

Comments on Freelin's "Religious Freedom, Religious Practice, and Discrimination"

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I am in the unfortunate position of commenting on a paper the thesis of which I largely agree. Like Professor Freelin, I believe that it is becoming increasingly critical to come to some public agreement about where to draw the line in regard to religious and public life. Dr. Freelin has taken on an enormous project and I praise him for his ambition. So, the following briefly suggest some critical issues for what must be a continuing project, not only for Dr. Freelin but for every concerned citizen given our equal stake in our freedom of conscience in religious and moral concerns.

First, while Professor Freelin is reticent to offer arguments of a legal nature, since as he conveys, his paper offers only a preliminary exploration of a much larger project, he nonetheless offer arguments with very definite legal implications. For example, he critiques the pre-revised version of the Indiana RF law for being too broad, and as a result leads to an expansion of freedom that is "inconsistent with liberal democratic tradition". However, it may be more accurate to bring this argument to bear against the liberal democratic tradition, rather than in defense of that tradition. Historically, the tradition, especially within the United States, has never been particularly consistent or even-handed on matters involving the competing interests of religious and non-religious citizens.

Second, Professor Freelin claims that religious freedoms, like other rights, should be understood as having *prima facie* weight, that is they can be reasonably overridden under certain compelling circumstances in order to protect the competing rights of others. While this is an important distinction I note that he uses an extremely obvious and non-controversial example to establish this point, that is, the prospect of a religion that practiced human sacrifice. This

example is not very helpful, since it presents no hard case for the criteria of reasonable discrimination that he wishes to advance. For example, what would he say about the religious freedom of some Mormons, who would like to resume their traditional practice of polygamy? It seems pretty clear that getting public consensus regarding the latter issue would be much more difficult than the case regarding human sacrifice. Yet defining the limits of RF laws regarding such controversial cases is precisely the challenge that Professor Freelin must confront, such as the Bowman-Cyers case that he addresses later in the paper.

Finally, Professor Freelin hopes to develop a criteria for religious protections that are based on our ability of come to some consensus about what constitutes a set of “core religious beliefs.” Under this criteria, RF laws would broadly protect our freedom of conscience regarding the core beliefs of Christians, Jews, Muslims, Wiccans, Hindus, etc., yet be properly limited in respect to our religious activities, including the right to dissent based on one’s religious conscience. The founding fathers of the United States had to confront entrenched religious rivalries largely only among different sects of Christianity, and to a far lesser degree between Christianity and Judaism. The context of defining religious protections now is immensely more difficult. We have not only a diverse number of established faiths, each one holding its distinctive core beliefs, but also a growing number of alternative religious paths, which could make moral claims under the current RF laws in each state. But to what extent can we realistically expect that each faith will agree on its core beliefs, let alone about which core beliefs they wish to have protected under the law?

Currently RF laws are being written in broad terms in order to error on the side of protecting religious freedoms. While this places the burden upon citizens who feel that their rights have been adversely affected by the free religious activities other others, or by their dissent

based on religious conscience, I still believe that this burden is properly placed, at least until the nation revisits the larger issue, of what the division of church and state means currently, in our far more diverse religious and secular landscape.