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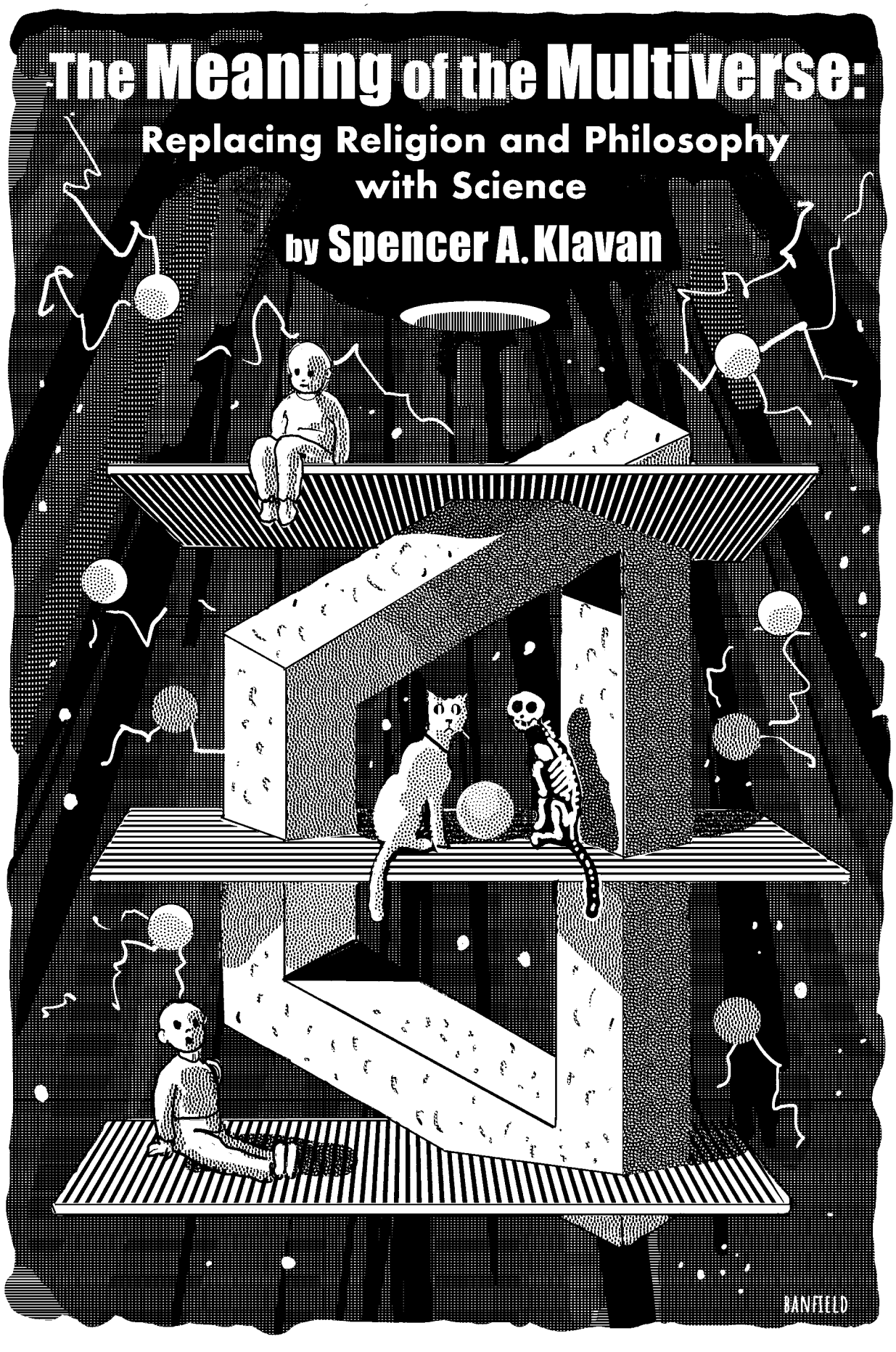

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Essay by Richard Samuelson

The Great Unwokening

Disestablishing our new state religion.

Physicians know that different treatments become necessary at different stages of illness: what helps early in the course of a disease might cause harm later on. Public policy is often similar. The legal tactics necessary to fight Jim Crow and racism in 1964 are now, nearly 60 years later, causing more harm than good. Unfortunately, laws can reconfigure the body politic much as some medicines can change the body. In theory, it should be easy just to switch medicines. But sometimes that is hard on the body. Similarly, a law that remains in existence for decades will shape political culture profoundly, making it difficult to change course. That does not mean the change is not necessary.

