Commerce, Religion, and the Rule of Law

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Abstract

The rule of law and religion can act as commercial substitutes. Both can create the trust required for material prosperity. The rule of law simplifies social interactions, turning people into formal legal agents and generating a map of society that the state can observe and control, thus credibly committing to the enforcement of the legal rights demanded by impersonal markets. Religion, in contrast, embraces complex social identities. Within these communities, economic actors can monitor and sanction misbehavior. Both approaches have benefits and problems. The rule of law allows for trade among strangers, fostering peaceful pluralism. However, law breeds what Montesquieu called “a certain feeling for exact justice” that crowds out deeper forms of relation. Religious commerce fosters precisely such communities. Religious commerce, however, does not create bridges between strangers as effectively as the formal rule of law. Furthermore, the state tends to be suspicious of tight religious communities, particularly when they are commercially successful.

Keywords

rule of law – religion – trust – markets

1 Introduction

The rule of law is a phrase redolent of high political philosophy. In this concept, we are apt to think, the work-a-day lawyerly tasks of precedent parsing and statute reading touch deep questions of justice and political legitimacy. Many see a tension between religion and the rule of law, a tension between the frightening antinomian call of religious conscience and the stern demands

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of equality and accountability before secular authority.\(^1\) At issue are questions of free exercise of religion, due process, and the equal protection of the laws.\(^2\) This essay, however, addresses itself to the question of religion and the rule of law in a more pedestrian form. High political philosophy is by no means the only or even the most important issue on which the rule of law touches. The lives of most people are dominated not by questions of political legitimacy but by the eternal requirement laid on Adam that “in the sweat of thy face shalt thou eat bread.”\(^3\) Both religion and the rule of law play a role in this more elemental struggle for material subsistence and prosperity.

One of the central features of the contemporary world is that some people are very rich while others are very poor. In the struggle to understand why this is so, theorists have increasingly focused on the role of the rule of law in economic development. In the economic story of the influence of the rule of law, what is important is less a matter of political legitimacy than of social trust and stability. Seen in these terms, religion can serve as a substitute for the rule of law. Religious communities across space and throughout history have served to generate the social trust on which commerce depends. This has often been the case in social contexts where the rule of law has been weak, affording some religious minorities a kind of comparative economic advantage. In this vision of the relationship of religion and the rule of law, they are less the Scylla and Charybdis—or perhaps Gog and Magog—of political legitimacy than at times equally serviceable tools for commercial purposes. This does not mean that in the economic sphere we should be indifferent to which tool we choose. The thesis of this essay is that there are advantages and disadvantages to generating trust by either method. The rule of law can facilitate trust and trade between strangers. Religion, in contrast, depends on its capacity to generate trust among those who are not strangers. The vice of religion as a lubricant of commerce

\(^{1}\) Witness the recent Sturm und Drang in the U.S. over whether an order of Catholic nuns must be required to fill out certain forms before claiming an exemption from certain health insurance regulations. See Zubick v. Burwell, 587 U.S. (2016). See Paul Horwitz, “The Hobby Lobby Moment”, 128 Harv. L. Rev. (2014), 155–156 (“On one side of the divide, some saw the contraception mandate as ‘trampling’ or ‘assault[ing]’ religious liberty. On the other side were those who warned that a win for Hobby Lobby threatened our local and national civil rights laws, and perhaps the rule of law itself. After the ruling, most of the immediate reaction to the decision was similarly divided.”).

\(^{2}\) Compare U.S. Const. am. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”) with U.S. Const. am. XIV (“nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

\(^{3}\) Gen. 3:19 (KJV).
is that it does little to facilitate trade across tribal lines. The vice of the rule of law is that it tends to encourage commercial actors to treat everyone as though they were a stranger, breaking down the thicker webs of community that religion can provide.

2 Trust and Economic Growth

Since the publication of the *Inquiry into the Nature and Causes of the Wealth of Nations*, in 1776, the question posed by the title of Adam Smith’s work has proved a central intellectual puzzle. We can pose the question both spatially and temporally. One of the most salient social features of the globe is that some societies are very wealthy while others are mired in crushing poverty. Despite rapid increases in material prosperity around the globe in recent years, particularly in China, the global divide between the haves and the have-nots is stark. At the bottom of the international league tables are Burundi, Congo, and the Central African Republic, which in 2015 had per capita GDP of $818, $770, and $630, respectively. At the other end of the economic divide, Qatar, Luxembourg, and Singapore came in with per capita GDPs of $132,999, $98,987, and $85,253. (The United States was in the tenth place, with a per capita GDP of $55,805; Israel was a 33rd, with a per capita GDP of $33,656.) Why this gap? What causes some societies to deliver opulent incomes to their citizens, while other countries fail to provide even $2 a day on average to theirs?

