

Book Review: Law's Religion: Religious Difference and the Claims of Constitutionalism by Benjamin L. Berger

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Book Review



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Book Review: Law's Religion: Religious Difference and the Claims of Constitutionalism by Benjamin L. Berger

Abstract

This is a book review of *Law's Religion: Religious Difference and the Claims of Constitutionalism* by Benjamin L. Berger.

Book Review

***Law's Religion: Religious Difference and the Claims of Constitutionalism*, by Benjamin L. Berger¹**

HOWARD KISLOWICZ²

BENJAMIN BERGER'S *LAW'S RELIGION: Religious Difference and the Claims of Constitutionalism* is a remarkable work of sharp analysis and deft prose. For readers within legal academia and practice, the book sets a challenging task: to examine from the outside a structure in which they are sitting. The central insight of Berger's book is that Canadian constitutional law is a culture, a system of symbols that structure and generate meaning, deeply influenced by a liberal tradition and a particular history. Berger reminds us that even those who agree with this basic proposition often find themselves speaking of law as if it were above or without culture. Through examples drawn principally from Canadian court decisions, Berger shows persuasively that when law encounters religion, we witness a meeting of cultures, each with its own symbolic, aesthetic, and normative commitments. The participants in this cross-cultural encounter, however, are not equal in power. The law has a coercive capacity unavailable to most religions, which sometimes makes the encounter colonial or conversionary in character. Berger argues that this is not a problem that can be cured; law cannot help but be a culture, and its impulse to rule is deeply ingrained. Instead, Berger provocatively suggests that judges should cultivate their indifference to

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1. (Toronto: University of Toronto Press, 2015) [Berger].
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difference, widening the spaces for minority religious practices by reading them, where possible, as inoffensive to the state's basic commitments. For those familiar with Berger's previously published work,³ some of these themes will be familiar. Put together in this monograph, the larger arcs of Berger's arguments come into sharper focus as he draws out the connections between those earlier pieces. *Law's Religion* also represents a significant development of Berger's thought on possible responses to the more problematic aspects of law's meeting with religion.

In what follows, I delve more deeply into three distinguishing features of Berger's argument. First, I discuss Berger's methodological approach, which begins from the lived experience of legal subjects instead of focusing on abstract ideas of law or theory. Second, I address Berger's exposition of the culture of Canadian constitutional law, along with the limits and conversionary tendencies of this culture. Third, I consider Berger's suggested adjudicative virtues—fidelity and humility—as a response to the difficulties encountered when law casts religion in its own image. I conclude by suggesting that future scholarship, nurtured by Berger's approach, could enrich understandings by incorporating the voices and perspectives of religious individuals and communities subject to the law's rule.

I. METHODOLOGICAL SHIFT: FOCUS ON LIVED EXPERIENCE, NOT LAW OR THEORY

Constitutional analysis tends to start from first principles. The terms of constitutional rights are usually broad, and the lawyer's instinct is to define the terms before putting them into action in a given case.⁴ So it is when we turn our imaginations to the relations between state and religion and to principles of secularism. Berger claims that “such analysis, whose point of departure is an ideal of ‘the secular,’ ultimately hides more than it illuminates.”⁵ In part, this is because there are many varieties of secularism, each an idiosyncratic product of its geographical, historical, and political context. More crucially for Berger, setting up a grand theory of secularism as a point of departure tends to “strip away

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3. See generally Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall LJ 277; Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 Can JL & Jur 245; Benjamin L Berger, “The Aesthetics of Religious Freedom” in Winnifred Fallers Sullivan & Lori G Beaman, eds, *Varieties of Religious Establishment* (Burlington, Vermont: Ashgate, 2013) 33.
 4. See e.g. *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 at para 39 (Justice Iacobucci adopts a provisional definition of religion before analyzing how the right of religious freedom applies in a particular context).
 5. Berger, *supra* note 1 at 33.

lived experience”; the “prescriptive and explanatory breadth” of such accounts is achieved “at the expense of regard for the messy details of wrestling with the relationship between religion, law, and politics.”⁶

