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Against Circumspection: Judges, Religious Symbols, and Signs of Moral Independence

Benjamin L Berger*

INTRODUCTION

Issues of symbolic interpretation have emerged as a mainstay of the transnational jurisprudence on law and religion. How should we understand the social and legal significance of a crucifix hanging on the wall in an Italian classroom?¹ What is the meaning and political valence of a headscarf, and how does this differ in Turkey² and France?³ How should we interpret the reference to God in the Pledge of Allegiance,⁴ and what is the nature, meaning, and effect—what is the phenomenology—of prayer?⁵ It is this latter question about the nature and the communicative effects of prayer that was at the heart of the Supreme Court of Canada's decision in *Mouvement Laïque v Saguenay*.⁶

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¹ *Lautsi and Others v Italy* ECHR 2011–III 2412, 54 EHRR 3.

² *Leyla Sahin v Turkey* ECHR 2005–XI 819, 44 EHRR 5.

³ See Mayanthi Fernando, 'Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France' (2010) 37 *American Ethnologist* 19.

⁴ *Elk Grove Unified School District v Newdow* 542 US 1 (2004).

⁵ *Town of Greece v Galloway* 572 US (2014). On the question of the phenomenology of prayer and its intelligibility to law, see Benjamin L Berger, 'The Legal Unintelligibility of Prayer', <https://perma.cc/Q32Y-E5UK>.

⁶ *Mouvement laïque québécois v Saguenay (City)* 2015 SCC 16.

The Court proceeded with notable confidence in finding that an individual who did not share the religious beliefs reflected in the prayer at issue in *Saguenay* would experience it as exclusionary, and as an affront to state neutrality. Given the context and the specific prayer at issue, perhaps that is so, and perhaps that effect properly dictated the outcome in that case. But apart from the ‘empirical’ question of how this prayer would be perceived, there are distinct and important questions about how it *could and should be* interpreted. Such questions are, I suggest, always salient in cases involving religious symbols. Otherwise put, how much are we willing to ask of one another—of politicians, of fellow citizens, of judges—by way of interpretive creativity, flexibility, and nimbleness when met with the appearance of religion in public life? And who ought to bear that interpretive onus? Given a symbolically complicated social world, made so in part owing to religious and cultural difference that we seek to support and constitutionally protect, such questions seem to be increasingly exigent.

This chapter takes up these questions surrounding the interpretation of religious signs and symbols—and the interpretive possibilities that emerge when we demand more from one another in thinking about such symbols—by examining the question of judges and religious dress in the particular context of the judge’s role as wielding the coercive force of the state through the exercise of criminal punishment. I advance the argument that recent debates have proceeded on a misleadingly simplistic approach to understanding the meaning of signs of religious belonging and identity in this setting and that, with this, we miss an opportunity for a deeper understanding of the virtues that we hope to find in our public officials.

In recent years, and consistent with Canadian constitutional history, Quebec has been the gravitational centre of debates and reflection in Canada about the management of religious difference in a religiously diverse society. Political and legal debates within Quebec have tended to raise, with particular clarity, issues that are salient across the country. Two recent happenings in the law and politics of religion in Quebec stand out.⁷

⁷ There are others, including issues of religious education, an issue that has found its way to the Supreme Court of Canada in the form of the cases of *SL v Commission scolaire des Chênes* 2012 SCC 7 and *Loyola High School v Québec (Attorney General)* 2015 SCC 12. The case of *Saguenay* (n 6), which concerned prayer at the outset of municipal council

In 2008 Gérard Bouchard and Charles Taylor released their co-authored report arising from the Consultation Commission on Accommodation Practices Related to Cultural Difference, the 'Bouchard-Taylor Report'.⁸ The report advocated a model of open secularism, one that would navigate the imperatives of regard for religious difference and the particularities of Quebec history and culture, through a more or less embracing regard for the accommodation of religious practices. The report arose from a sense of public concern about the issue of religious difference, concern generated to some extent in response to court decisions that had required the accommodation of minority religious practices. In their report, Bouchard and Taylor urged the government to prepare a white paper on how to approach the question of religious accommodation in Quebec.

In 2013 the Parti Québécois (PQ) government took up this invitation and placed the 'Charter of Quebec Values', or so-called 'Charter of Secularism', on the public table for debate.⁹ Although it proposed a number of amendments and initiatives, Bill 60's most controversial aspect was the prohibition that it would place on public employees wearing 'conspicuous' religious symbols. The Bill advanced a very different vision of the state relationship to religion than that urged in the Bouchard-Taylor report. Most academic and public commentators (including Charles Taylor himself) condemned the Bill's exclusionary and closed vision of secularism, and contested not only the political position evident in the Bill, but the internal consistency and rationality of the measures that it introduced. The Parti Québécois gambled and lost when they sought to place the fate of this Bill at the heart of a snap provincial election, an election that returned a devastating electoral

meetings, in its own way raised questions of state neutrality and the appearance of religion in public life, the focus of this chapter and others in this volume.

⁸ Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation* (Quebec, Commission de consultation sur les pratiques d'accomodement reliées aux différences culturelles, 2008).