The same questions can be asked historically. Poverty has been the norm in human history. Compiling precise statistics on such matters is impossible, but the best educated guess that we can hazard suggests that from the reign of Augustus to the reign of Phillip II of Spain there was no sustained growth in global per capita GDP at all. Despite local increases and decreases, the average level of material human prosperity remained constant at roughly the level of modern Ghana for millennia. Beginning in the early 18th century and accelerating in the 19th century, societies clustered around the North Atlantic began to experience sustained, exponential growth in per capita GDP for the first time in human history. Some countries in Asia, beginning with Japan, followed suit, and a few countries in Latin America have achieved sustained

4 These are the 2015 numbers from the International Monetary Fund.

growth in recent decades. The result is the divide between rich and poor we observe today. The sheer century-after-century persistence of poverty suggests that economic growth is the exception in human history, and that material deprivation on a massive scale is a highly stable social outcome. What changed in the modern era? How did humanity suddenly learn how to generate sustained economic growth?

The debate over the answers to these questions is a sprawling brawl that stretches across decades and different academic disciplines. Some have offered simple geography as a cause, arguing that nations were fated for prosperity or poverty by virtue of their physical location. Other have pointed to the discovery and use of certain technologies. Karl Marx purported to find an answer in a materialized version of Hegel’s dialectic of historical development. More prosaically, mid-20th-century development economists stressed capital accumulation and the creation of modern physical infrastructures. Hence governments in the developing world launched gigantic civil engineering projects, such as the Aswan High Dam in Egypt, which were expected—mistakenly—to deliver prosperity to the countries where they were built. Amidst all these debates, there is widespread agreement that economic success requires high levels of mutual trust within societies.

One of the hallmarks of the modern world of sustained economic growth is its complexity. Prosperity requires specialization. Specialization, in turn, requires the coordination of ever more individuals to accomplish collective tasks. We can see this by comparing a modern business corporation with the commercial enterprises of earlier generations. A modern company such as Apple or Samsung employs thousands of people. They associate over a
sustained period of time, each worker performing a highly specialized task such as software programming, marketing, finance, or graphic design. In contrast, commercial projects of earlier times were far less complicated. For example, the trading ventures of the Ottoman Empire were greatly limited. A handful of generalist merchants—often only two or three—would associate for a single commercial voyage.\textsuperscript{10} Their ventures were simpler and less productive than those of modern firms. Adam Smith stressed the importance of specialization, noting that the Highland Scots were marked by their self-sufficiency and lack of specialization. “In the lone houses and very small villages which are scattered about in so desert a country as the Highlands of Scotland,” he wrote, “every farmer must be a butcher, baker and brewer for his own family.”\textsuperscript{11} He went on:

In such situations we can scarce expect to find even a smith, a carpenter, or a mason, within less than twenty miles of another of the same trade. The scattered families that live at eight or ten miles distant from the nearest of them, must learn to perform themselves a great number of little pieces of work, for which, in more populous countries, they would call in the assistance of those workmen.\textsuperscript{12}

In the absence of specialization, autarky reigns. The householder of the Highlands produces everything himself. He is also impoverished.

Specialization requires trust. Only in a world of stable expectations and commitments would anyone risk specialization. The Highland Scots described by Smith were more self-sufficient than their Lowland brethren. In particular, short of outright violence and theft, a self-sufficient farmer is less exposed to opportunistic behavior by others. Trust simply isn’t as economically important to the farmer.\textsuperscript{13} By contrast, an organization such as Apple is massively exposed to the opportunism of others. Workers may shirk. Suppliers may fail to


\textsuperscript{12} \textit{Ibid}.

\textsuperscript{13} Cross-cultural experiments, for example, show lower levels of trust and reciprocity among groups that depend on subsistence agriculture than among groups engaged in trade or other cooperative economic activity, such as hunting whales. See Joseph Henrich et al., “In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies”, 91 \textit{American Economic Review} (2001), 2, 73–78.
deliver as promised. Financiers may not come through with capital at critical junctures. In its simplest form, the problem is that when *quid* is exchanged for *quo* over time, there is always the temptation to take the money and run rather than deliver as promised.\(^\text{14}\) Yet without exchange, specialization is a suicidal strategy. It is a testament to the success of the modern world in generating such trust that most people devote enormous energy to acquiring highly specialized skills but lack the ability to feed, clothe, or shelter themselves without the assistance of others. Most of us have hazarded our lives on the trust of others, neglecting the skills needed to survive on our own, in order to focus on more specialized tasks, confident that we will be able to enlist the cooperation of others to meet our most basic needs.

In short, a necessary condition for anything beyond a subsistence level of prosperity, to say nothing of the material abundance of modern societies, is the creation of a social environment in which there are high levels of mutual trust. Both religion and the rule of law can provide such high-trust social environments. In this sense, they can substitute for one another.