Instead, Berger advocates a “phenomenological turn in the study of law and religion, one that seeks to privilege experience of the law as the analytic starting point, rather than legal concepts or ideal forms of theory.”⁷ He does this by understanding the meeting of law and religion as a cross-cultural encounter. Such an approach does not start by defining terms or relying on metaphors such as a wall of separation between law and religion. Instead, it investigates the competing cultural commitments of both law and religion that are exposed when the two meet.⁸

II. CULTURAL COMMITMENTS OF CANADIAN CONSTITUTIONAL LAW

In Berger’s view, law’s cultural understanding of religion has three overlapping and mutually reinforcing elements: “(1) religion as essentially individual, (2) religion as centrally addressed through autonomy and choice, and (3) religion as private.”⁹ When Canadian constitutional law explains the purpose of religious freedom, says Berger, it focuses on the “individual’s sense of his or her own relationship to the divine or to the object of faith,”¹⁰ and Berger finds ample support in the case law for this claim. This individualistic orientation is consistent with the Supreme Court of Canada’s (SCC) general approach to the *Canadian Charter of Rights and Freedoms*,¹¹ “a product of the structure and the informing [liberal] ideology” of that document.¹² This orientation can mean that some claims of religious communities are not cognizable by courts. Berger points to the case of *Adler v Ontario* as an example, in which several minority religious communities sought provincial funding for their schools equal to that provided to Catholic

6. *Ibid.*

7. *Ibid.* at 36.

8. In taking this approach, Berger acknowledges the influence of Paul Kahn. See Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University Of Chicago Press, 2000).

9. Berger, *supra* note 1 at 66.

10. Berger, *supra* note 1 at 66.

11. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

12. Berger, *supra* note 1 at 72.

schools in Ontario.¹³ Berger says the claim failed not only because it impugned another constitutional provision that guaranteed Catholic school funding, but also because the claim to community-based education does not fit within the individualist mould.¹⁴

While *Law's Religion* offers a compelling reading of *Adler*, that case also reveals at least one way in which Canadian constitutional culture sometimes understands religion in terms of communities rather than just individuals. The constitutional protection of Catholic denominational schooling rights in Ontario is given life through institutions. While the educational rights vest in individuals, the schools are sites of community autonomy in a way that cannot be completely reduced to individual rights. Indeed, in a recent case, though the majority of the SCC declined to answer the question whether corporate bodies can claim religious freedom rights, a Catholic school (rather than any individual) was granted a remedy in the name of religious freedom, and a concurring minority held that religious schools and other organizations could bear rights of religious freedom.¹⁵

This said, Berger's claim about the strong pull of individualism is well demonstrated through other examples. According to Berger, law's concern with autonomy predisposes courts to understand religion as something made meaningful in a person's life principally because it is chosen. Though some say that contemporary religious freedom jurisprudence has shifted from a concern with freedom toward a preoccupation with identity¹⁶ or equality,¹⁷ Berger argues that law ultimately justifies its concern with identity-related harms by focusing on the autonomy of the identity-bearer.¹⁸ So, when Jehovah's Witness parents made a religious freedom claim against a state decision to require a blood transfusion for their baby, the SCC was unanimous that the decision did not violate the *Charter*,

13. *Adler v Ontario*, [1996] 3 SCR 609, 140 DLR (4th) 385.

14. Berger, *supra* note 1 at 74.

15. See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 33-34, 89-102, [2015] 1 SCR 613. To be clear, Berger is careful to recognize that Canadian constitutional law has some regard for collective dimensions of religious practice. His claim, more finely put, is that "wherever else its eyes might wander, in the contemporary treatment of religious liberties, Canadian constitutional law invariably returns to a sharp focus on the individual" (Berger, *supra* note 1 at 68-69).

16. Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 SCLR (2d) 201.

17. Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013).

18. Berger, *supra* note 1 at 87-88.

and one of the concurring judgments justified this result through its preservation of the child's autonomy in choosing her faith until she developed that capacity.¹⁹

Finally, Berger claims that law relegates religious commitment to the private sphere, a domain "in which we are governed in our actions and dispositions not by the universalism of reason but by the particularities of love, preference, and belief."²⁰ This orientation helps make sense of the distinction the court has drawn between religious belief and practice.²¹ "As belief only, religion is a preference that remains solidly and unproblematically within the realm of the personal. As conduct, it might seep into the realm of the public where interest and preference have a troublesome status."²²