⁹ *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st sess, 40th Leg, Quebec, 2013.

defeat for the PQ, albeit a defeat that does not neatly or stably track support for the Bill.¹⁰

There seems to be a great deal of conceptual distance between the Bouchard-Taylor Report and Bill 60. They assume markedly different postures toward the accommodation of religion and the management of religious diversity in Quebec. And yet there are two notable points of convergence. First, both documents assume that the place to begin when addressing the issue of the just management of religious difference in contemporary society is with a set of claims about the nature and demands of 'the secular'. In retrospect, one might well read Bouchard and Taylor's emphasis on defining an idea of the secular as a fateful move in the road towards Bill 60, one that permitted a denatured, simplistic, and abstract claim about what secularism implies to drive a vision of religion's place in Quebec society. Bouchard and Taylor rooted their views and recommendations in an understanding of secularism, as did the Parti Québécois when the government advanced a conception of *laïcité* appropriate to Quebec, one that drew heavily from a particular – and arguably misleading – understanding of the nature of French *laïcité*.¹¹ Whether one creates more heat than light through seeking to deduce just approaches to dealing with religious difference from ideal concepts such as secularism is an important question; this episode in Quebec feeds my scepticism about this kind of approach.¹² Appeals to the nature and demands of such broad concepts can draw attention away from the complicated social, historical, and political facts associated with religious difference in a given society, clearing the way for policy prescriptions that – like Bill 60 – have regressive and exclusionary effects.

Yet this chapter is focused on an issue that arises at a second point of convergence between these two moments in the recent history of law and religion in Quebec. Despite the normative space between the

¹⁰ Many other factors were at play in the election, including stances taken about Quebec sovereignty and the perennially crucial electoral issue – the economy.

¹¹ Bowen shows that the conventional image of French *laïcité* is radically misleading in its effacing of the rich associational lives that are lived beneath the rhetoric about a single republican identity. See John R Bowen, *Can Islam Be French?: Pluralism and Pragmatism in a Secularist State* (Princeton, Princeton University Press, 2009).

¹² For a fuller account of my scepticism on this point, see Benjamin L Berger, 'Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion' (2015) 24 *Social & Legal Studies* 47.

Bouchard-Taylor report and Bill 60, and although the Bouchard-Taylor report rejected a general prohibition on the wearing of religious symbols that would apply to all agents of the state, both agreed that judges—along with Crown prosecutors, police officers, prison guards, and the president and vice-president of the national assembly—should be barred from wearing religious ‘signs’. In the case of Bill 60, this bar on judges wearing religious symbols was caught up in the general ban that was the focus of so much criticism. For Bouchard and Taylor, by contrast, these figures were distinctively subject to such a prohibition, and this targeted prohibition was justified by the particular character of the public duties and authority that they exercised. Bouchard and Taylor explained that in the case of other public officials, freedom of religion for these individuals, as well as the imperative of equal access to public employment, overcame any possible concern that the appearance of religious affiliation might signal an absence of state neutrality or some form of conflict of interest. For most public officials, Bouchard and Taylor reasoned, we should look to the substance of how their public duties are discharged: ‘we must evaluate agents of the State in light of their acts. Do they display impartiality in the performance of their duties? Do their religious beliefs interfere in point of fact with the exercising of their professional judgment?’¹³

And yet, for Bouchard and Taylor, the balance came out differently in the case of judges, police officers, and prison guards. Although they clearly agonised over the decision, Bouchard and Taylor ultimately concluded that these individuals should be prohibited from wearing religious signs. The specific justification is of most interest to this chapter:

We suggest that the appearance of impartiality imposes itself at the highest level in the cases of judges, police officers and prison guards, *all of whom possess a power of punishment and even coercion* in respect of individuals such as defendants, accused person and inmates, who are in a position of dependence and vulnerability. [Emphasis added.]¹⁴

¹³ Bouchard and Taylor (n 8) 150.

¹⁴ *ibid* 151.

Bouchard and Taylor argue that these figures should ‘impose on themselves a form of circumspection concerning the expression of their religious convictions’,¹⁵ a duty that translates into an obligation to not wear items that mark their religious identity. ‘These are positions’, the co-commissioners explained, ‘that strikingly exemplify State neutrality and whose incumbents exercise a power of coercion.’¹⁶

It is this claim—that there is something about the public function of state punishment and coercion that justifies the prohibition on judges wearing religious symbols—that I want to explore and interrogate in this chapter. In my view, the ban proposed by both Bill 60 and the Bouchard-Taylor report fails on some rather straightforward critiques, most clearly the exclusion of particular religiously identified people (those for whom religious belonging involves outwardly identifiable displays) from key roles in the institutions of government. Prohibiting a person who will perform his duties impartially and professionally from being a judge because he wears a turban or kippah is not defensible.¹⁷ Bouchard and Taylor were right to insist on focusing on the substance of one’s conduct and treatment of others, rather than leaning on a semiotic analysis of signs and symbols in pursuit of an abstract ideal of neutrality as non-particularity, and this idea should carry through to police officers, correctional officers, and judges.