### 3 Trust and the Rule of Law

The rule of law is a slogan with which to conjure. Despite the power of the phrase, however, it is not always clear precisely what is meant by it. The ancient Greeks lauded the ideal of *isonomia*, which Thucydides and other ancient authors associated with a free commonwealth.\(^\text{15}\) The term translates literally as something like “equal laws.” It reflects two important features of the rule of law: that all are subject to the law, and that like cases will be treated as alike before the law. These are thin ideals, but no less potent for that. In the telling of Whig historians, for example, the English struggles over Magna Carta, Star Chamber, and *habeas corpus* represent the triumph of the principle that government officials are subject to the law.\(^\text{16}\) Office does not confer arbitrary

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\(^{14}\) Oliver Williamson went so far as to identify overcoming the risk of such opportunism and encouraging transaction specific investments as the central problem of economic organization. See Oliver E Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985).


discretion even on the sovereign. The idea that like cases are to be treated alike gestures toward equality before the law, and like all gestures toward equality it leaves open the question of what exactly is equal.\textsuperscript{17} What characteristics are alike and which differences will be treated as irrelevant? Still, it can form the basis of a society without privileged castes or hopeless underlings.

Modern legal thinkers have often focused on the formal structure of the law. The late Justice Scalia captured the basic idea in a neat chiasmus, declaring that “the rule of law is a law of rules.”\textsuperscript{18} In the mid-20th century, for example, Lon Fuller elaborated on the rule of law by arguing that law had its own internal morality.\textsuperscript{19} For Fuller, the simple expedient of governing through rules places constraints on the governors. In the famous Hart-Fuller debate, Fuller elaborated this “internal morality” of the law.\textsuperscript{20} He suggested that there are many ways in which government officials and other authorities may seek to rule through law but fail to do so.\textsuperscript{21} For example, rules might be changed with such rapidity that they fail to provide useful guides to people’s behavior.\textsuperscript{22} Likewise, official action might simply fail to conform to stated rules, and so on.\textsuperscript{23} Fuller wrote in the shadow of the Nuremburg trials, and wished to show why the totalitarian regime of the Third Reich, despite its bureaucratic and legal trappings, rejected the rule of law.\textsuperscript{24} He tried to offer an idea of legality that could condemn the officious and bureaucratized evil of Nazism as lawless, without calling on the supposedly discredited ideas of natural law.\textsuperscript{25}

Fuller’s insight structures many debates over the limits of the rule of law. On one side are thinkers like Friedrich Hayek, who in effect argue that beyond the


\textsuperscript{19} See Lon Fuller, The Morality of Law, (revised edition, New Haven & London: Yale University Press, 1969); Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart.”


\textsuperscript{22} Ibid., 33–38.

\textsuperscript{23} Ibid.


\textsuperscript{25} Despite the numerous declarations of its death, natural law has proven a jurisprudential phoenix, continuing to rise despite the dominance of contemporary theories of legal positivism. See generally John Finnis, Natural Law and Natural Rights (New York: Oxford University Press, 1980); Robert P George, In Defense of Natural Law (Oxford: Clarendon Press, 1993).
adverbial constraints articulated by Fuller and others, the rule of law necessarily embodies substantive ideals of political morality. Hence one may be able to extract from the idea of the rule of law a classically liberal regime of property, contract, and limited government. Others, such as Joseph Raz, have insisted that beyond the adverbial constraints imposed by the use of rules and certain institutional requirements, such as an independent judiciary, the rule of law imposes no substantive political morality. “If the rule of law is the rule of good law,” he writes, “then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.” Michael Oakshott has gone farther, arguing that the very idea of a teleological, substantive political morality is inconsistent with the idea of the rule of law.

The expression “the rule of law,” taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, noninstrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.

If one descends from the ethereal heights of political theory to the workaday demands of commerce and economic development, the rule of law has a similarly ambiguous meaning. The last few decades have seen a fad among policy makers of invoking the rule of law as a nearly-universal solvent for economic woes. Rule of law metrics and rankings produced by various NGOs testify to its popularity. To a certain extent, the economic benefits of the rule of law

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27 There is also an intermediate position, espoused by Richard Epstein, that while the rule of law does not imply a classical liberal regime, it tends to reinforce such an approach. See Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge, Mass: Harvard University Press, 2011).


31 Thomas Carothers has been a prolific critic of the tendency to view the rule of law as a universal solution for political and economic problems. See Thomas Carothers, “Rule of Law Temptations”, *The Fletcher Forum of World Affairs* 1 (Winter/Spring 2009), 49–61; Thomas Carothers, “The Rule of Law Revival”, *Foreign Affairs* (April 1998), 95–106.

32 Transparency International produces an international ranking of corruption levels each year, and the World Justice Project publishes an annual rule of law index.
flow from the brute fact of legal predictability and consistency, in other words from the thin conception championed by Fuller and Raz. As one lawyer with decades of experience in structured finance transactions in developing markets put it:

The degree to which these countries approximate the ideal commercial code is probably not the highest issue on the list. In terms of feasibility there are certain things that certainly rank higher. One ... is ... legal transparency. Or, in the words of a Central American lawyer who works at a bank who's a regular client of ours, whether it makes a difference in a case that we bring that the other lawyer is the brother of the judge.33

In other words, whether judges follow the rules can be more important than the economic quality of the rules that they are following.