In 2022, we are 58 years from the passage of the 1964 Civil Rights Act. That means the Civil Rights Act is, today, as far in the past as the infamous case of *Plessy v. Ferguson* (1896) was in 1954, when the Supreme Court ordered the eventual desegregation of American schools in *Brown v. Board of Education*. In 1964, Jim Crow laws were still in effect. There were separate drinking fountains and bathrooms in public facilities; there were essentially zero black elected representatives in the South; most Americans frowned on interracial marriage; and racial discrimination in employment and much else was still common practice. All that is long gone. We are past the acute stage of the evil. But the way forward, given the radical change we have seen, entails a serious rethinking of our anti-discrimination regime.

Though our landmark anti-discrimination laws were written in race-neutral terms, the main purpose of the 1964 Civil Rights Act was to correct laws and social conventions which discriminated against a specific group: black Americans. Talmudic scholars have a term, *peshat*, to describe the form of interpretation that restricts itself to a text's surface meaning alone. The *peshat* of the 1964 law, then, would suggest that there should be no legal or moral difference between a white person discriminating against a black person, and a black person discriminating against a white person. But in practice the latter conduct is defined as reverse discrimination, frequently said either not to exist or not to matter. That is to say, discrimination *by whites*, and not *against them*, is what really counts as discrimination in civil rights law as practiced, despite the law's surface appearance.

A second important element of the contrast between *peshat* and practice in our civil rights law is that we keep identifying new classes of people, in addition to blacks, against whom discrimination is prohibited. For our purposes, the key additional prohibitions forbid discrimination by whites against racial minorities in general, by men against women, and, nowadays, by straights against gays or by the "cisgendered" against the "gender non-conforming." Strictly speaking, the text says that all discrimination according to "race," "sex," and "gender" is prohibited. In practice, though, we have created certain "protected classes," defined as those "minority groups" against whom one may not discriminate. Members of these groups have learned, thanks to the law, to see themselves as deserving special protections in the aggregate. In other words, the way we have enforced our civil rights laws since 1964 has fostered what we might call protected class consciousness. Moreover, for convenience of enforcement, we put all members of protected classes on one side of every conflict and, well, straight white males on the other.

Media observer Andrew Breitbart said that "politics is downstream from culture." But sometimes the reverse is true: culture is downstream from politics and law. From

this perspective, what Christopher Caldwell calls a "second Constitution," created by the enforcement of the Civil Rights Act, has become a full-fledged regime—a set of rules for life that grows ever more comprehensive as it branches out to take hold of the nation's political and social institutions. And precisely because the Civil Rights Act is associated with a just and noble cause, the ideology it fosters—or, perhaps, the religion it teaches—has begun to pervade more and more elements of our daily life.

The third element of civil rights enforcement causing tensions today is the notion of "disparate impact." Individual cases of discrimination are often hard to prove, and fighting racism on a local, case-by-case basis could only produce slow change. Our enforcement bureaucracy and courts simplified the process by trying to establish the disparate impact principle: if there is a statistical disparity that disfavors members of a protected class, it is taken in itself to indicate the presence of racism. Our Supreme Court affirmed this doctrine in the 1971 case of *Griggs v. Duke Power Co.*, ruling that if a test used by an employer for hiring purposes produces racially disparate results, the test is presumably illegal unless the employer can prove its necessity for the job at hand. Though the Court had second thoughts, the genie was out of the bottle. Similarly, when affirmative action came before the Supreme Court in *Regents of the University of California v. Bakke* (1978), the Court held that discrimination would not be allowed—unless the goal of the discriminators was to create "diversity" on campus (or by extension, in a business). Since then, the term "diversity" has become a sacred totem in parts of our discourse and in our bureaucracies, and a growth engine for H.R. departments everywhere. Thus has our language, our culture, our sense of justice, and our conceptual universe been shaped by a somewhat naive choice of words in a Court case.

America Transformed

Since 1964 America has been transformed in two ways, both of which are important for understanding our situation today.