The Court drew the belief/conduct distinction in a case addressing Trinity Western University's (TWU) Community Covenant, which prohibited students from engaging in same-sex or unmarried sexual intimacy (among other things). In the absence of evidence supporting the British Columbia College of Teachers' claim that graduates of TWU's education program would likely discriminate against LGBTQI students once in the classroom, the Court held that the College of Teachers penalized TWU on the basis of (private) belief rather than (public) conduct. But the Community Covenant can equally be understood as a religious practice that crosses into the public realm when TWU seeks accreditation by a public regulator. In fact, now that TWU has proposed establishing a law school while still retaining a similar Community Covenant, this has been an argument pursued with mixed success by the law societies of British Columbia, Ontario, and Nova Scotia, in denying accreditation.²³ The differing results of these cases support Berger's argument that law is hospitable to religious difference only when the religion can be understood as private. In one of the cases where TWU was successful, the court held that "[p]ermitting TWU graduates to article in

19. *RB v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) at para 230 [*Children's Aid Society*]; Berger, *supra* note 1 at 90.

20. *Ibid* at 91.

21. *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31 at para 36, [2001] 1 SCR 772.

22. Berger, *supra* note 1 at 94.

23. *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (Div Ct), aff'd 2016 ONCA 518, 398 DLR (4th) 489 [*TWU v LSUC*]; *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722, aff'd 2016 BCCA 423; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, aff'd 2016 NSCA 59, 401 DLR (4th) 56 [*TWU v Nova Scotia Barristers' Society*].

Nova Scotia will not open the door to discrimination in Nova Scotia.”²⁴ In other words, there will not be public consequences, at least in the province of the regulator’s jurisdiction. In contrast, in the case where TWU was unsuccessful, the court reasoned that the law society, as a gatekeeper of the legal profession and an entity subject to Ontario’s human rights legislation, could take into account the discriminatory nature of TWU’s Community Covenant. In this view, the Community Covenant’s impact reverberates into the public sphere, and can thus not be tolerated when it conflicts with one of law’s values (non-discrimination).²⁵

Indeed, Berger says that “the extent and character of legal tolerance for religion may turn on a religion’s conformity with the law’s conceptual commitments about religion.”²⁶ When courts ask “if a limit on religious freedom is justified, the question is assessed within the values, assumptions, and symbolic commitments of the culture of Canadian constitutionalism itself.”²⁷ Courts wind up assessing the tolerability of a religious practice based on their culturally infused understanding of how religion works and why it is valuable, focusing on how the practice relates to individual autonomy and whether its implications were private or public.²⁸ So, when a religious practice can be digested as consistent with law’s cultural commitments, such as a Sikh high school student *choosing* to wear his kirpan, the cultural difference is more likely to be tolerated.²⁹ In contrast, the Jehovah’s Witness parents discussed above, who sought to prevent a blood transfusion for their infant child, “found the limit of legal tolerance at the border of individual autonomy and choice.”³⁰ While religious views may be permitted in public discussions of school board policies, they are intolerable when they fail to comply with the cultural values of inclusion and equality.³¹ The message of the cases, says Berger, is that law behaves as if it meets an equal partner in cross-cultural exchange only when law’s fundamental values are respected. When they are not, law will impose its will in a more conversionary kind of encounter.³²

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24. *TWU v Nova Scotia Barristers’ Society*, *ibid* at para 253. The Court of Appeal upheld the decision on administrative law grounds, holding that the Barristers’ Society had overstepped its jurisdiction by arrogating to itself the power to determine whether a university had engaged in unlawful discrimination.
25. See *TWU v LSUC*, *supra* note 23 at paras 130–35 (Divisional Court reasons), 118–19, 138 (Court of Appeal reasons).
26. Berger, *supra* note 1 at 101.
27. *Ibid* at 117.
28. *Ibid* at 118.
29. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.
30. Berger, *supra* note 1 at 123; *Children’s Aid Society*, *supra* note 19.
31. *Chamberlain v Surrey School District No 36*, 2002 SCC 86, [2002] 4 SCR 710.
32. Berger, *supra* note 1 at 126.