When economists discuss the rule of law, however, they often give it more than this purely formal content. Douglas North, the Nobel Prize-winning economist who placed legal institutions at the center of theories of economic development, wrote a generation ago:

Efficient economic organization is the key to growth; the development of an efficient economic organization in Western Europe accounts for the rise of the West. Efficient organization entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return to the social rate of return.34

This requires legal institutions that clearly specify property rights, enforce contracts, and give commercial actors the security and predictability they require to pursue long-term economic projects.

This is what the rule of law can do in even its thinnest version. When the concept is expanded to include effective commercial institutions, the rule of

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law has proven a major driver of material prosperity. Daron Acemoglu and James Robinson, for example, have made a compelling case that the contemporary global divide between rich and poor breaks down along institutional lines. Despite differences of geography and culture, societies with venal legal systems that ignore their own rules and exist primarily as mechanisms for predation by elites are poor. Societies that control corruption and have legal systems that provide a stable and predictable framework for economic life prosper. Those whose legal institutions are calibrated to provide efficient incentives do even better. Douglas North, Barry Weingast, and John Wallis have made the same point historically, showing the basic stability of predatory states over time and the gradual emergence of rule-of-law norms, and with them, economic growth in the modern period.

4 Trust and Religion

Religion has also been offered as an answer to the question of the wealth and poverty of nations. In *The Protestant Ethic and the Spirit of Capitalism*, Max Weber argued that the Reformation fostered a peculiar ethic of materialized asceticism, in which the accumulation of wealth was prized as evidence of God's grace, but its consumption was strongly discouraged as undisciplined licentiousness. The result, according to Weber, was the accumulation of capital on which modern capitalism, and with it economic growth, depends. Weber's thesis has not fared well at the hands of later scholars. Economists have searched in vain for any strong correlation between local concentrations of Protestants and economic growth. As noted above, modern students of the question are far more likely to point to the importance of institutions and the trust that they foster. Within the focus on trust, however, we can see a role

for religion in economic success, albeit one different from that envisioned by Weber.

If we put trust at or at least near the center of our account of the shift from poverty to prosperity, it is possible to reconsider the role of religion in commerce. It is relatively easy to find examples of commercially successful religious groups. Jews are often taken as the paradigmatic example of such “middle man minorities,” but such groups are geographically and historically ubiquitous. In West Africa and the Caribbean, for example, much commercial activity is in the hands of Lebanese immigrants and their descendants. Other examples include the Armenian minorities in the Ottoman Empire, Jewish conversos in the early modern Atlantic, or the Muslim Arab trade diasporas of East Africa and southern Asia. Syrian immigrants dominated much of the textile industry of Brazil by the beginning of the First World War. In Nigeria, the Ibo serve as the dominant commercial group. In India, the Parsees fill a similar role. In Myanmar, Chettiar from India were the dominant money lenders, until they were expelled by the native Burmese. And so on.

There are multiple explanations for the rise of such commercial minorities. Often they are pushed into commerce by hostile majorities. In most pre-modern economies, the lion’s share of the economic activity is agricultural, which makes the ability to own land of enormous significance. When hostile rulers prohibit members of a particular religion from owning land, they are pushed out of agriculture and into other trades. In other cases, internal religious imperatives make the presence of a religious “other” commercially


42 Ibid., 80.
43 Ibid., 85.
44 Ibid., 82–83.
useful. The role of Jews in medieval European finance provides an illustration. The Church Fathers taught that the taking or payment of interest violated the spirit of Christian brotherhood.\textsuperscript{45} Accordingly, the canon law of the church prohibited usury, which it defined capaciously. The rabbis taught Jews that the Torah contained similar prohibitions on inter-Jewish lending.\textsuperscript{46} Both Jews and Christians, however, allowed interest-bearing transactions across their joint religious border. This interaction proved economically important. First, in the medieval period, it provided needed financial services. Second, and perhaps more important in the long term, it created a social space in which actors could engage in the ends-means rationality that often characterizes mature markets, a kind of rationality that the thicker norms of religious communities at times made extremely suspect, if not impossible.

Beyond such local reasons for the commercial niches occupied by particular minorities, however, in all of these cases religious networks provide a high-trust social context in which commerce can thrive. Within relatively tight-knit religious communities, it is easier to monitor the behavior of members and sanction those who misbehave. For example, in the context of the much studied international diamond trade, Barack Richman has identified the commercial advantages of what may be called “rule by rabbis,” a system of formal and informal punishments meted out to bad commercial actors.\textsuperscript{47} In addition to monitoring and sanctioning, common religious identity can stabilize expectations about a counterparty's behavior around religious norms.\textsuperscript{48} Coreligionists have a better sense of how members of their tribe will behave. These expectations around behavior and trustworthiness can be increased when hostility in the broader society increases the value of the goodwill of coreligionists.\textsuperscript{49}

Many of these benefits are not unique to religion. The economically successful Chinese diaspora in South Asia does not seem to be defined primarily by religion. Rather, networks of ethnic and family solidarity seem to underlie the intra-tribal trust. Even in this case, however, religion plays a role in the structure and reliability of social networks. The Confucian emphasis on family lines and patrilineal loyalty provides a social foundation for commercial

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\item \textsuperscript{46} See \textit{ibid.}, 287.
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activity. Mercantile religious groups all have different theologies and histories, but they have often operated within what we would consider today to be weak institutional environments, with poor and at best imperfectly realized rule-of-law values. Within these social contexts, religion acts as a substitute for the rule of law, providing stable expectations about rights and obligations for commercial actors. In some cases, this is the result of religious legal systems, which can provide relatively high quality adjudication of commercial disputes, as in the case of Ottoman Jews and 18th-century Quakers. In other cases, the solidarity provided by shared religious identity, as well as the greater ease of monitoring and punishing misbehavior created by religious insularity, can accomplish many of the same tasks, enforcing contracts and maintaining stable expectations about property rights and investments.