First, unlike in 1964, millions of minority group members and women (who are not a minority, incidentally, but who are a "protected class") today hold high positions in government, in the corporate world, and beyond. Far from rewarding racism or sexism, we now sometimes ruin entire careers over the mere accusation of either. When the Voting Rights Act passed in 1965, there were majority-black counties in the South where only a handful of blacks actually voted. Nowadays, we are so sensitive to racial discrimination that even ID requirements for voting have become a hotly contested issue (even though such requirements almost always include workarounds for people without an official ID). In the past two decades, America has elected a black president and a black vice president, both unthinkable in 1964. In order to win a Democratic primary in what used to be Dixie, our current president pledged to appoint a black female to the Supreme Court, a pledge on which he made good. For that matter, in today's America, the Supreme Court Justice most beloved by (allegedly "racist") conservatives is a black man who grew up in the segregated South and is married to a white woman.

America's second drastic change since 1964 is a demographic one. The Civil Rights Act was not the only major legislation from that era: Congress also radically reformed immigration. The Immigration and Nationality Act of 1965 ended four decades of minimal immigration (by U.S. standards) and began transforming the population. Previous waves of immigrants had come mostly from Europe.

The current wave has come mostly from the rest of the world. In the 1960 census, blacks were a bit over 10% of the population. The overwhelming majority of the other inhabitants were white. (The 1960 census did not count "Hispanic" as a separate category from "white": it listed "white," "negro," "Indian" [in the sense of Native Americans], "Japanese," "Chinese," "Filipino," and "all other." The last five categories combined came in at less than 1% of the population.) In the 2020 census, the "white" portion was around 61% and dropping. The "Asian" population is now almost 6%, and the "Hispanic" population is over 18% (had we counted the "Hispanic" population in 1960, it would probably have been under 5%, many of whom regarded themselves as "white"). Meanwhile, the black population today is up a bit, to roughly 13%.

A proliferation of minority populations has meant a proliferation of people in protected classes, each with a claim to the benefits of "good" discrimination under civil rights law. Yet the authors of that law never foresaw that so many different groups would seek redress under the new system, which is totally unequipped, both philosophically and practically, to adjudicate between competing minority groups. Protected classes were never supposed to collide. When a nation that is becoming "majority-minority" enforces anti-discrimination law in this way, buttressing it further with disparate impact litigation that treats all statistical disparities as evidence of Jim Crow, you have a serious problem.

The Oppression Free-For-All

What happens when protected groups come into conflict? Initially, the response is a form of denial. The idea of "intersectionality" was invented to explain that different kinds of discrimination can overlap. Black lesbians, to take an early example, could suffer triply: as blacks, as women, and as homosexuals. Our enforcement bureaucrats latched onto that concept and transformed it, establishing in effect a rigid hierarchy of "greater" and "lesser" oppression. This allowed them conveniently to ignore the reality that there are often conflicts between protected classes: they simply gave priority to the individual or group with the most "oppression points." Or, to put it more bluntly: those with a more oppressed identity score as "black" in the model. Those with fewer oppression points count as "white."

This primitive system can only handle situations where there is an obvious winner in the diversity contest—say, a gay couple getting married—and an obvious loser—say, a Christian baker refusing to decorate their cake with a celebratory message. But what if there is no cut-and-dried winner? What if, say, a black trans lesbian brings a lawsuit against a disabled Polynesian immigrant? Without a reliable means of determining who is the "up" and who the "down" group, the whole system, run by legions of enforcement bureaucrats, activists, and lawyers, hits tilt. Consider the case of Asian applicants to Harvard and other elite colleges and universities. Asian candidates, on average, have higher grades and test scores than other "minorities" and white applicants. As if to compensate, admissions officers have a suspicious tendency to give Asian applicants low scores on the "personality" part of the admissions profile at Harvard. Writing in the *Spectator* ("Harvard's Diversity Disgrace," January 2022), analyst Kenny Xu found that "an Asian-American student must score 450 points higher on the SAT to have the same chance of admission as a black student with the [otherwise] same qualifications."

One seldom, if ever, hears Harvard's diversity bureaucracy complain about the disparate impact of the personality score. This is because in the diversity lottery, Asian students' high academic performance makes them *ipso facto* less oppressed than other races, which must therefore be boosted to compensate. Another way of putting this is to describe Asian applicants as "white-adjacent," so that discrimination against them is justified in the service of other important goals.

> Protected classes were never supposed to collide.