For Berger, law's conversionary impulse is not something that actors in Canada's legal system can change. While some might hope that law and religion could meet as mutually respecting partners in dialogue, each learning and growing from its engagement with the other, Berger concludes that "[t]he distinctive character of the culture of contemporary constitutionalism... precludes [this] kind of dialogical engagement."³³ For those committed to building a pluralistic society where minority groups are respected precisely for their cultural difference this sounds like depressing news. But in his final argumentative manoeuvre, Berger provides an intriguing response: those who care deeply about the merits of cultural diversity should work on getting courts to care *less* about cultural difference.

III. HUMILITY, FIDELITY, AND EXPANDING INDIFFERENCE

Taking seriously the idea that law and religion meet as two distinct cultures means, for Berger, that judges should be at once more faithful to the culture of Canadian constitutional law and humbler about law's assumed exclusivity in generating norms and meaning in the lives of individuals and communities. Berger argues that, though in tension, the virtues of fidelity and humility will allow judges to leave more space for alternate cultural forms that can be interpreted as not in conflict with state values.

Judges can accomplish this, says Berger, by being more transparent about the cultural commitments of law. If judges imagine law as a culture rather than as above culture, they can lay down the impossible burden of "juridically solving the cultural tensions between law and religion."³⁴ Instead, judges can react to cultural difference by "[staying] the violent hand of the law," expanding the array of religious practices to which law is indifferent, marking them as "not intolerable."³⁵ And even when law determines that a practice is beyond the boundaries of its toleration, a judge who understands such determinations as stemming from cultural differences will explain a litigant's loss by "gesturing to a reason other than the inability of the individual to participate in a rational community."³⁶

One example Berger uses to show this ethic in action is Justice Abella's dissenting judgment in *Hutterian Brethren*.³⁷ In assessing the litigants' objection

33. *Ibid* at 139.

34. *Ibid* at 177.

35. *Ibid* at 177-78.

36. *Ibid* at 187. For an example of this form of reasoning, see Berger's discussion of Justice Binnie's dissenting view in *Children's Aid Society*, *supra* note 19 at 174-75.

37. *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at paras 110-77, [2009] 2 SCR 567.

to being photographed, Justice Abella is faithful to the culture of constitutional law by understanding the claim in terms of autonomy, focusing on whether the legislation left the colony with a meaningful choice between religious observance and civil obedience. Having done so, she “provides a sterling example of the cultivation of indifference” by emphasizing the minimal impact that would have been occasioned by the colony’s desired accommodation, concluding that the law should not be bothered by it.³⁸

IV. WHERE TO FROM HERE?

Berger’s resolve to find a new entry point to analyzing the relations between law and religion yields a subtle and well-supported account of why the tensions between them seem intractable. Berger exemplifies the virtue of humility by not claiming to have found a new way to end these conflicts. Instead, he encourages his readers to inhabit them faithfully, humbly, and honestly. While law’s colonial impulse may never be completely stayed, Berger offers hope that it can at least be tamed. For those who find Berger’s account convincing, there is much work to be done. As discussed above, Berger insists on an approach focused on the lived experience of legal subjects rather than grand questions of theory or overarching legal doctrine. Though Berger’s accounts of the religious practices at the centre of some disputes are moving,³⁹ we cannot know how deeply they resonate with the lived experience of religious practitioners until we hear their stories in their own voices. One way of doing this is to ask them, in interviews, to give their own accounts;⁴⁰ a less direct way is to examine the written and oral arguments advanced on their behalf.⁴¹ Berger’s account is rich, and worth reading carefully. Future studies could build on its foundations by drawing on the practical methodologies of cultural anthropology that inspired some of Berger’s thinking.

38. Berger, *supra* note 1 at 184.

39. See the discussion of the eruv and the succah (*ibid* at 43-45).

40. See *e.g.* Angela Campbell, “Bountiful Voices” (2009) 47:2 Osgoode Hall LJ 183; Anne Saris & Jean-Mathieu Potvin, “Canadian Muslim Women and Resolution of Family Conflicts: An Empirical Qualitative Study (2005-2007)” in Silvio Ferrari & Rinaldo Cristofori, eds, *Law and Religion in the 21st Century* (Surrey, BC: Ashgate Publishing Limited, 2010) 339; Howard Kislowicz, “Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation” (2013) 39:1 Queen’s LJ 175.

41. For one example, see the discussion of Amish litigation in Robert Cover, “Nomos and Narrative” in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) at 95.