Even in situations where the rule of law is well established, religion may provide comparative advantages. Religious communities can often produce what we may think of as excessive levels of intra-tribal trust. A paradigmatic example is affinity fraud, where members of the tribe prey on the trust of coreligionists. The widespread presence of affinity fraud among religious groups such as Mormons, African-American churches, and Jewish communities has been well documented.\(^50\) In such cases, religion makes people too trusting. Yet there are situations where successful commercial activity requires higher levels of trust than that generated by the rule of law in the anonymous market. The international diamond trade provides an excellent example. The trade revolves around small, extremely high value stones that are easy to steal and move around the world. The wholesale trade in such stones is a relatively low value-added proposition that relies on volume to generate returns, exposing participants to the constant temptation to engage in lucrative opportunism against trading partners. Given the low margins in the trade, heavy investment in monitoring trading partners isn’t a viable option. In short, this is a commercial context in which the apparently excessive trust generated by religion is an economic asset.

The Dangers of Trust through Law

The commerce sponsored by the rule of law is not without problems. Crucially, law makes it easier for people to truck and barter with strangers. This is one of the things that makes the rule of law a potentially powerful engine of economic growth. But the rule of law and the anonymous market can crowd out other ways of acting and relating to one another. Montesquieu captured something of this problem in the *Spirit of the Laws*:

> The spirit of commerce produces in men a certain feeling for exact justice, opposed on the one hand to banditry and on the other to those moral virtues that make it so that one does not always discuss one’s own interests alone and that one can neglect them for those of others.51

Montesquieu’s point is subtle. He is not claiming that trade leads people to become the heedless profit maximizers envisioned by the critics of *homo economicus*. Indeed, there is evidence that trade both requires and fosters a vision in which economic actors have moral obligations toward others.52 Something like this is what Montesquieu seems to mean by his claim that trade fosters “a certain feeling for exact justice.” It is this feeling for exact justice, however, that is the problem.

John Rawls claims that “justice is the virtue of practices where there are competing interests and where persons feel entitled to press their rights on each other.”53 Rawls here builds on a point first made by David Hume. Hume wrote:

> [T]he rules of equity or justice depend entirely on the particular state and condition in which men are placed and owe their origin and existence to that utility, which results to the public from their strict and regular observance. Reverse, in any considerable circumstance, the condition of men: Produce extreme abundance or extreme necessity: Implant in the human

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52 See generally Rose, *The Moral Foundation of Economic Behavior* (arguing that complex, anonymous markets require allegiance to rigid moral duties around honesty and fidelity); Henrich et al., “In Search of Homo Economicus” (reporting experimental results showing that those involved in trade and other cooperative economic endeavors behave more equitably in various classical situations, such as the so-called “ultimatum game”).
breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally *useless*, you thereby totally destroy its essence, and suspend its obligations upon mankind.\(^{54}\)

Justice is the virtue of competitive strangers who seek to treat one another fairly but are not bound by ties of affection or deeper duties rooted in solidarity or shared belonging. In economic terms, the virtue of the rule of law is that it fosters commerce among such people. For the rule of law to be able to do so, however, the state must use the law to flatten and simplify social reality. To the extent that this flattened and simplified social reality begins to crowd out other ways of imagining and experiencing social life, something of great value is lost. If the rule of law allows trade among strangers, its danger is that it encourages us to treat one another as strangers.

The persistent idea that the rule of law is an important limit on government power points toward the link between the rule of law and the modern state. Weber defined the state as the institution that successfully claims a monopoly on the legitimate use of violence.\(^{55}\) Claiming this monopoly is difficult, and requires that modern states amass overwhelming coercive capacity. The rule of law as a limitation on state power has thus become more pressing as that power has increased. At the same time, the rule of law has also increased the very power it is supposed to limit. Weber identified one of the sources of the power of the state in the rationality of modern government bureaucracies, their ability to define goals, marshal resources, and pursue coherent agendas of social change and control.\(^{56}\) For modern states to do this, it is necessary for them to simplify social reality and make it both cognizable and manipulable. James C. Scott has persuasively documented this tendency in a host of contexts, from urban planning to forestry and agriculture.\(^{57}\) Rules facilitate this process of simplification and legibility by stripping out most of the detail from social interaction and relentlessly focusing attention on a few operative characteristics.

