Is Religion the New Race Or Is Race the New Religion?

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One of the defining features of our current moment is the use of antidiscrimination principles and civil rights discourse by religious and political conservatives to position themselves as the victims of discrimination. The supposed perpetrators of this discrimination are, of course, progressives, those who endorse the policies that religious traditionalists and other political conservatives decry, in particular, LGBTQ rights, reproductive rights and equality for women, legal secularism, and the dismantling of structural inequality—to which we must now add COVID-19 regulations. Support for these policies, especially when coupled with political success, has been redescribed as discrimination against those who oppose them and have suffered a corresponding political defeat. Which is to say, political defeat, losing a political battle or suffering a loss of political power, is being equated with discrimination. Even when revanchists succeed in regaining or maintaining political power, they continue to present themselves as a persecuted minority whose turning of the tables is their just due under the laws that guarantee equal treatment, in conjunction with the laws that protect freedom of religion, freedom of thought, and freedom of speech.

In this fashion, religious liberty has been reconfigured as "the new civil right," which requires large carve-outs from laws that protect other civil rights. By the same token, the principle of religious liberty is deemed to require the state to afford various forms of public religious expression and public support for religion that, in America at least, had long been thought to be antithetical to the constitutional principles of religious liberty, pluralism, and the separation of religion and state.

This new way of conceptualizing "religious liberty" that I am describing, and the aggressive political campaign to implement it in domestic and foreign policy, has both national and international manifestations. But my aim here is not to describe this political movement, but rather, to wrestle with the doctrinal and theoretical conundrum that lies at its heart. The core claim is that being subjected to laws that violate one's beliefs is a form of discrimination—discrimination on the basis of belief. But what does it mean to be discriminated against on the basis of belief? The claim requires us to come to terms with the shifting meanings of both religion (or, more broadly, belief) and discrimination. We have no fixed definition of "religion." Nor do we have a consensus about how to define or understand the meaning of the term "discrimination." The latter is a term whose social meaning has been forged in significant measure by the history of racism. So, we also need to contend with the definition of "race," yet another important term that lacks a fixed or mutually agreed-upon definition.

A couple of examples of situations where religion has been assimilated into the category of race and religious discrimination likened to race discrimination may help to anchor an otherwise abstract discussion of definitions. Both are drawn from the United States, but I expect there are interesting comparisons to be drawn with the experiences of other countries, which I hope we can talk about in the discussion.

The first is perhaps the most explicit case of equating religion with race, which occurred under the aegis of Title VI of the Civil Rights Act. By its terms, Title VI prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal assistance. It does not, by its terms, prohibit discrimination on the basis of religion. Most of the controversy over this piece of civil rights legislation concerns its

application to universities and other educational institutions which receive federal funds, as virtually all American universities and colleges do. A year ago, the Trump administration made headlines when it issued an executive order specifying guidelines for how to interpret the prohibition on discrimination on the basis of race, color and national origin as it applies to incidents on university and college campuses. Titled "Executive Order Combating Antisemitism," it had three key features.

First, it stated that "While Title VI does not cover discrimination based on religion, individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices." An interesting application of the idea of intersectionality (though not acknowledged as such), this part of the order is actually a continuation of the policy of past administrations. Forged in the context of incidents of hate crimes and hate speech directed against Sikhs, Muslims, and Jews, it reflects the recognition that they have been treated as racial groups by those who perpetrate acts of discrimination against them. This accords with the view of Jewish historians who distinguish between "racial" and "theological" versions of antisemitism. It also accords with the experience of groups that have been subjected to modern forms of Islamophobia, not only Muslims but also members of other faith traditions, such as Sikhs, and people from Iran, India, Pakistan and other countries mistakenly viewed as Muslims, despite belonging to a different faith.

But while this part is stated in general terms, which theoretically apply to all religious groups that "face discrimination on the basis of race, color, or national origin," the order goes on to single out Jews as the sole beneficiary of the Trump administration policy. As the title of the order indicates, it is concerned exclusively with protecting Jews from

antisemitism. This represents a departure from the policies of previous administrations which sought a more evenhanded approach that would provide protection to Jews alongside Muslims, Sikhs, and members of other faith traditions. This singling out of Jews for protection is the second notable feature of Trump's Title VI policy.

The third goes even further in its singling out of antisemitism by prescribing a particular definition of what antisemitism is, to wit, "the non-legally binding working definition of antisemitism adopted on May 26, 2016 by the International Holocaust Remembrance Alliance (IHRA)," buttressed by the "Contemporary Examples of Anti-Semitism" identified by the IHRA." It is this reference to IHRA's examples that has sparked the most controversy, as many of them, grouped together under the heading "What is Anti-Semitism Relative to Israel?," are expressions of anti-Zionist views or simply criticisms of Israel that do not meet IHRA's standards for legitimate criticism.