But my particular interest is in the argument from punishment and coercion. What should we make of this link between expressions of religious belonging and the judge’s task of punishing? More than arguing that Bouchard and Taylor’s reasoning on this point is simply unconvincing, I will suggest that it might actually be backwards—that the argument from the coercive and punishing roles of the judge might provocatively point in just the other way. Might it be that reflection on the character of these judicial tasks, and the virtues that we seek in the exercise of those functions, should actually lead us to welcome a judiciary that reflects and displays its religiously diverse nature?

The goal of this chapter is to trouble and disrupt the instinct that religion and judicial authority are best hermetically sealed from one

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ See, eg, Jocelyn Maclure’s chapter in this volume for a powerful critique of such bans on grounds of respect for identity and political morality.

another, offering an alternative way that we might choose to read religious symbols worn by judges. In this way, this argument should be understood, more broadly, as engaged with the set of questions raised at the outset of this chapter, questions about the burdens of interpretation in a religiously diverse and multicultural society. In exploring the specific issue of how we could and should read the appearance of religious symbols on the person of a judge, this chapter thus also gestures to this larger theme of the burdens of interpretation in a religiously plural society. Beginning with some scene-setting in the form of a brief discussion about the character of sentencing and punishment in Canada and why it is a particularly helpful entry point into a discussion about the judicial role, this chapter will take a historical excursion into the imbrications of punishment, religion, and judgment in the common law criminal trial. Having thus recovered some material that could contribute to a different reading or coding of the ‘conspicuous’ religious affiliation of judges, I will suggest that there is actually something structurally and politically appealing about markers that remind us that, in their judgments about the exercise of state power, those who stand between the will of a government and the infliction of coercive force on individuals have moral independence from the bare wishes of government.

WHY LOOK TO PUNISHMENT?

There is an obvious hazard involved in using sentencing and punishment as the terrain on which to explore an argument for accepting judicial displays of religious affiliation. To raise the issue will lead some to imagine judges reasoning from religious authority or justifying sentencing decisions on the basis of religious text or precept. James Whitman has touched on the way in which the peculiar version of (non-)separationism found in the United States—one in which religious institutions and public institutions are meant to be insulated from one another, but talk of religion circulates freely in political and legal discourse—has resulted in distressing examples of biblically grounded claims for greater punishment being made in US courtrooms.¹⁸ Of course

¹⁸ James Q Whitman, ‘Separating Church and State: The Atlantic Divide’ (2008) 34 *Historical Reflections* 86. On the use of religion in sentencing in the United States, see also Mark Greenlee, ‘Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges’ (2000) 26 *University of Dayton Law Review* 2; Sanja

there would be much to worry about if this simplistic insertion of religion into the world of judicial punishment were the direction or thrust of my argument. But I am not offering an argument for judicial reasoning from biblical mandate, nor for the suppression of the distinctive judicial task – that of reasoning through and with publicly generated legal norms – in favour of religious moralising. I am neither sanguine in the face of the risks of injecting religion into the judicial task, nor am I complacent about the importance of the judicial discipline of public reasoning. In that sense, although I am questioning the political desirability of building too tall a wall between the character of judicial authority and the religious identity of judges, I am not squarely joining the debate about the character and content of judicial reasons in some form of rejoinder to Rawls.¹⁹ Rather, the inquiry here is into how else the appearance of religion as an aspect of a judge's identity and belonging, which so troubled Bouchard and Taylor and vexes many others, might be differently coded. How else might we read it?

Why, then, select the fraught area of punishment and sentencing – the archetypal case of state coercion – as the basis for exploring these ideas about judicial authority and religious identity? Of course the answer is, in part, linked to the story told in the introduction: it was the prospect of punishment and coercion of the accused that led Bouchard and Taylor to distinguish the case of judges (as well as police and correctional officers) from other public officials, who they felt should be permitted to display religious affiliations. Punishment played, in this way, the key role in creating an otherwise unlikely convergence between these two significant recent policy statements on religious accommodation in Quebec.

Zgonjanin, 'Quoting the Bible: The Use of Religious References in Judicial Decisions' (2005) 9 *New York City Law Review* 31.

¹⁹ For this kind of discussion of appeals to religion in light of the character of public reasoning see, eg, Mark C Modak-Truran, 'Habermas's Discourse Theory of Law and the Relationship Between Law and Religion' (1997) 26 *Capital University Law Review* 461; Michael J Perry, *Religion in Politics: Constitutional and Moral Perspectives* (New York, Oxford University Press, 1997); Scott C Idleman, 'The Limits of Religious Values in Judicial Decisionmaking' (1998) 81 *Marquand Law Review* 537. The frame for this debate is, of course, very much set by John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review* 765; Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14 *European Journal of Philosophy* 1.

