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Indiana and Doux Commerce

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Amidst the often disappointingly vacuous cacophony over Indiana's recently passed RFRA legislation, Jacob Levy, a political philosopher at McGill, raised the fascinating question of how we ought to think about the relationship between religious freedom and commerce.

Levy raises two sets of concerns with Indiana's law, one of which is largely illusory and one of which merits serious thought. The illusory concern is that the Indiana RFRA is a radical innovation that by applying the compelling state interest test to private causes of action threatens to undermine the basic legal infrastructure – property, contract, and tort – of the market.

It's important to remember that we have decades of experience applying some version of the compelling state interest test to religious claims. We have the nearly three decades from Sherbert to Smith as a matter of constitutional law, and then the more than two decades from the passage of RFRA to the present as a matter of federal statutory law. Beginning in the mid-1990s some states began passing their own RFRAs, and during this entire period numerous states applied some version of the compelling state interest test as a matter of state constitutional law. If antinomian chaos were going to break forth one would think that after a half century it already would have happened.

In terms of concrete conflicts between RFRAs and basic private law, it seems to me that the most dangerous ones would be cases involving bodily harm or the invasion or destruction of property. I think that in cases involving bodily integrity, courts would have no problem saying that the state had a compelling government interest in protecting bodily integrity and in providing recourse to those suffering bodily injury. I think that for most property cases, we can dispose of them by saying that property law places no substantial burden on religious exercise. Saying that you have to build your sukkah on in your yard rather than my yard is not a substantial burden. There might be issues if we have a property owner who for some reason owned religiously significant land, as has been the case with some Native American claims against the federal government. Depending on the facts, I am not convinced that chaos would result if we granted an exemption from certain rules of property law. To give an analogy, lots of private property owners have land that contains graves. In many states there is a common law doctrine granting descendants an easement on the land to visit the graves. The market has not been threatened.

His rather fanciful legal concerns aside, however, Levy raises a deeper issue, one that deserve far more attention that it has received. His concern is with the way in which allowing religious believers to claim exemptions from otherwise applicable laws might inject the question of religious identity into commerce. He quotes Voltaire's famous statement of the doux commerce argument:

> *Take a view of the Royal Exchange in London, a place more venerable than many courts of justice, where the representatives of all nations meet for the benefit of mankind. There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts. There thee Presbyterian confides in the Anabaptist, and the Churchman depends on the Quaker's word. At the breaking up of this pacific and free assembly, some withdraw to the synagogue, and others to take a glass. This man goes and is baptized in a great tub, in the name of the Father, Son, and Holy Ghost: that man has his son's foreskin cut off, whilst a set of Hebrew words (quite unintelligible to him) are mumbled over his child. Others retire to their churches, and there wait for the inspiration of heaven with their hats on, and all are satisfied.*

Voltaire's insight – one he shared with thinkers such as Montesquieu and Adam Smith – was that markets are more than simply a mechanism for organizing economic production. They are also moral and political institutions that structure relationships and inculcate certain moral habits. For the eighteenth-century apologists for commerce, the effect of markets in this area was largely beneficent. They allowed those of very differing religious convictions to peacefully cooperate and tended to inculcate habits of tolerance and, if not respect, at least peaceful co-existence.

Levy suggests that by allowing religious people to claim exemptions from the demands of contract or property, RFRA statutes might undermine this order. As explained above, I think that this is the wrong thing to worry about. The scope of anti-discrimination laws, however, does raise this issue. As near as I can tell, Levy himself favors rather narrow antidiscrimination laws on largely libertarian grounds. What happens, however, when we apply the doux commerce argument itself to the question of antidiscrimination laws?

Normally we think of contract as structuring relationships in the market. Antidiscrimination laws, however, deprive certain market participants of the ability to avoid contracting. This raises two questions. First, does such forced contracting undermine doux commerce by replacing contractual norms with non-contractual equality norms, or does it enhance doux commerce by requiring people to trade across tribal and religious boundaries? Second, when thinking about religion in our society, how desirable is the Royal Exchange of Voltaire? On one hand it tends to promote tolerance and peacefully mediate religious pluralism. At the end of the day, however, Voltaire was no great friend of religious faith and for him one of the great attractions of commerce was the corrosive effect he hoped that it would have on religious communities, which he wished to see submerged in the universal, secular identity of citizenship.

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