Time is too short to delve into the questions of when and why anti-Zionism should, or shouldn't, be equated with antisemitism. Suffice it for now to observe that incorporating this equation into Title VI implies that anti-Zionism is a species of racism (if antisemitism is racism and anti-Zionism is antisemitism, ergo, anti-Zionism is racism)—an interesting inversion of the old canard that Zionism is racism. The implication that Jews are a race, or at least should be treated as a racial group for purposes of applying Title VI, was received with alarm by many Jews, who took umbrage at the imposition by the government of one particular way of defining Jewishness, in particular a racialized one. Beyond that particular issue, many express concern about equating criticisms of Israel with antisemitism, which raises difficult questions about when political beliefs—that is, political beliefs that are critical other political beliefs—become a form of discrimination against people who hold

the criticized beliefs (or people who are associated with those beliefs even if they don't hold them).

The second example of religion being likened to race also raises the issue of when opposing beliefs create relations of social dominance and inequality. More specifically, when is the government's adoption of a policy that reflects one group's values, which necessarily entails rejecting another group's values, properly viewed as an act of discrimination against the latter group? Unlike the Title VI controversy, which squarely puts the question of whether to classify Jews as a race (or alternatively, a nationality)—or whether to classify discrimination against Jews or other religious groups as discrimination on the basis of race or national origin—this area of legal controversy presents the equation of religious discrimination and racial discrimination in a much less focused way.

I am referring to the recent spate of religious liberty cases, which characterize burdens on the free exercise of religion as a species of discrimination and implicitly analogize religious discrimination to race discrimination. Thus, public accommodations laws which make it illegal for sellers of goods and services to refuse customers on the basis of their sexual orientation; for family service agencies to refuse to place children with gay foster parents; and for doctors and pharmacists to refuse to provide medical services they deem to be sinful are said to infringe not only the right to religious liberty but also a right to equality. Now this way of framing religious liberty claims is being applied to COVID regulations, which are said to relegate religion to "second-class" position,[1] language that is calculated to evoke the second-class status accorded to Black people under Jim Crow.

[1] South Bay United Pentecostal Church v. Newsom. https://www.sfchronicle.com/news/article/Another-try-for-California-church-that-lost-15758424.php

But if this is like race discrimination, what kind of race discrimination is it like? Systemic or non-systemic? Intentional or unintentional? A practice of inequality that violates the principle of formal equality, which requires people be treated the same? Or a practice that violates the principle of substantive equality which undergirds the right to be different and to have one's differences accommodated? Confusingly, the right to accommodation (i.e., to be different) and the right to equal treatment (i.e., to be treated the same) are not clearly distinguished in recent liberty claims. In one breath, they present a picture of government authorities acting out of hostility towards religious groups and purposefully treating them as "second class." But in the next breath, they fault the government for failing to recognize and accommodate their different practices and beliefs. The failure to recognize and accommodate differences is a sin of omission, not of intentional action. Or as others have characterized it, it is the product of negligence—a failure to treat groups with equal care and respect—not the product of discriminatory intent.[2] But the allusion to Jim Crow laws connotes intentional discrimination, a violation of the principle of formal equality that involves purposefully treating groups differently.

Much of the rhetoric surrounding these claims implies or baldly asserts that groups which wish to defy the restrictions placed on churches are being subjected to intentional discrimination. Consider, for example, a press release issued by Attorney General William Barr stating that "religious institutions must not be singled out for special burdens" and that "the government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity." Similar language occurs in the complaints and

[2] Sager & Eisgruber

in the opinions of judges who support these claims (which now includes 5 members of the Supreme Court).

Language like this bespeaks a not so subtle, yet strangely overlooked, shift that has occurred in religious exemption cases from sounding in the register of unintentional discrimination (the kind of claim recognized in Sherbert v. Verner, the supposed urtext of our religious accommodation doctrine) to sounding in the register of discriminatory intent. As in the Title VI context, we see here the use of "hate" or hostility as the master concept, with its simultaneous implications that discrimination is always a matter of animus; that this is the common denominator of religious and racial discrimination; and that discrimination is an intentional act. That further implies that is an aberrational act perpetrated by individual actors (the proverbial bad apples) with bad thoughts lodged in their heads, rather than the normative practice of a society.

But if the discrimination is truly intentional, as the rhetoric of hostility, second-class status, and singling out implies, then the task at hand is to prove that the reason the authorities refuse to exempt religious services is because they despise or devalue the religious practice (or religion as such) and not because they deem it dangerous. But there is no convincing evidence that the government is not genuinely motivated by concerns about dangerousness. More tellingly, little to none is proffered, apart from word-games and inferences drawn from tortured comparisons.