Consider the example of neighbors living on two adjoining pieces of land. Their interactions are likely to be exceedingly complex. Friendships and

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enmities are embedded in histories informed by a host of overlapping identities: political, ethnic, religious, sexual, and so forth. The respective plots of land will be shaped by diverging economic needs, aesthetic choices, water, soil conditions, sunlight, relative wealth, and so on. Traditions, habits, choices, affections, family ties, and many other concerns all figure into the relationship. In the eyes of the law, however, virtually all of this detail falls away as irrelevant. The law sees a crisp geometric relationship of property lines, title deeds, and a sharply limited set of duties defined by concepts such as trespass, nuisance, and contract. This simplification serves the interests of the state by making the relationship legible and manipulable. Title and property lines let the state know whom to tax and how much. Likewise, ignoring the rich histories and complex motivations that lie behind particular actions, makes it possible to control those actions, picking out a particular conduct to punish and prohibit.58 As Oliver Wendell Holmes, Jr. put it:

The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head.59

In part this simplification is a necessary result of the rule of law as a law of rules. Consider the famous example of a law declaring that there shall be no vehicles in the park.60 For generations, law professors have made much of the difficulties in applying this rule to ambiguous cases. Do bicycles come within the meaning of “vehicles”? What about ambulances? Prior to the rise of textualism, the dominant theory of interpretation insisted that we should identify the purpose served by the rule, then interpret ambiguous cases so as to advance those purposes.61 Even purposive interpretation, however, denies that the meaning of the rule is infinitely plastic. The purpose of the rule may have been to promote the safety of pedestrians in the park, but that doesn’t mean that the law prohibits those who engage in vigorous ballroom dancing on the playground, no matter how dangerous. As Frederick Schauer has pointed out,

58 See ibid., 37–45 (discussing the interest of the state in simplified and legible models of property ownership).
60 The original author of the hypothetical rule is H.L.A. Hart. See Hart, “Positivism and the Separation of Law and Morals”, 607.
61 See Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart”, 662–663.
the rule entrenches a certain empirical assumption—vehicles are sufficiently dangerous that they should be banned—in a way that excludes or at least limits contrary judgments. In doing so, it allocates power away from rule followers to rule authors. It is important to see that in doing this, the rule does more than simply entrench a particular empirical assumption. It also reduces the complexity of social reality. We are directed only to the question of whether or not there is a vehicle, rather than considering the far more complicated question of physical interactions in the park and their relative levels of danger. The law allocates power to rule writers by simplifying.

This tendency of the rule of law to abstract and simplify human interactions tends to be exacerbated by our dominant ideologies of the state: democracy and liberalism. Of the two, democracy is much the older. Democratic self-government conceptualizes members of society first and foremost as voters. As voters, we are equal. Each voter is in some sense identical with every other voter, a chooser whose choice is given a particular pre-determined weight in social decisions, regardless of the particularities of the voter. Moral characteristics such as wisdom and virtue are irrelevant in the tabulation of votes, as are social characteristics such as one’s particular tribal memberships or idiosyncratic history. Liberalism endows subjects with some characteristics beyond that of a voter, but in important respects these characteristics are divorced from the particularities of individuals. Hence, as members of a liberal society, we are bearers of rights against the state and against one another. We are agents with the ability to choose particular ways of life. We may even be endowed with the ability to generate obligations for ourselves, as when we enter into contracts. In a pluralistic vision of liberalism, we abstract our public identity from the accidents of history, tribal identity, personal affections, and commitments precisely because we fear that public identities organized around such characteristics are dangerous to social peace. For a more perfectionist vision of liberalism, such complex identities are ultimately accidental. We are fundamentally autonomous choosers. Our identities are procedural rather than substantive. Commitments, community, and even moralities are all secondary to choice, deriving their legitimacy from the act of consent. Those obligations and communities that are unchosen are seen as illegitimate impositions from which one must be liberated. The rule of law is congenial to both democracy and liberalism in that legal identities are always limited and formal, abstracted from the particulars of individuals in the way demanded by the idea of a voter

or an individual in liberal society. One need not make the move condemned by Raz and identify the rule of law with liberal democracy to see how all three concepts can reinforce a simplified and flattened vision of human beings.

The kinds of anonymous market transactions facilitated by the rule of law exacerbate these tendencies. Almost by definition, such transactions do not require that we enmesh ourselves in the comprehensive identities and moral schemes of others. Although the weak relationships of the market may at times blossom into deeper understanding and friendship, they need not do so. Rather, actors in the anonymous markets of the rule of law relate to one another primarily as choosers. Buyers and sellers are bearers of preferences to be satisfied, and ultimately have an instrumental relationship to one another. In itself, there is nothing necessarily pernicious about such a relationship, which has its own virtues, not least its ability to generate material prosperity and facilitate peaceful cooperation across what might otherwise be hostile tribal frontiers. But just as voters and bearers of liberal rights have only a thin identity as a chooser, so do market actors.