Yet punishment offers a uniquely valuable sightline into the judicial role in Canada for reasons that have to do with the process and nature of sentencing. For most of Canadian criminal law history, criminal punishment was essentially unguided by legislation, with no statements in the Criminal Code of the purposes and principles of sentencing.²⁰ Choice of punishment was a quintessential example of judicial discretion, with judges left to generate their own theories and objectives of sentencing. This fundamentally discretionary approach was subject to forceful critique, with concerns voiced about consistence, predictability, and transparency. In the mid-1990s, Parliament sought to respond with a wholesale revision to the sentencing provisions of the Criminal Code. And yet the 1995 amendments did little to alter the essentially discretionary character of sentencing in Canada. Parliament offered a veritable buffet of sentencing objectives, ranging from deterrence and denunciation to rehabilitation and the cultivation of responsibility, with no indication as to which objective a judge ought to select and when, nor of the relative weighting or priority of these objectives.²¹ The sentencing principles remain broad and woolly, leaving intact the substantial margin for manoeuvre available to the sentencing judge. Indeed, the legislation's newly formulated 'fundamental purpose of sentencing' underscored the deeply normative and evaluative character of the sentencing enterprise. Section 718 explained that this fundamental purpose 'is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions',²² sanctions that pursue one or more of the listed objectives. Although precedent and some legislative minima and restrictions shape the judge's range of options, the moment of punishment invites the judge to make broad judgments not just about the facts of a case and the character of an act, but about a 'just society' and the character of an offender's circumstances and life's story.

²⁰ For an excellent brief history of sentencing in Canada, see Allan Manson, *The Law of Sentencing* (Toronto, Irwin Law, 2001) 14–29.

²¹ Parliament has since offered some limited guidance in this respect, indicating in ss 718.01, 718.02, and 718.03 that primary consideration should be given to the objectives of deterrence and denunciation in cases of offences against children, and certain offences committed against peace officers, law enforcement, and other participants in the justice system. See Criminal Code, RSC 1985, c C-46, ss 718.01, 718.02, 718.03.

²² Criminal Code, RSC 1985, c C-46, s 718.

The result is that in the act of sentencing we find one of the most forceful and violent expressions of the authority of the state matched with a high degree of discretion afforded to the decision-maker. How to realise the fundamental objectives of sentencing; how to respond well, and in an individualised way, to the person that has found their way before the court; how to balance the competing interests involved in the moment of sentencing; the nature of the system is that these are matters of ineradicable and deep indeterminacy to which we accept that judges bring certain kinds of personal instincts, perspectives, and experiences. Without much by way of rule-based buffer, the whole person of the judge is drawn into an encounter with the person, responsibility, and deeds of the offender. Comforting ideas that the judge is simply a speaker of state law wither in the sentencing environment. Another way of putting this is that there is, in sentencing and punishment decisions, no plausible retreat to the conceits of legal formalism. Sentencing is one place where it is very difficult not to accept that who the judge is—the content of her conscience and philosophy of crime and punishment—matters deeply. In the moment of punishment, the clearest and most potent moment of the exercise of the raw will and coercive force of the state meets the principled but wide-ranging discretion of the sentencing judge. It is this very confluence that points, I will suggest, to why markers of religious and normative pluralism in a judiciary should be welcomed, not prohibited, or even merely tolerated.

A HISTORICAL EXCURSION

The demand for proof beyond reasonable doubt is one of the pillars of contemporary criminal law. It stands as an emblem of the modern, enlightened administration of criminal justice and, within that realm, serves as a virtual synecdoche for the rule of law. Its relationship to the rule of law flows from the imagined position that it occupies in the criminal process. It is thought that this standard of proof stands between the fearful and potentially tyrannical power of the state and the liberty of the subject, serving as a protective principle that ensures that the morally innocent are not improperly swept up in the machinery of state punishment. As we understand it today, then, proof beyond a reasonable doubt is a much-cherished but rather simple principle—a feature of modern law that serves to protect the accused from wrongful conviction.

As it turns out, the history is far more complex and interesting. This complicated history points to a very different function for the idea of proof beyond a reasonable doubt; it is a history that ties together religion, state authority, and punishment in provocative ways. In this section, I turn to this history as a means of excavating resources for thinking differently about the place that religious adherence might occupy in our picture of criminal judgment.

At the Fourth Lateran Council in 1215, Pope Innocent III prohibited the clergy from participating in trial by ordeal. This edict effectively abolished the principal means of criminal trial in England, but it also released a flood of anxiety into the criminal justice system. To be sure, trial by ordeal had been a terrible event for the accused. Whether by hot iron, cold water, or (for the higher-status accused) battle, trial by ordeal must have been a fearful process, all the more so in light of the mortal consequences of a finding of guilt. And yet it posed little concern or anxiety for those involved in administering criminal law. The logic of ordeal was straightforward enough: in the epistemology of the time, the ordeal offered a direct point of access to God's judgment as to the guilt of the accused. Concerned with the taint of blood for the clergy who oversaw these ordeals, when Pope Innocent III banned clergy participation, matters shifted entirely. Now that direct judgment from God could not be secured, criminal judgment would have to be a human matter. As James Whitman shows in *The Origins of Reasonable Doubt*,²³ this shift in responsibility after the ordeal generated deep moral anxiety, an anxiety that would be crucial to the development of the contemporary criminal trial.

Whitman explains that the act of human judgment—suddenly necessary in a post-ordeal world—was understood to be a deeply perilous and risky business. 'Early modern Christians', Whitman writes, 'experienced great anxiety about the dangers that acts of judgment presented for the soul' because 'any sinful misstep committed by a judge in the course of judging "built him a mansion in Hell"'.²⁴ Phrases such as 'judge not lest ye be judged', and 'they that take up the sword shall perish by the sword' rang in the ears of those responsible for judgment with a resonance and force that it is difficult to imagine today. In the

²³ James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, Yale University Press, 2008).