Like Asian students, "trans-exclusionary radical feminists" ("TERFs") have found their value in the diversity market dropping with the arrival of a new and more oppressed class. TERFs deny that transgender individuals should receive the protections granted to biological women, and as a result they are publicly excoriated. This is how we end up with a case like that of Lia Thomas (né William), the University of Pennsylvania undergraduate swimmer who came out as trans, switched to the women's team, and set record after record in women's swimming. Thomas's teammates and swimmers on the other teams have been told not to complain in public about the unfairness of having to compete with a biological male. Our civil rights enforcers have no means of balancing competing claims from different protected classes (in this case, biological women and trans people), so they simply pick a winner and support that side. Moreover, they need to suppress those who point out that there are, in this case, protected classes on both sides.

Thus Andrew Sullivan, a leading proponent of gay marriage in America, and tennis star Martina Navratilova, formerly a champion of lesbians' rights, are now on the outs with today's civil rights establishment for insufficiently supporting trans extremism. Once a new "protected class" is identified as the one most in need, anyone in opposition—however admired or progressive he or she was previously—is pegged as an enemy of civil rights in general. In the establishment view, to oppose intersectional scoring is to oppose civil rights. Given the demographic realities of our day, and given what civil rights enforcement today often presumes, this is not, necessarily, incorrect. And that's precisely the problem.

Woke Religion

These legal structures and political practices have created a set of entrenched social attitudes which we might call "civil rights culture." Civil rights culture, which goes deeper and farther than the laws on the books, is an entire way of looking at the world. Thomas Sowell calls it the "civil rights vision," or, in the title of one of his books, "The Vision of the Anointed."

Columbia Professor John McWhorter is more explicit: he calls civil rights cultural dogma a "religion" and its woke devotees "the elect." This religion is blind to those forms of discrimination which have been deemed irrelevant or even salutary. For instance: boys are far more likely than girls to be disciplined by school officials and to drop out of high school. Meanwhile, male labor force participation has fallen to Great Depression levels. If disparate impact matters, and if sex is a protected class, clearly this ought to be a problem that our diversity bureaucracy addresses. But precisely because boys are an "up" group in what is now the "intersectional" perspective, their suffering does not register (though judges occasionally do consider the law's *peshat* and notice such cases).

Even black Americans, the main intended beneficiaries of the original civil rights law, have fallen victim to the new logic of civil rights culture, which lumps all peoples of African ancestry in the same group and obscures some very real differences in social and economic advantage among black people. In 2017, for example, black students at Cornell protested that too high a percentage of the "black" stu-

dents on campus were children of immigrants from Africa or the Caribbean. According to one 2007 study, roughly 27% of black students on elite campuses came from the black immigrant community. Presumably the percentage is higher today, 15 years later. Black students at top schools are thus increasingly less likely to be descendants of the people whom legislators in 1964 had specifically in mind.

Civil rights culture, having no means of weighing competing claims of oppression against each other, can only sweep such concerns aside. The economic trajectory of immigrants from Africa, the Caribbean, and the rest of the world is similar to that of previous waves of immigrants (with similar diversity among groups). But our civil rights bureaucracy wants to address the case of such immigrants (with the exception of Asians, of course) with the law and methods we created to combat Jim Crow. To illustrate the absurdity of this practice, consider an extreme but entirely possible hypothetical: according to the official rubric, the great-grandson of an S.S. officer who fled to Argentina, and whose grandchildren moved to the U.S., would be listed as "Hispanic" and benefit from affirmative action. But the great-granddaughter of a Jew he had killed would not. That is, frankly, meshuganah.

This enforcement system has fostered an all-encompassing set of convictions, attitudes, cultural practices, and articles of faith—in other words, it has taken on the character of a religion. The mandatory diversity statements that some schools and corporations are starting to require for entry illustrate this development. Every time one applies to a school, or for a job or promotion, our laws force us to think racially. Nowadays, the ACLU would probably not defend the right of Nazis to march in Skokie, Illinois, as it did in 1978. And after a Muslim took hostages at a Texas Synagogue in January 2022, the Anti-Defamation League went out of its way to warn, not about rising anti-Semitism, but about increased hostility to Muslims—who, after all, have more oppression points than do Jews. Accepting the legitimacy of this outlook, at least implicitly, is becoming essential for entrée to our establishment.

Like all such establishments, our new one has its complement in popular culture. We see the spirit of the civil rights movement in the original *Star Trek*, with a multiracial and multiethnic (even multi-planetary) crew working together. By contrast, one sees the spirit of our current civil rights regime in *Hamilton*, with people of color as the Americans and the king, the enemy of the revolution, as the only white person on stage.