Furthermore, if the government was motivated by animus, the remedy sought—accommodation—would make no sense. Accommodation, typically provided in the form of an exemption, is a remedy for violations of the right to be different. Such violations occur when the government treats everyone the same when it ought to be recognizing and

accommodating their differences. But the plaintiffs here are complaining of the opposite. They say the government is not treating them the same—or rather, that it is not treating their religious activities the same as secular endeavors. Were that true, the appropriate remedy would be to stop treating them differently, not to make an exemption. But the plaintiffs are asking for an exemption from rules that apply to most everyone and everything else.

In short, the argument is based on a category error. It confuses the two different categories of discrimination, one rooted in the sameness model of formal equality which requires refraining from treating groups differently (a practice that is inherently intentional); the other rooted in the difference model of substantive equality, which is violated by practices devoid of discriminatory intent. This false conflation has been concealed by appealing to the existing exemptions and repackaging the right to be different as the right to be treated the same—the same, that is, as the secular activities that are exempted on the ground that they are "essential." This serves to disguise the fact, but it cannot negate the fact that, at bottom, the complaint is that religious services are being lumped together with most human activities and *not* being treated differently.

That complaint—based on the assertion of a right to be different[3]—would be better served by proof of unintentional discrimination. But just as proof of discriminatory intent is lacking, so too there is little evidence of unintentional discrimination, if by that we mean what it has meant in the past: a culpable failure to consider the effect of a regulation on groups with practices that don't conform to the norm. This kind of discrimination (what I

[3] See Michael W, McConnell, "On Religion, the Supreme Court Protects the Right to Be Different," https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html

call blindspot discrimination)[4] is wholly at odds with the logic of intentional discrimination and lacking in the COVID regulation situation, where the impact on religious services was not unexpected, but rather, a matter of deep concern.

In the absence of either discriminatory intent or the lack of awareness and concern that characterizes unintentional discrimination, these cases treat the mere existence of a burden on the free exercise of religion as a kind of *res ipsa loquitur*, whose discriminatory nature speaks for itself. The axiomatic nature of the proposition that religion is being intentionally disfavored[5] is expressed in the indiscriminate use of "discrimination," which conflates intentional with unintentional discrimination, papering over the absence of a theory that would explain when treating religion differently is a violation of the principle of equality and when it is a requirement. In lieu of such a theory, what we have instead are vague analogies with race; and what we have in lieu of clear and stable definitions of race and religion are hazy intuitions about what religion and race are and what discrimination on those bases involve.

Born of centuries of experience, these intuitions actually point to two different paradigms of discriminatory practices and of group identity itself, which cut across the categories of religion and race. One is based on differences of belief. The paradigmatic form of discrimination that corresponds this way of defining group identities is the auto-da-fe, the "act of faith" addressed to heretics and apostates, as well as religious minorities (Muslims and Jews in the context of the Spanish Inquisition), who were required to recant or convert or else face expulsion or execution. Today, forced conversion policies are

[4] "Blindspot: The Misinterpretation of *Sherbert* and the Reconstruction of *Smith*," on file with the author.
[5] See Justice Alito's recent speech to the Federalist Society.

described as "reeducation" and more often targeted against political beliefs than religious ones (though, as in the case of the Uyghurs in China, we can see that these two categories often merge). Short of such draconian measures, which are aimed at altogether eliminating people with different beliefs, the forms of discrimination associated with the belief-based paradigm include practices of confinement and exclusion and conduct regulations that serve to protect people from other people's ostensibly dangerous acts. The assertion of the need for protection from the dangerous acts of the other is the sine qua non for all of the practices of discrimination in this paradigm.

The other paradigm neither classifies groups in terms of the possession of different beliefs, nor seeks to change them. Nor does it seek to protect the dominant group from the other's dangerous acts. The aim of practices that fall under this paradigm of discrimination is not to eliminate the other, but rather, to exploit it, to extract its resources and its labor, by pressing it into one or another form of service. Servitude, in a word, is the object of this paradigm of practices of inequality. Not protection, but production is their goal. In keeping with the goal of organizing the relations of production, people are sorted into different groups, not on the basis of different beliefs and practices, but rather, on the basis of ostensibly different physical and mental traits and abilities. Not dangerousness, but rather, subservience or servility or simply suitability for a particular kind of service is the trait that defines the subordinated group and purports to justify their subordination.