²⁴ *ibid* 3.

case of criminal judgments, with the mortal and bloody consequences so often associated with conviction, the peril was particularly acute because, in the theological atmosphere of the time, the individual who judged wrongly was responsible for and polluted by this bloodshed, wielding the sword just as the soldier did. The stakes were high, then, not only for the accused but also for the judge, whose soul was at stake in each act of criminal judgment.

When the ordeals ended in 1215, the need to judge collided with a complex theology of doubt that had generated out of this anxiety around human judgment. A doctrine called the 'safer path' had developed in moral theology, and instructed that 'in cases of doubt, "in dubiis," one should act in such a way as to minimize the possibility of pollution'.²⁵ Trepidation about pronouncing judgment in the presence of doubt was deep. Without the moral comfort of the ordeals, other means would have to be found to manage this anxiety about judgment, and many of those techniques were the progenitors to the characteristic features of our modern criminal trial. The jury itself, Whitman explains, was one such device for the moral comfort of judges, shifting moral peril from judges to lay jurors who were placed under 'exceptional moral pressure'.²⁶ Jurors, no less aware of the 'safer path' than judges, were reticent to convict in the presence of any uncertainty. Over the course of the thirteenth to seventeenth centuries, however, techniques of responsibility-shifting (including the special verdict and benefit of clergy) and jury control (including, in the seventeenth century, fining and even imprisoning jurors) allowed the system to extract convictions from juries. However, in the late seventeenth and early eighteenth centuries these practices fell into disrepute. Benefit of clergy withered and jury control was abolished. And with this, jurors fell back on the safer path, reluctant to convict.

Moral theology responded to the risk that this posed to the administration of justice, and its response was the doctrine of reasonable doubt. Yes, it was a grave matter—a matter that implicated one's soul—to judge another when one had doubt. But this did not mean, this doctrine held, that you had to be concerned with any doubt whatsoever. No, your soul was safe, theologians explained, as long as you harboured

²⁵ *ibid* 117.

²⁶ *ibid* 127.

no *reasonable* doubt. The origins of reasonable doubt were, thus, as a means to *encourage* conviction, not to discourage it. It was a device of moral comfort, not one aimed at factual proof. Whitman summarises the provocative conclusion as follows:

the ‘beyond a reasonable doubt’ standard was not originally designed to make it more difficult for jurors to convict. It was designed to make conviction *easier*, by assuring jurors that their souls were safe if they voted to condemn the accused. In its original form, it had nothing to do with maintaining the rule of law in the sense that we use the phrase, and nothing like the relationship to the values of liberty we ascribe to it today. It was the product of a world troubled by moral anxieties that no longer trouble us much at all.²⁷

The principal contemporary lesson that Whitman draws from this history of reasonable doubt is that, with the loss of this pervasive Christian moral frame, modern law has become comfortable—perhaps too comfortable—with judging. Indeed, he argues that ‘[o]ne of the features that makes our law modern is our lack of anxiety about judging others.’²⁸ The historical fear around judgment was an artefact of the saturation of the public and private lives of the judge and juror alike with the worldview and absolute authority of Christian moral theology. ‘Modern secularization has brought the decline of the fearful religiosity of the past.’²⁹ Most people—including judges and jurors—no longer move in their lives trembling with fear for the eternal fate of their souls. In many respects, release from this kind of day-to-day fear is a good thing: ‘humans who no longer quake and tremble are humans who live richer lives in many ways.’³⁰ And yet that fear and anxiety in criminal adjudication served a function: it helped to restrain the violent hand of the criminal law. Be it in the development of demanding burdens and standards of proof or in the creation of procedural rules such as jury unanimity, this sense of moral discomfort in the exercise of criminal judgment tended historically to translate into a kind of parsimony in the

²⁷ *ibid* 5.

²⁸ *ibid* 6.

²⁹ *ibid* 7.

³⁰ *ibid*.

use of the criminal law. Whitman concludes, harrowingly, that '[t]he larger truth is that we have slowly been losing the capacity to gaze into our own breasts and ask ourselves hard questions about when and how we have the right to punish others'.³¹

It would be a mistake to fall into nostalgia for this period in the criminal trial or to become Pollyannaish about the historical influence of Christianity on the uses to which criminal law and trial processes have been put. Yet there is significant value in the specific lesson that, in the presence of uncertainty, a due measure of anxiety about judgment is a salutatory thing. And this lesson, along with the details of the historical excursion that teaches it, points to something of structural interest for the purposes of this chapter. The story of the origins of reasonable doubt offers an example of how the meeting of religious conscience and the barest form of coercive power generated attitudes of restraint and scepticism about the uses of state power. When the seventeenth-century juror gazed into his breast, he found a source of authority in Christian moral theology that offered an important counterpoint to the raw coercive authority of the state. The salutary anxiety that Whitman identifies was produced because state punishment had to pass through the person of a judge/juror whose normative reference points could not be readily assimilated to law enforcement interests or kingly authority alone. This moral independence of the juror from the government was disciplined and controlled for centuries through mechanisms of jury control and responsibility-shifting; the story of reasonable doubt is the story of finding a way to assuage that anxiety in service of more efficient and reliable punishment. Yet it remains true that Christian theology was a force to contend with in the development of modern criminal law, forceful because it offered an alternative footing on which to stand in judgment of the rightness of an act of punishment.

