign states within the State—the nature of the *State* that encompassed them would determine religion's sphere of liberty. Does anyone believe that a state within the Russian state would enjoy the same civic goods and freedoms as one within the United States? Is the Tibet *Autonomous* Region what its name would have the international community believe? Today, the Bureau of Indian Affairs (BIA) can be faulted for its paternalism. But, the BIA is not the People's Republic of China. Even for the

case of a state within a state, it matters what kind of state the former inhabits. It is to *that particular* quality of civic life of the American state that Lady Leviathan represents for us. An American Lord Leviathan regulates, but he does so *on behalf of* the civic interests that constitute the body of Lady Leviathan.

Some may find the notion that the State gives religious adherents freedoms and other benefits of citizenship a theological affront, if not blasphemy. As President George W. Bush was fond of saying, freedom is a divine gift destined for all peoples, not the gracious concession of the State. In his view, the State faded into the background as responsible for such social goods as freedom, however enumerated. How does this square with the picture we paint of the bounty granted us by Lady Leviathan? In a way, Bush is right, insofar as these social goods, such as freedom of conscience, are not invented, or “granted,” but are rather “recognized”—felt to be inherent in human nature. Theists, of course, concede the natural character of these social goods, adding their standard creationist gloss to it: “God-given rights!”—that is, God-given in the nature God created, and in that way, “natural.” While theists may be right about the ultimate source of the social goods flowing to humanity in the person of Lady Leviathan, Lord Leviathan (the Erastian State) maintains a firm grip on the faucet controlling that flow of social goods.

What if objections should still come forth that these divine gifts have come directly and immediately to religious communities (to churches, for instance) and not by sufferance of a State? We would have to respond that religious communities do not exist outside the territorial and juridical boundaries of states, even when they are states within the State. This is true even of the ancient Hebrew/Jewish community of the Tanakh. In the case of Moses and the Hebrews en route to Palestine, the People of Israel *were* a State. Hebrew prophets were sometimes also examples of Machiavelli’s “armed prophets,” and therefore had a hand in governing power. Likewise, the medieval Roman Catholic community was a Church, but also a Church that was also a State—indeed, some have argued, the first European State. Ever since the breakdown of the medieval system, and the rise of Reformation pluralism, churches have had to seek accommodation with some sort of State—Calvin’s Geneva and its colonial city-state Puritan kin excluded. It is a fortunate polity whose State makes it fertile with the social goods of Lady Leviathan—freedom, security, prosperity, and justice for all. Even when a religion achieves sovereign statehood within a state, it matters what *kind* of state that religion inhabits. Given world history’s sad record of authoritarian and autocratic states, Americans (and especially religions in America) should appreciate how rare it is to live in a State equally in tune with the demands of *both* Lady and Lord Leviathan. What today we may find disturbing is how fixated the churches are on the predations—real or imagined—of Lord Leviathan while overlooking the immense essential benefits they enjoy from the bounty of Lady Leviathan. The decisions of recent court cases have played a large role in my reaching this conclusion.

WORKS CITED

- Alexander, Richard W. 1971. “The Myth of Power: Hobbes’s ‘Leviathan.’” *Journal of English and Germanic Philology* 70, 1 (January): 31-50.
- Berman, Harold J. 1983. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, Mass.: Harvard University Press.

- Dumont, Louis. 1970. "Religion, Politics, and Society in the Individualistic Universe." *Proceedings of the Royal Anthropological Institute of Great Britain and Ireland* 1970 (January): 31-41.
- Eliot, Thomas Stearns ("T.S."). 1935. *Murder in the Cathedral*. New York, N.Y.: Harcourt, Brace and Company.
- Figgis, John Neville. 1913 / 1997. *Churches in the Modern State*. Bristol, Eng.: Thoemmes Press.
- . 1907 / 1998. *Studies of Political Thought from Gerson to Grotius, 1414-1625*. Bristol, Eng.: Thoemmes Press.
- Green, Steven K. 2017. "The Mixed Legacy of Magna Carta for American Religious Freedom." *Journal of Law and Religion* 32, 2 (July): 207-226.
- Hill, B. Jessie. 2017. "Kingdom Without End: The Inevitable Expansion of Religious Sovereignty Claims." *Lewis and Clark Review* 20, 4 (January): 1177-1200.
- Hirsch, Emil G., Kaufmann Kohler, Solomon Schechter, Isaac Broyde. 1901-1906. "Leviathan and Behemoth." *The Jewish Encyclopedia*, ed. Isidore Singer, viii:37-39. New York, N.Y.: Funk and Wagnalls. Available online: <<http://www.jewishencyclopedia.com/articles/9841-Leviathan-and-behemoth>> (accessed 21 May 2019).
- Hobbes, Thomas. 1651 / 1909. *Leviathan*. New York, N.Y.: Oxford University Press.
- Lupu, Ira C., and Robert W. Tuttle. 2017. "The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC." *Lewis and Clark Law Review* 20, 4: 1265-1315.
- "Magna Carta 1215." 2008. The Avalon Project, Yale Law School; available online: <<http://avalon.law.yale.edu/medieval/magframe.asp>> (accessed 10 May 2019).
- Mauss, Marcel. 1950 / 1966. *The Gift: Forms and Functions of Exchange in Archaic Societies*, trans. Ian Cunnison. London, Eng.: Cohen and West Ltd.
- Nussbaum, Martha C. 2008. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York, N.Y.: Basic Books.
- . 2007. "Constitutions and Capabilities: 'Perception' Against Lofty Formalism," *Harvard Law Review* 121, 1: 4-97.
- Schwartzman, Micah, Chad Flanders, and Zoë Robinson, eds. 2016. *The Rise of Corporate Religious Liberty*. New York, N.Y.: Oxford University Press.
- Springborg, Patricia. 1995. "Thomas Hobbes and Cardinal Bellarmine: Leviathan and 'the Ghost of the Roman Empire.'" *History of Political Thought* 16, 4 (Winter): 503-531.
- Stewart, Katherine. 2018. "A Christian Nationalist Blitz." *New York Times* (27 May): SR6.
- Stolzenberg, Nomi. 2016. "America's Divisions and Scalia's Christian Visions." *Religion and Politics Fit for Polite Company* (9 March); available online: <<https://religionandpolitics.org/2016/03/09/americas-divisions-and-scalias-christian-visions/>> (accessed 3 May 2019).

West, Robin. 2016. "Freedom of the Church and Our Endangered Civil Rights." In *The Rise of Corporate Religious Liberty*, ed. Micah Schwartzman, Chad Flanders, and Zoë Robinson, 399-418. New York, N.Y.: Oxford University Press.