What can be lost in all this are the deeper and more meaningful associations based on a fuller vision of human beings and their characteristics. Human beings do not take their meaning and identity from the thin abstractions of the rule of law and its associated ideologies. Or at least, they ought not to do so. Ideally, commerce, as facilitated by the rule of law, is a way for people to peacefully and productively cooperate so as to relieve material want. In the liberal vision of such a society, the political and economic framework provided by the rule of law allows cooperation across the overlapping tribal boundaries and markers of identity that it regards as formally irrelevant. The danger is that we so internalize this legal conceit of formal irrelevance that we regard such identities as irrelevant, or worse, pernicious. This is not to deny the possibility of abuse in the spaces that define and are defined by those identities—families, churches, associations, ethnic or religious tribes, and so on—but a life without such spaces strikes me as a rather bleak wasteland of legal rights and consumerism. As Grant Gilmore observed:

The better the society, the less law there will be. In heaven there will be no law, and the lion shall lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In hell there will be nothing but law, and due process will be meticulously observed.63

There may also be shopping amidst the fires below, but it would still be hell.

6 The Dangers of Trust through Religion

Religion tends to regard as supremely important many of the things that the liberal democratic state through the rule of law regards as irrelevant, which is not accidental. Modern liberalism was born in part out of the European wars of religion, and its formal vision of the individual was carefully constructed to avoid explosive religious questions. The older ideal of the rule of law served as one of the many midwives of liberalisms. The religious visions of individuals and their social relations tend to be much richer than those envisioned by the law. Consider again the relationship between two neighbors. Where the law sees a formal relationship of property holders, mediated by property lines and chains of title, the Christian gospel imposes the command to love one's neighbor as oneself.64 What to the state is a readily legible set of simplified relationships, becomes for the Christian disciple a matter of heart and conscience, service, mourning, and affection, in short, a web of actions, motivations, and intentions, impenetrable to any but an omniscient deity.

Religious communities deny ready simplification and observation by the state. Consider Christian churches in the United States. The legal instantiations of such churches have little to do with their lived reality as religious communities. Evangelical denominations are organized on a congregation-by-congregation basis, using a variety of legal mechanisms from special religious incorporation statutes to ordinary limited liability companies.65 Other groups, such as the Mormon Church, lack any formal legal personality. As a matter of law, the Mormon Church is an unincorporated association, and its legal affairs are conducted by a series of corporations sole, that have no legal relationship to its membership.66 These entities hold property, enter into contracts, pay salaries, and comply with regulations, from the tax code to campaign finance laws. They are easily visible to the state, and their affairs are easily controlled.

64 See Mark 12:30–31 (RSV) (“The second is this, ‘You shall love your neighbor as yourself.’ There is no other commandment greater than these.”). The idea is not unique to Christianity. In the Gospels, Jesus is quoting from the Torah. Compare Leviticus 19:18 (RSV) (“You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the Lord”).


To religious believers, however, these legal constructs are largely unknown and irrelevant. The religious communities revolve around rituals, theologies, social practices, and religious authorities constituted in complex and often religiously contested ways. The existence and use of power within these communities is often opaque to the state, and the multitude of roles and obligations far exceed the available legal categories. Legal formalities do not change this fact.

This is no less true when we examine the legal systems of religious communities that emphasize adherence to God’s law. Much of the canon law of the Catholic Church is directed to the internal forum of conscience, and is not assumed to be readily applicable by an agent other than God or the individual soul. The Halakhah contains elaborate rules, such as those involving the service of the Temple, that are unlikely to be applied outside of an eschatological age. Others, such as the laws of purchase and sale are specified in great detail, despite the fact that they can be set aside through choice of law clauses as the governing rules even in commercial cases between pious Jews, decided before a rabbinical court. They continue, however, to be objects of intensive religious study. Whatever is happening within such legal systems, it is not the ordering and simplifying of social reality in the service of modern state bureaucracies.

The religious strategy for generating commercial trust is thus opposed to that represented by the rule of law. Where the rule of law simplifies and promotes transactions in the absence of thick communities based on identity and solidarity rooted in shared beliefs, practices, and history, religion fosters such communities. The rule of law is the paramount structure for commerce between strangers. Religion, by contrast, seeks to eliminate the idea of strangers, at least within the community, and fosters commerce on that basis. In the words of Paul’s letter to the Ephesians, “Now therefore ye are no more strangers and foreigners, but fellow citizens with the saints, and of the household of God.” This, however, is precisely the problem. Facilitating commerce between strangers is hugely important for two reasons. First, it is key to widespread material prosperity. Second, without such commerce, markets lose one of their chief political virtues.

One of Adam Smith’s key insights is that the level of specialization increases with the extent of the market. This is the point illustrated by his example of the Highland Scots, discussed above. More modern examples abound.

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68 Ephesians 2:19 (KJV).