One might feel as though this digression into legal history has taken us far afield from this chapter's questions about judges, religious symbols, the Bouchard-Taylor Commission, and the 'Charter of Quebec Values'. It is, however, just this structural observation—an observation about the importance of moral independence in the act of judgment—that offers the key to an alternative reading of religious symbols and the judicial role, a reading that might in fact have particular salience and appeal at the moment of state coercion or punishment.

³¹ *ibid.*

READING RELIGION AND THE JUDGE

Equipped with this account from the history of the common law criminal trial, I return to the matter at hand: how to read the appearance of religious symbols on the person of a judge. The Bouchard-Taylor report reflected the instinct that there was something about the capacity to exercise state coercion – what the commissioners called ‘the power of punishment’³² – that made the case for ‘circumspection’ particularly strong. Consider the heart of Bouchard and Taylor’s argument leading to their suggested prohibition on judges wearing items that would mark religious belonging:

Everyone will agree that this type of situation must be broached with the utmost caution. The case of judges is probably the most complex and the hardest to decide upon. It is essential that the parties involved in a trial, especially the respondent, who may be punished, can assume the judge’s impartiality. Could a Muslim respondent assume the impartiality of a Jewish judge wearing a kippah or a Hindu judge displaying a tilak?³³

The next line of the report makes the assertion that ‘[t]he right to a fair trial is one of the acknowledged basic legal rights of all citizens.’³⁴

Notice how this reading of the religious symbol proceeds: the symbol of religious belonging is implicated in issues of impartiality and fair trial rights. The symbol worn by one of these imagined judges is evidence of religious particularity, and this particularity translates into the possible apprehension of partiality. The protection of the fair trial rights of the accused thus requires that we ensure that there is no evidence that the judge is compromised by religious particularity. And yet with the historical excursion in hand, I think that we might imagine a very different reading of the marker of the judge’s religious belonging, one that flips the argumentative valence of the moment of punishment or coercion.

³² Bouchard and Taylor (n 8) 151.

³³ *ibid.*

³⁴ *ibid.*

Rather than tethering the religious symbol to concerns about impartiality (understood here as dependent on non-particularity), one might choose to focus instead on the basal judicial norm of independence. Judicial independence is amongst the most fervently invoked and jealously guarded principles in the structure of our justice system. It is a commitment protected both by explicit right and by implication in the Canadian constitution.³⁵ Notably, most discussion of and jurisprudence about judicial independence focuses on the institutional paraphernalia of independence: security of tenure, protections around remuneration, and such. And yet the under-discussed heart of the principle is independence of mind: a kind of conscientious or moral independence. This is what the accused desires at the moment of judgment or punishment. The accused's chief interest is not in an abstract philosophical impartiality, but rather impartiality as between the accused and his antagonist, the prosecuting authorities. The central hope is for a judge that is independent from the interests or raw will of the government. This is the foundation of the fair trial right. And if this idea of moral independence is brought into focus, the particularity of the religious symbol might designate something quite different and salutary: a marker for the existence of evaluative footings that are not reducible to the prevailing governance interests of the executive.

Both the structural logic and the practical realities of rights protection in the criminal justice system turn on the existence of a buffer, in the person of the judge, between law enforcement authorities and the subject. It is precisely at the moment of coercion—where there exists the power of punishment—that a distance between government and judge is most imperative. It is at this moment that the hope is most ardent that the authority and interests of government will not be the sole perspective from which power is exercised. And it is therefore at this moment that we might actually have the greatest appetite for the showing of religious particularity within our judiciary. The appearance of religious symbols amongst members of the judiciary can be read (and should be encouraged to be read) as a reminder that judges cannot be neatly assimilated into the apparatus of the government, functioning solely as agents of its will and authority. These symbols could be viewed as reminders of how important it is that judges have the moral

³⁵ See Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Toronto, Irwin Law, 2010).

independence that comes with evaluative footings that cannot be tidily identified with the perspectives of the legislature or executive.

Consider the historical case of the origins of reasonable doubt. In that story the religious conscience of adjudicators did not serve to aggravate punishment; the rule of law did not admit of that kind of effect. Rather, religion introduced a ground for scepticism and caution in the exercise of state authority through the imposition of state violence. Christianity offered resources that created a counterpoint to ideals of efficient and confident punishment. Ultimately, those cautionary principles had to find expression in the law, giving rise, as Whitman explains, to a number of the central features of our contemporary criminal trial. But the religious particularity of the judges and jurors served as an avenue through which these decision-makers achieved critical distance from the pure will of state authority, testing the will to punish against norms of justice and fairness that were not endogenous to the prevailing logic of government. That history is a rather potent expression of the idea of judicial independence and its value to a justice system.