The trouble with this new dispensation is that it is not and cannot be true to life. As there is, in fact, diversity among cultures, different subcultures in the U.S. will have different economic and professional profiles. Yet the assumption of our diversity bureaucrats is that any statistical disparity is per se evidence of discrimination, as celebrity author Ibram X. Kendi famously insists. When the statistics fail to align with this (impossible) expectation, the only acceptable explanation is that something nefarious is going on. The solution is to ratchet up the enforcement and scope of "bias training" and "anti-racist" education in our schools. Yet these very things probably make the problem worse, reinforcing rather than weakening racial bias.

More and more members of these protected classes are starting to recognize that the system does not, in fact, help them. Our rising cohort of young men and women with ancestors from Asia are, as a rule, opposed to affirmative action. "Hispanics," too, are moving rightward as the woke revolution becomes increasingly hostile to traditional religious views on matters such as family and sexual morality. When even progressive California overwhelmingly votes down affirmative action, it suggests that most Americans would prefer to move beyond modes of enforcement that grew out of the '60s. Meanwhile, our woke elites view the mere suggestion of such a preference as heresy. As for "people of color" who vote against the woke agenda, they are in the same woke purgatory as other minorities with fewer diversity points. As candidate Joe Biden put it in 2020, if you vote that way, "you ain't black."

The Case for Extending the Sphere

What is the solution? Voltaire once observed:

> 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....
>
> If one religion only were allowed in England, the Government would very possibly become arbitrary; if there were but two, the people would cut one another's throats; but as there are such a multitude, they all live happy and in peace.

James Madison liked to quote that passage. And in *The Federalist*, he paraphrased Voltaire's logic: "Extend the sphere" of the republic, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other." By conforming every dispute to a binary template of good versus evil, oppression versus victimhood, woke enforcement creates something very much like the competition between two religions in which Voltaire said the combatants would "cut one another's throats."

One Madisonian solution, then, would be to dissolve the current binary to allow for plurality. We might help that process along by extending the identity sphere further, breaking up the available identity groups into a proliferation of smaller and more diverse, not to mention more accurate, categories. In America today, we encourage assimilation—but not assimilation to American citizenship. When diverse peoples from Central and South America merge their disparate backgrounds into a single "Hispanic" identity, that is no less an act of assimilation than it would be if they all assimilated to an unhyphenated American identity. Our practice of reducing racial identity to a handful of census boxes—"white," "black," "Hispanic," "American Indian/Alaska native," "Native Hawaiian/Other Pacific Islander"—is an artificial creation of the federal bureaucracy in the late 1970s. Modern technology has surpassed these crude categories, enabling us to make a far more fine-grained assessment of identity and demographics. Adding more categories would both reflect the real diversity of America's current population, and ease the pressure that simplistic, binary enforcement is creating. It would be much easier to recognize that "minorities," too, are diverse.

The sex, gender, and sexual identity categories are a bit different. In the past few decades we have seen a proliferation of sexual identities. And yet we tend to view them through the lens of Jim Crow, or, *mutatis mutandis*, of "patriarchy"—straight (white) guys on one side, and the entire sexuality alphabet on the other. If one may put it this way without giving offense, we have extended the queer, but our enforcement ideology is still bi. That is why Lia Thomas's teammates were told not to complain: it is an unstated article of the Diversity, Equity, and Inclusion faith that all conflicts can be boiled down to victims and oppressors.

To cool down our culture wars here, we need to rediscover the hard division between public ecumenism and private sectarianism, which fostered the peace Voltaire observed at England's stock exchange. That exchange was, functionally, a monopoly. It was the only such marketplace in England. As such, it was necessary and good that it allowed all to participate equally. Inside the Exchange, members of the diverse religious groups of England worked together in peace. The market was thus a solvent for prejudice, as everyone operated peaceably and equally under the rules of the exchange.

Outside the exchange, however, life worked differently. As Voltaire noted, "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." The various groups, which, as a rule, didn't much like each other, only had to work side by side on the exchange floor (in a "pacific and free assembly"). As a result of such regular contact, many probably softened their prejudices, and some even became friends. Meanwhile, off the floor of the exchange, the trading shops were private in the full sense. They could choose who was in the room as an employee or a customer. No one asked whom a Jew hired as a bookkeeper or whom a Muslim served as a client. Each went his own way for socializing or worship. And that, also, was necessary for civic peace. Elements of traditional Catholic, Jewish, and Muslim doctrine were no less offensive to our establishment in the 18th century than they are to today's establishment. Because all religions touch upon sex and sexuality, enforcing nationwide mandates on those subjects will inevitably provoke the kinds of religious fights that England forestalled by separating the public from the private. Forced confession in the name of civil rights is no less oppressive than forced confession in the name of the king's religion.

