Quarantines, Religious Groups, and Some Questions About Equality

By Christopher C. Lund[1]

When the government imposes quarantine orders for public safety, shutting some places down and leaving other places open, how should it treat religious organizations and religious services? A natural answer is that they should be treated *equally*. And that makes sense. Equality is a solid principle, with wide-ranging appeal and deep roots in history and in law.

But, at the same time, equality is not self-executing. And the deeper one goes into these quarantine orders, the more that becomes apparent. We can try to treat religion equally, but it becomes harder in practice than it is in theory. Equality means that religious groups should be treated the same way as other similarly situated groups, but this becomes difficult when there are a bunch of possible comparators treated different ways. Courts, even the United States Supreme Court, have had to be tough decisions about which comparisons count.

For this short piece, I seek merely to establish two propositions, which are relatively uncontroversial but which also illuminate some of the difficulties inherent in these decisions. The first proposition is that quarantine schemes require judgments about the value of religious exercise. These judgments are probably not susceptible to objective calculation. And they end up being somewhat uncomfortable in a system like ours, where the government tries to avoid direct questions about religion's worth or value. The second proposition is that, by insisting that all gatherings of all religious organizations be treated the same way, quarantine schemes become blind to some genuine religious differences. We decide how much to restrict religious organizations in general by imagining what typically happens in a religious service, but our imagined typical religious service ends up looking a lot like a Sunday morning Christian worship service.

Much of the debate, and the litigation, over quarantine schemes has been over issues of who should decide. There are questions of judicial and legislative competence, questions about how power should be allocated during emergencies, and even much more mundane questions (like the standard of review for a party seeking an injunction pending appeal). But forget those questions. Underneath all of them are more fundamental questions about equality that are unavoidable, profound, and difficult. This piece does not answer those questions. It tries simply to see them clearly—to see them for what they are.

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States have worked against the COVID-19 pandemic in a variety of ways. Quarantine orders have been one of those ways. Starting in early 2020, but continuing up to the present moment, states have issued shut-down orders requiring businesses and other organizations (including religious organizations) to close temporarily. These shut-down orders work by categorizing organizations by type. Some organizations have to close; others can stay open. Organizations that can stay open may have to follow certain rules—like spacing requirements, mask mandates, and fractional capacity limits. Oftentimes things proceed in stages. This kinds of organization can open now; this other kind can open next week; this other kind can open next month.

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Forget religious organizations for a second. If you were in charge of deciding what things should open and when, you would naturally take into account the value of the thing in question. Essential businesses never had to close—this might include things like grocery stores, hospitals, lawyers' offices, and liquor stores. States have different definitions of "essential businesses," of course, but the common task was to identify what businesses were *essential*—what business were too important to close.

But this isn't just about essential businesses. These kinds of value judgments enter into every part of a state's classification scheme. In its multi-stage reopening plan, California put restaurants in stage 2 and bars in stage 3—meaning that restaurants could re-open before bars.[2] Now this could be purely about the relative risk of COVID-19 transmission. But that's not entirely clear, especially given that social distancing and masks were required in both places. More likely, there's also a value judgment here. California believes—and it may have good reason for believing—that open restaurants are simply more important to society than open bars.

Value judgments here are inescapable. Grocery stores are essential businesses because people need to be able to buy food and a lot of people don't have the money for grocery delivery. Childcares get placed in the first category of businesses that could reopen because we know parents will have trouble working without childcare for their kids.

There is a simple truth here. Determinations about when different things should re-open does not merely involve questions of fact (what's the amount of risk?), but also involve questions of value (is this worth the amount of risk?). The more something is worth, the more risk we are willing to accept.

But this creates real problems when it comes to figuring out where religious organizations should fit into the organizational taxonomy. Again take California's multi-stage reopening plan. Essential businesses (including grocery stores, fast food places, and liquor stores) were in stage 1 and never had to close. Other organizations were classified as stage 2 (which really consisted of two separate stages, 2a and 2b), stage 3, and stage 4. Where do religious organizations most naturally fit? Should religious organizations be treated like concerts (stage 4), movie theaters (stage 3), restaurants (stage 2b), or grocery stores (stage 1)? We must listen to the scientists, who will tell us about the comparative transmission risk of all those things. But that is not enough. Cost/benefit analysis depends on us evaluating both the costs and the benefits. This means somebody also needs to tell us about the comparative value of those things. How important is religious exercise, as compared to a concert, or a movie, or a meal out, or a trip to the grocery store?