Muhammed Yunus, the founding father of the microfinance movement, gives the example of a young Bangladeshi woman trying to make her living by manufacturing stools, an activity requiring 22 cents worth of materials. Because her only available sources of financing were the money lenders in her small village, her profits were reduced to a mere 2 cents per stool. The ability to borrow money from distant strangers would reduce the financing costs for her business, dramatically bettering her economic condition.70 A similar dynamic can be seen across the developing world. One Peruvian economist has remarked: “The cities of the Third World and the former communist countries are teaming with entrepreneurs. You cannot walk through a Middle Eastern market, hike up to a Latin American village, or climb into a taxi cab in Moscow without someone trying to make a deal with you.”71 What these entrepreneurs lack, he argues, is the access to extensive markets—trade with strangers—provided by legal formality. Without the ability to interact commercially on a large scale with large numbers of strangers, these entrepreneurs are confined to poverty. Commerce based on religiously generated trust tends to face a similar problem. To be sure, religion can provide a basis for commerce between strangers when the strangers are co-religionists. But widespread prosperity requires commerce beyond the confines of religious communities.

Commercial insularity is fraught with political as well as economic risks. In the Spirit of the Laws, Montesquieu wrote of the way in which commerce tended to “gentle” manners, breaking down intense tribal rivalries and promoting peace.72 To make a similar point in the language of contemporary philosophical liberalism, impersonal markets allow cooperation in a society marked by deep pluralism on religious and moral questions. Jules Coleman wrote:

One extremely attractive feature of markets is the fact that they allow interaction among individuals without first requiring of [or? (please re-check)] presuming the existence of broad agreement about fundamental values, goods, or ends among exchange partners. That is, individuals can

72 See Montesquieu, The Spirit of the Laws, 338 (“Commerce cures destructive prejudices, and it is an almost general rule that everywhere there are gentle mores, there is commerce and everywhere there is commerce, there are gentle mores.”); Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph (Princeton: Princeton University Press, 1977) (documenting the 18th century argument that commerce provided an incentive to behave more peacefully with others).
successfully engage in market transactions whether or not they have a common conception of what is important to an individual or to a life. I may disapprove of your interests, find your tastes perverse; you may well find me uncouth, my tastes bovine. We may not make for good friends, but we can transact. Our capacity to interact in the market does not depend on our sharing a common conception of the good. In some ways, this may be a shortcoming of markets but it is an important virtue as well.73

Coleman's point holds true, however, only if commercial interactions are not built exclusively or primarily on the back of religiously generated trust and solidarity. Where commerce is dominated by religion, markets, far from acting as a relatively unideological space of mutual cooperation and forbearance, can become yet another arena of religious and moral conflict.74 Precisely because religious communities tend to resist the simplifying force of the rule of law, their opacity to the agents of the state becomes more threatening as they become enmeshed in a field—commerce—that most states regard of primary importance.75 This is one of the reasons why religious trade diasporas have so frequently provoked resentment and official persecution. The state tends to be suspicious of that which cannot be easily observed and controlled. In a sense, religion as a basis for commerce presents risks that mirror those presented by the rule of law.

74 The Mormon experience in the United States provides a vivid example of this dynamic. In 19th-century Utah, religion dominated commerce, with ecclesiastical leaders directing much of the large-scale economic activity within the territory. The result was a frontier region that, compared with its immediate neighbors, had more elaborate commercial projects. But the religious insularity that generated the mutual trust that underlay these economic projects also generated non-Mormons’ hostility, turning the market into a flashpoint for religious conflict. See Nathan B. Oman, “Doux Commerce, Religion, and the Limits of Antidiscrimination Law”, 91 *Indiana Law Journal* (2017), 713–714 (discussing the Mormon example); see generally Nathan B. Oman, “Doux Commerce in the City of God: Trade and the Mormon Ideal of Zion” (November 7, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520499 (examining the religious and ideological dynamics of trade in 19th-century and contemporary Mormonism).
Conclusion

The rule of law and religion can act as substitutes in commercial endeavors. Both can create the high-trust social contexts required for sustained economic growth and material prosperity. They generate this trust, however, in radically different ways. The rule of law operates by simplifying social interactions, turning people into formal legal agents, and generating a sufficiently simple map of society that the state can observe and control, credibly committing to the enforcement of the legal rights demanded by modern, impersonal markets. Religion, by contrast, embraces complex and comprehensive social identities. Indeed, it can be one of the forces that generates those identities. Within the communities that foster, monitor, and discipline such identities, it is relatively easy to monitor economic actors and sanction misbehavior. Both approaches have benefits and problems. The rule of law allows for trade between strangers, which is key to sustained economic growth and does much to manage pluralistic modern societies. But it also creates the danger of breeding “a certain feeling for exact justice” that can crowd out other forms of relation and social meaning. We are left with Gilmore’s hell of perfect law, with Amazon.com and Netflix thrown in as palliatives. Religious commerce fosters precisely the thick communities and identities that the abstractions of the rule of law as a moral ideal can break down. By conferring comparative economic advantages on religionists, especially in social contexts where the rule of law is weak, coreligionist commerce strengthens such communities. This very process, however, creates its own problems. Religious commerce does not create bridges between strangers, a necessary function in a pluralistic society, as effectively as the formal rule of law. Furthermore, religious communities are precisely the kind of opaque social arrangements that are likely to draw the suspicions of states wishing to create a legible social reality. Tying something as important as commerce to such communities has thus at times exacerbated the conflicts between religious and political authorities.