Religion, after all, is also a protected class in the 1964 Act. In the interplay of our many religious groups, plus our multiplying views of sex, gender, and sexuality, there is scope for the kind of multiplicity that Voltaire and Madison embraced. But that can only take place if businesses—or at least businesses under a certain size—are regarded as more fully private than current civil rights law allows. This is essential if we are to live and let live. Like "repression" in Freudian analysis, applying the Jim Crow binary to sexual pluralism produces cultural neurosis.

We Can't Woke It Out

Consider once again in this light the case of Lia Thomas, the transgender swimmer at the University of Pennsylvania. Without the weighted scorekeeping of the civil rights hierarchy, Thomas's case transforms from a regime-level persecution of the newest outgroup (i.e., biological females) to a matter of private concern. Thomas's claim is as follows: she regards herself as no less female than any other contestant on her team. As such, to deny her the right to swim on the women's team is to deny her self-understanding. But, others will reply, there is a biological reality which makes Thomas's claim unreasonable. Thomas is physically stronger than any woman competing in the Ivy League. It is unfair for Thomas to compete in the same pool as biological women. And can we really blame the Penn swimmers for being uncomfortable changing clothes alongside someone who, in that context at least, remains manifestly a man?

What to do? Perhaps the best way out is to restore the separation of public and private and, as a result, allow for tailored local accommodation of such fraught cases. Much of the national tension will dissipate if we remove these cases from the diversity bureaucracy (Title IX, etc.) and from potential federal litigation, referring them instead to the universities and sports teams in question. Jim Crow forced us to suspend the presumption that private companies and institutions would make good-faith efforts to work through such tough cases (or even easy ones with regard to race). A free country must, however, make such trust the rule rather than the exception. If we cannot trust the people with such tasks, we are neither free nor democratic. Moreover, we now have so many protected classes that conflicts among them are likely to grow increasingly common, causing ever more cultural heat.

Restoring privacy to many businesses will help. General Manager Branch Rickey, after all, brought Jackie Robinson up to the Dodgers partly because he wanted to win and to make the franchise more profitable. Prejudice costs money. And Jim Crow seating was created against the wishes of bus companies, who didn't want to pay the cost of creating separate sections. Given the situation in 1964, it was necessary to break into the realm of privacy to kill Jim Crow. But today's discrimination is, thank goodness, not Jim Crow. Given our racial progress, our demographic transformation since 1964, and the larger cultural transformation we have seen since then, a restoration of a more robust private sphere, particularly for smaller businesses and for religious schools, is now what the doctor orders. If affirmative action at Harvard loses at the Supreme Court next year, perhaps (a big perhaps) some private universities might join this effort to restore the rights of private association. They would, of course, have to find some way of remaining legally "private" despite receiving some federal money, perhaps by taking less than some agreed-upon percentage of their budget from the feds. Once they secured private status, however, they would be free to tinker with their student body's racial composition according to whatever dogmas, woke or otherwise, they may choose.

In *Planned Parenthood v. Casey* (1992), Justice Anthony Kennedy said that liberty is, fundamentally, "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." He did not, however, say one had the right to demand others affirm that concept. Freedom includes freedom to disagree about things that are fundamental, not merely things that are trivial. Given human diversity and imperfection, there always will be competing rights claims, competing claims of justice, and incommensurable ideas of the good life. We must be allowed to express these more fully in our daily lives. In other words, a culture of genuine freedom and equality is liberal or gregarious, open to appreciating the variety of human life, even when it makes us uncomfortable. The intersectional hierarchy, and the binary upon which it builds, puts legal and cultural roadblocks in the way of such true liberality.

Earlier this summer, in *Carson v. Makin*, Justice Stephen Breyer wrote that "with greater religious diversity comes greater risk of religious based strife, conflict, and social division." That gets the genius of American liberalism and pluralism precisely backward. In the context of America's liberal republic, combining pluralism with a more robust separation of public and private is the way to avoid the wars of religion Madison and Voltaire dreaded. If we continue to view all discrimination through the woke, intersectional binary lens, treating all conflicts between the "privileged" and the "oppressed" as moral equivalents of Jim Crow, we are on the road to postmodern religious wars—wars that will make the fights of the Trump presidency seem trivial by comparison.

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