Of course, there is nothing to assure us that the religious conviction that opens up this distance will always counsel a posture of mercy or mitigation. The moral independence that is signalled by symbols of religious belonging could instil an appetite to punish, or as a matter of outcome in a given case, align the judge with the interests and power of the government, rather than inducing scepticism about the use of criminal law. Although the historical example of the development of proof beyond a reasonable doubt is a story about religion as a force for parsimony and restraint, it would be a mistake to imagine that religious belief will consistently induce that salutary attitude. Yet in this respect we are in no different a position than we would find ourselves with a religiously committed judge whose religion does not involve symbolic displays, or with a judge inspired by otherwise-sourced political or philosophical commitments. Moreover, at a historical moment in which prevailing interpretations of the mixing of religious identity and public authority are so often negatively charged, we do well to meditate on examples of the goods—including a scepticism about state power in the context of criminal punishment—that religious commitment can bring. But what is ultimately appealing about the appearance of religious symbols within the judiciary is not a particular normative valence, but

what is structurally communicated: the independence of the judge who is tasked with sitting in review of exercises of state power.

Read within these terms, consider the picture of the judiciary that is invited by the prohibition on religious symbols suggested in the Bouchard-Taylor Commission and the proposed 'Charter of Secularism'. That ban on religious symbols is not, of course a ban on symbols associated with the judiciary and the act of punishment. Symbols abound in that setting, but they are all the symbols of state authority. The coat of arms, the flag, the uniforms of public office, the 'Crown', 'Her Majesty', the trappings of government buildings—everything that an accused meets through the process of state coercion is an expression of state authority and power. Stripped of markers of her own particularity, there is little to obviously distinguish the person of the judge from the machinery of punishment. The authority of the government and the ends of justice are too neatly aligned when all symbols and language within a justice system are those endogenous to law itself. We have never allowed the authority of law and the ends of justice to be collapsed in this way. Throughout our legal history, equity has been a structural space for the exercise of conscience that is not reducible to law alone. And through the royal prerogative of mercy, prosecutorial discretion, and the power of jury nullification, the criminal justice system has continued to depend on, cultivate, and protect ways in which justice requires that law be supplemented with assessments and evaluation from other grounds of moral and ethical judgment.³⁶ Manifestations of cultural and personal particularity (of which religious symbols are one example) could serve as a welcome reminder that, amongst those through whom the coercive force of the state must pass, there exist footings for just this kind of sceptical posture.³⁷ Viewed in this way, contemporary religious pluralism affords us a symbolic cache for

³⁶ See Benjamin L Berger, 'The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination' (2011) 61 *University of Toronto Law Journal* 579.

³⁷ For a defence of religious norms as amongst the external norms that judges, of necessity, must draw in reasoning about justice, see Mark C Modak-Truran, 'Reenchanting the Law: The Religious Dimension of Judicial Decision Making' (2004) 53 *Catholic University Law Review* 709. See also Stephen L Carter, 'The Religiously Devout Judge' (1989) 64 *Notre Dame Law Review* 932. For an influential critique of this position see Kent Greenwalt, *Private Consciences and Public Reasons* (New York, Oxford University Press, 1995).

markers of this kind of moral independence, so central to the task of judging.

One might object that this argument suggests that we can expect *greater* independence or impartiality from judges who wear items that mark their religious belonging. To be clear, my argument is not that the sceptical position that I have described is somehow only possible perceivable where religion is brought into the courtroom. My interest is not with whether a particular judge does or does not wear a religious symbol. Instead, what should be attractive to us is the appearance of various moral touchstones and resources in the aggregate picture of the judiciary, because this helps to mark the judiciary as a collegium of ethical reasoners who enjoy moral independence from the claims of government authority alone. Each judge benefits from the presence of others who manifest this particularity. The existence of a turbaned judge down the hall who is deciding a bail matter benefits the many others who wear no such symbols of religious belonging. It benefits them by association, if you will. Having, *in the aggregate*, a judiciary that represents a range of moral and ethical resources that may play a role within the legal discipline of hearing, arguing, reason-giving, appealing, and dissenting, reminds and comforts the public that this is not a branch that is just about the technocratic execution of legislative or executive will. With the presence of these symbols in our composite picture of the judiciary, we are reminded of the many forms and sources—some visibly marked, some not—of the sceptical, independent ground that we hope our judges will occupy. Judges are still, of course, bound to the defining practice of reason-giving through and within the law. We insist, throughout, that whatever scepticism one has can fit within and be articulated through public legal norms. And yet, though part of the state apparatus, they are not reducible to servants of government authority or command.

It seems to me that, contrary to the argument advanced by Bouchard and Taylor, this matters *most* in light of the power of punishment and aware of the risks of state coercion. Should the prevailing attitudes of the government and its exercises of state authority become unjust or excessive, a judiciary equipped with moral resources drawn from other perspectives seems a salutary thing, indeed. Might we adopt this reading of the appearance of religious symbols in the judicial setting, a reading in which the presence of such symbols comforts us by

evidencing a public role as decision-makers whose resources for critiques of state power are rich and various?