This is often what people have in mind when they talk about race. It is the kind of basis for sorting people into different groups that underlies all status-based classifications, status signifying a concept that encompasses gender and other identities or social stations one is supposedly born into, as well as race. Status in this familiar sense refers to the idea

of inherited physical and mental differences, supposedly immutable traits, that make groups fit for certain kinds of occupation and unfit for others. More to the point, according to traditional status-based social logics, these genetic differences make certain groups fit to serve and fit to perform particular sorts of services, while making others uniquely fit to be masters over those who serve. Whereas security is the governing concern in the first paradigm of relations of social inequality, servitude is the paradigmatic practice of inequality associated with the capacity-based system of status distinctions, such as race and gender. Not the auto-da-fe but a system of prescribed social roles and ranks and relations of production is the form this kind of system of social inequality takes. By the same token, it is not dangerousness, but dis-ability (that is, the supposed lack of ability) that is the stigma born by the group that is pressed into service and a condition of submission to those they serve.

Disability as opposed to versus dangerousness; subservience as opposed to threat; servitude versus security; production versus protection—these are very different functions and bases for sorting people into groups, which give rise to very different kinds of practices and institutions, even if they are all structures of inequality. Yet this distinction between different kinds of practices of social distinction and inequality is rarely named. Instead, we draw distinctions between different classifications—race, religion, gender, etc—with the vague understanding that some are status-based, while others are based on holding (and acting on) different beliefs.

In this rough-and-ready fashion, religious discrimination seems clearly to belong to the belief-based paradigm, while slavery and its legacy place racism in the domain of the status-based paradigm. Yet it takes but a moment's reflection to realize that assigning

religion to the first paradigm and race to the second is overly simplistic. Obviously, there as many racist acts that are motivated by perceptions of dangerousness as there are racist practices and institutions motivated by perceptions of differing abilities. Furthermore, dangerousness is commonly attributed to the existence of an inferior racial culture, characterized by immorality and other defects of breeding, values, and behavior. Sometimes imagined to be the result of "a culture poverty," other times, the product of innate primitive traits, either way, the upshot is a belief in the existence of a distinctive racial culture—and inferior one but a culture, nonetheless. Of course, there are also non-racist and anti-racist versions of the view that racial differences are expressed as cultural differences.[6] All of these views which associate racial differences with different ways of behaving and perceiving the world bring race inside the belief-based paradigm, which is, at its heart, a cultural model of belief-*systems*. Beliefs, in other words, are not just isolated tenets or sets of intellectual propositions; they are embodied in cultural practices, norms and institutions and norms which together constitute a social system.

Once race is associated with the performance of behaviors that conform to culturally prescribed norms, we are in the realm of the very aspect of religion that has historically served as the basis of religious conflict and, by the same token, the object of religious tolerance. The possession of different behavioral norms, which is to say beliefs about acceptable and unacceptable behavior that are reflected *in* behavior, is the distinguishing characteristic between groups in the belief-based paradigm. Performative theories of race lend race this character. And they lend rac*ism* this character. Which is to say, racism

[6] For a critical analysis of these "positive" forms of racial culture, see Richard T. Ford, *Racial Culture: A Critique* (2005).

shares the characteristics of religious belief-systems which motivate our concerns about coexistence and conflict.

The ideology of white supremacy historically rested on theological foundations. But even without its explicitly religious foundations, a political ideology such as white supremacy can and often does function in much the same way that religious belief-systems do. This is true not only of ideologies that justify relations of inequality but of any political ideology that serves the cultural, psychological, and moral functions served by religious belief-systems. Insofar as they articulates values and a historical narrative that provides a cultural lens through which its adherents view the world and themselves, and insofar as that ideology conceives of adherents of different worldviews as not merely different but dangerous, political ideologies function as religions do[7]—except, of course, when religion functions, not in this manner, but rather, as a status.

Like race, religion can function as a belief-system or as a status. So perhaps instead of trying to define race and religion, it would be better to attend to this distinction between status-based and belief-based forms of identity. On some not fully conscious level, we know that status-based and belief-based practices of discrimination are very different things, which demand different remedies and require different analytic frameworks to determine if they exist. Equally important, they require different analytic frameworks to determine if they are unjustified and hence unjust. After all, it is sometimes justified to treat people differently because of their lack of capacity (consider children) or because of the danger they pose (consider cult leaders or religiously or politically motivated

[7] See Chapter 2 of Yuri Slezkine's *The House of Government: A Saga of the Russian Revolution* for an extensive analysis of the similarities between political ideologies and religions.

assassins). Notwithstanding our knowledge of the difference, these two types of practices of inequality are not clearly distinguished from each other in doctrinal discourse, nor in public discourse. Failing to distinguish the two, we end up "shifting between two implicitly contradictory meanings of the same word"[8] in a way that serves to make disproof of one form of discrimination proof of the other. The result is a kind of shell game, which hides the fact that in some circumstances knowingly burdening the exercise of religion is neither status-based nor belief-based discrimination; neither intentional nor unintentional discrimination; it is no kind of discrimination at all.

[8] I am borrowing this phrase from a recent essay by Fintan O'Toole.