This is a pickle. In deciding in what category to put religious organizations, governments must make judgments about the worth of religious exercise. But those are exactly the kind of judgments we usually want the government to avoid. In our system, people get to decide the worth of religion for themselves. They might think religion good or bad; they might think it valuable, invaluable, or worthless. But each of us gets to decide about religion for ourselves—we decide, with those we love and trust, what to believe,

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[2] California's rules came before the United States Supreme Court in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). But more factual detail about California's reopening plan is available from the dissenting opinion in the Ninth Circuit. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 940 (9th Cir. 2020) (Collins, J., dissenting) (noting that "Stage 2 entities [included] schools (in an adapted form), childcare, dine-in restaurants, outdoor museums, destination retail, including shopping malls and swap meets," while "Stage 3 [included] bars, movie theaters, hair salons, and "more personal & hospitality services").

whether to believe, and how to practice. But the pandemic changes this. We now affect each other more than we did before. Your decision to go to a bar, to a restaurant, or to a church affects my life differently than it did before. This prompts us into now making collective (that is, governmental) decisions about the worth of things—including the worth of religion.

To be clear, this problem cannot be avoided. It is inherent in quarantine schemes that classify organizations by type. And to be sure, I do not think any other kind of quarantine scheme could really work. If governments could not classify organizations by type, they would only be able to use generally applicable rules like "indoor masks," "always six feet apart," "buildings at 50% capacity." But that simply would not work. It would not work because it would make it impossible for government to distinguish even among *nonreligious* organizations based on their value. California would be unable to favor restaurants over bars. It would be unable to give any priority to grocery stores, hospitals, or childcare places. Sensible quarantine schemes must classify organizations by type. But that brings us back into the thicket.

This cuts a bunch of different ways all at once. Religious exercise should be given a high priority. But how high? And high by what measure?

An example here clarifies the point. One of the cases the Supreme Court considered this summer was *Calvary Chapel*, which involved Nevada's quarantine scheme. Nevada had reopened casinos. Religious organizations—churches, synagogues, mosques, and so n—could have a maximum of 50 people. But casinos could have up to 50% of their maximum capacity—given their size, that meant effectively thousands of people. And casinos are like religious organizations in a way that relates to risk transmission. Like churches, and unlike (say) grocery stores, people tend to stay at casinos for periods of time.

A number of Supreme Court Justices thought this unconstitutional. They said that devalued religious exercise. "[T]here is no world," Justice Gorsuch said, "in which the Constitution permits Nevada to favor Caesar's Palace over Calvary Chapel."[3] Justice Gorsuch's analysis is sound. If casinos and churches are similar in terms of risk transmission, then the decision to let casinos open while forcing churches to remain closed is indeed a value judgment that casinos are more important than churches.

At the same time, though, consider this. Nevada apparently gets more than 30% of its General Fund revenue—more than a billion and a half dollars a year—from casinos and their related hotels.[4] Nevada needs the casinos to be open—it needs that money to fix the roads, and keep the schools open, and for various social programs.

The argument that churches should open because casinos are open and pose the same kinds of health risks only works, as a logical matter, if the benefits of churches and casinos are roughly equal. But are they? Casinos are worth a billion dollars to Nevada. What do we say about churches in this respect? Are they worth more than that? Less? How much? How can we know? But that is the question at the

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[3] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief).

[4] Nevada Resort Association, How Gaming Benefits Nevada, available at https://www.nevadaresorts.org/benefits/taxes.php.

bottom of all of this—how much are churches worth? It's a question that we do not want the government to address explicitly, but it's implicitly laying behind all of these decisions.

My first point was that quarantine schemes require the government to make decisions about how much religious exercise is worth. Let me turn, in my final paragraphs, to my second point—that quarantine schemes flatten religious difference in uncomfortable ways.

Quarantine schemes all adopt the basic principle of denominational neutrality—the principle of treating all religious affiliations and denominations the same. In every quarantine scheme, churches, mosques, and synagogues have all gone into the same category, to be governed by the same rules and restrictions. This is the right approach. After all, equality between religious denominations is a bedrock principle. But this approach also ends up collapsing real differences between faiths.

For example, in deciding how to handle religious organizations, many courts and legislatures have seized on to the fact that singing involves a high degree of transmission risk, which naturally suggests caution about letting religious groups meet. But, of course, not all faiths sing during worship services—some faiths don't even have what many would consider to be worship services. We've been figuring what restrictions to impose on religious services based on some conception of what "usually" happens in religious services. But such conceptions will naturally be heavily shaped by the practice of the dominant majority faiths. To put it bluntly, quarantine orders act as if all religious gatherings resemble prototypical Sunday morning Christian worship services.

This is not terribly surprising. It is probably not even avoidable. Every society will have its own understandings about what religious worship looks like, and those understandings will naturally enter into law at various points. But it is a concern, or at least a curiosity, to see genuine religious differences been flattened in this way, and to see all religious organizations governed by rules that were designed largely for Protestant worship services.