CONCLUSION: COLIN WESTMAN AND MICHEL FOUCAULT

Over many years, Prime Minister Harper's Conservative government has marched a path of 'tough on crime' reform to Canadian criminal law. Central to that project was the revision of key elements of the sentencing regime, all of which restricted the freedom with which judges can craft sentences in pursuit of Parliament's putative will that the primary principle of sentencing be that of proportionality.³⁸ The Harper government has introduced a spate of new mandatory minimum sentences, extinguished the use of conditional sentences for most offences, limited the credit available for pre-trial detention, and imposed higher victim fine surcharges. Although judges have responded to defence arguments on each of these points, and some of these matters have come before the Supreme Court of Canada,³⁹ it is the latter example—that of the new mandatory victim surcharges—that produced the most widespread and open conflict between the judiciary and the government. Judges across the country took up legal arms against this fee, some giving offenders decades to pay the fee, others ruling the surcharge unconstitutional, and some simply refusing to order the fine.⁴⁰

Out of this controversy, Justice Colin Westman emerged as something of the public face of judicial resistance to the tough on crime agenda. He earned notoriety for taking a very public and strident stance against the surcharge, voicing his concerns through the media—an unconventional and controversial move for a sitting judge. Justice Westman, who took measures in court to evade the surcharge, denounced the government's measures, calling the surcharge a 'tax on

³⁸ Criminal Code, RSC 1985, c C-46, s 718.1.

³⁹ For a recent decision of the Supreme Court of Canada declaring certain mandatory minimum sentences unconstitutional, see *R v Nur* 2015 SCC 15.

⁴⁰ See Sean Fine, 'Judges Defy Order to Impose Tories' Victim-Services Surcharge' *The Globe and Mail* (Toronto, 9 December 2013) www.theglobeandmail.com/news/politics/judges-defy-order-to-impose-tories-victim-services-surcharge/article15820100/. For example, in *R v Michael* 2014 ONCJ 360, Justice David Paciocco ruled that s 737 of the Criminal Code, which provides for the victim surcharge, was unconstitutional.

“broken souls”⁴¹ Drawing attention to the poverty, mental illness, and dislocation that so many of those who come before him suffer, and voicing his dismay at the prospect of fining these people, Justice Westman explained his actions – both in the courtroom and in the media – as follows:

Those people in the soup kitchens I see in the courtroom, they don’t have a voice. I think I have an obligation to them. These are my brothers and sisters, from a theological perspective.⁴²

Quoting these words, Sean Fine, the justice reporter for the *Globe and Mail* notes: ‘Justice Westman wears a Christian cross under his judicial vestments.’⁴³

The theological language used by Justice Westman, and the cross sitting under his gowns, no doubt irritate some, or even appear unseemly. Justice Westman certainly received substantial criticism for his engagement with the media and for his judicial approach to the surcharge. Of Westman’s conduct, Professor Adam Dodek is quoted as commenting, ‘Judges cannot pick and choose which laws they like and which they do not. This undermines the rule of law and public confidence in the administration of justice’.⁴⁴ Yet without necessarily defending Justice Westman’s conduct, one can cull a more interesting and subtle lesson from this set of events, one that arguably shows a thinness in this sense of the rule of law and what might feed public confidence in the judiciary. In this case, Justice Westman’s religious convictions, hidden though they were to those appearing before him, served as a lever for wedging space between the technocratic execution of the will of the government and the act of just punishment.

In his lectures on ‘The Birth of Biopolitics’, Foucault noted that one feature of the rise of neoliberalism was the ‘anthropological erasure of the criminal’.⁴⁵ Over the course of the nineteenth century, there had

⁴¹ Fine, ‘Judges Defy Order to Impose Tories’ Victim-Services Surcharge’ (n 40).

⁴² Sean Fine, ‘The New Face of Judicial Defiance’ *The Globe and Mail* (Toronto, 13 December 2013) www.theglobeandmail.com/news/politics/the-new-face-of-judicial-defiance/article15971207/.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (New York, Palgrave Macmillan, 2008) 258.

been a tendency to understand crime in a way that involved the 'psychological, sociological, and anthropological problematization of the person on whom the law is applied'.⁴⁶ Foucault explains that with neoliberalism, this anthropological and individualised criminal—this *homo criminalis*—was replaced by *homo economicus*. As the market became the authoritative index of all legitimate government action, and human action was thus best interpreted through that grid of intelligibility, crime became just another form of economic action, with the criminal 'treated only as anyone whomsoever who invests in an action, expects a profit from it, and who accepts the risk of a loss'.⁴⁷

The victim surcharge was a pristine expression of a neoliberal frame for understanding crime and the criminal. Many Canadian judges have resisted this prevailing logic of criminal justice reform and have done so without manifest recourse to religious commitments; and whatever their posture, all judges have worked within and through the law. And yet for Justice Westman, theology was a means of reintroducing an anthropology of the criminal. For this judge, religion was a resource to draw on to recomplicate the picture of crime and criminals painted by the government. Judges, through judgments about punishment and sentencing, have always done that: they have met dominant narratives about justice, crime, and society, with inconvenient facts and complicating stories. In a society characterised by deep religious pluralism, might it be that we should welcome evidence of the religious particularity of judges as enrichments of that quintessential role of the judge? Perhaps we should re-read religious symbols as markers of the moral independence of the judiciary.

⁴⁶ *ibid* 250.

⁴⁷ *ibid* 253.