LAW AND RELIGIOUS PLURALISM IN CANADA, by Richard Moon (ed.). Vancouver: University of British Columbia Press, 2008. 309 pp. Cloth $78.32 ISBN 978-0-7748-1497-3 Paper Can$32.95. ISBN 978-0-7748-1498-0.

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The essays in this volume ponder the nature of religious freedom and pluralism in Canada. In addition to considering recent case law, the authors inevitably reflect upon the nature of religion, freedom (and the nature of the individual endowed with freedom), equality, autonomy, and the meaning of "secular" and "secularism." In terms of these deeper political questions, this collection of essays by mostly legal scholars is a mixed bag because they raise important questions without moving beyond the horizon of liberal (and, as I shall argue, religious) assumptions concerning the good society. Moreover, as most of them are legal scholars, they attempt to privilege legal decision making over that of legislative assemblies. But if, as several of them admit, judicial decisions share deeply in the common prejudices and opinions of the majority, then what is to be gained by looking to the judiciary to protect religious freedoms when the judiciary, and the legal experts who assist and appeal to them, simply replicate the mistakes made by so-called majoritarian institutions like legislatures?

Several interconnected examples of the limited horizon of the authors suggest themselves. If Canadian law is to be based upon secular principles, which are equated with reason, then one needs a way for reason to justify itself. What is the ground of reason? What is the horizon that "privileges" reason's capacity to know? No one says. Such is the enduring faith of the liberal order.

Why is the individual the ultimate source of meaning, whereby governmental coercion is an affront to its dignity, as most of the authors agree? How is it that no law, association, religious group identity, can fully "capture" the meaning of the individual? This is why, for instance, the Islamic sharia was rejected as the basis of arbitration in Ontario: Canadians come before the state as individuals, not as mediated members of a religious group. Why does the meaning of what it is to be an individual transcend not just the power of the state, but the power of language to determine what and who we are? What is it that makes us individuals? Or, if one objects to the incarnational metaphysics this statement suggests, then what is it about us individuals that enables us to make ourselves individuals, a circular reasoning suggested by the notion of autonomy? Must we be some sort of Baron Munchausen Ur-individual who, in lifting himself out of the primordial swamp by pulling up on his own hair, "posits" the individual (so asks Charles Taylor, pondering Hegel's speculation on this topic (Taylor, 1979, 39)? The "secular" explanation is probably even more absurd than the one that works within the revelatory horizon that constitutes the individual.

The absurdity of "secular" constructions of the "individual" has ethical and political implications. These can be seen in the focus on autonomy as constitutive of the individual, which tends to marginalize those, like the mentally and physically handicapped, the elderly, the dying, and, yes, the unborn, because their capacities

for "choice" tend to be viewed as inferior or deficient in comparison with the "able-bodied." Is it any wonder then, it takes someone from a revelatory tradition to articulate how working with the severely mentally and physically handicapped forces those who are "able bodied" to confront the violence within their own souls: "daily dealings with people who have handicaps makes those involved face their own violence. Confronted by the irreducibility of the other, the one whom they mean to serve but whose condition they cannot ameliorate, they discover with horror that they are capable of striking them, or even wanting to do away with them." (Young, 2007, 32)

Our legal categories that point to the irreducibility of the individual work within a horizon that should induce us to behold the weakness of the other, and ourselves (Walsh, 2008; 1997). Assertions of autonomy, in this light, are assertions of implied violence. Failure to recognize the irreducibility of the individual "that is higher than the universal" (to use Søren Kierkegaard's formulation) lead to other distortions like the "unencumbered" or "expressive" self, or, conversely and more dangerously, the "full human being" recognized by the state (239), as if the state (however defined) can possibly provide such complete recognition.

The contributors of this volume work within the horizon of these questions without actually bringing these questions into clarity. They assume the existence of the individual whose dignity must be religiously protected, from the coercion of both state and religious authorities. Many of them assume the existence of the "secular" without actually reflecting upon how "reason" can ground itself.

Is the same agent that makes us individuals the same that makes us equal? Many serious thinkers like Alexis de Tocqueville (not to mention Friedrich Nietzsche) regard equality not as reasonable, but as a sentiment. Canadian Supreme Court judges at times also appear to treat equality (as well as dignity) as a sentiment, a mere preference we "happen" to like in this day and age. We affirm equality because we arbitrarily feel like it. Or we are too risk-averse to assert our imagined superiority over others, and too envious to accept our inferiority. If equality is a sentiment, then a "public reason" whose first principle is equality is fallacious. And therefore treating the capacity of law to define and enforce provisions relating to religion and religious freedom as authoritative is equally arbitrary (Heyking, 2009a, 324-34).

I need not rehearse arguments demonstrating how religious equality precedes – historically as well as ontologically – political authority, except for one, the Hegelian one: in order for me, as a slave, to object to me being a slave, I first must have it in my mind that there are no intermediaries between God and me. This is the fruit of the Protestant Reformation. Arguments for a "rights based democracy" where the individual relates directly and without mediation with the state presuppose the Protestant Reformation, not only historically but ontologically. A "secularist" intellectual cannot get away with a wave of the hand, indicating that we progressive Canadians have moved beyond into a "secular" end of history when the moral universalism upon which the liberal order operates was established and continues to be sustained by a revelatory position, and that all those participating in it acknowledge it, if not by their words, then by their actions. Failure to recognize this ensures legal scholarship on religious freedoms consists in nothing more than

hieroglyphic genuflection by a priestly caste upon the altar of equality (Heyking, 2009b; 2009c). Failure to clarify the horizon means the worry is not so much the intrusion of religion into politics, but the intrusion of judicial politics into religion.

And so, we have a collection of essays by several leading legal scholars who, working within the horizon of meaning just outlined, are certain the promise of the freedom of religion under Canada's Charter of Rights and Freedoms is good, but unsure why it is good.

The first essay stands out from the rest of the essays in this volume. Shauna Van Praagh considers a case involving the rights of Chasidic Jews in Montreal to break his condominium bylaw by constructing a succah or shelter to celebrate the Jewish harvest festival. Her analysis stands out because she analyzes the case not through a constitutional prism, but through the tort of nuisance, or *troubles de voisinage* as it is known in Quebec where the claimant lives. According to the Civil Code of Quebec, "neighbors shall suffer the normal neighborhood annoyances that are not beyond the limit of tolerance they owe each other" (cited, 23). Her analysis invites not so much a top-down constitutional approach to managing multi-religious and multi-ethnic communities (which characterize Montréal), but as a way of seeing how neighbors themselves manage their relations. Van Praagh invites an approach that considers religion freedoms in light of concrete neighbors and their associational life, instead of through the abstract approach of conceiving rights utilized by constitutional analysis. As Alexis de Tocqueville notes of this approach, associational life becomes a school for democratic citizenship because citizens learn how their vague and abstract rights translate into, and become transformed in, their concrete lives with others.

Whatever the merits of Van Praagh's approach, the fact that the case came before the Supreme Court and was resolved there, in an overly abstract manner according to other contributors to the volume, undermines her case. In the case, the Supreme Court considered the testimony of a rabbi who informed them that it does not really matter whether the succah is constructed on someone's private balcony, which the condominium board prohibited, or in a common area, which the board permitted. The Supreme Court rightly avoided wading into doctrinal issues of Chasidism. However, in doing so, the Court adopted (or reasserted) an individualistic approach to its understanding of religion because it based its decision on the religious conscience of an individual believer without worrying whether his beliefs have standing within the tradition of his religion. While politically prudent, the Supreme Court's jurisprudence, as several other contributors to this volume observe, appealed to the individual's conscience, which means they read the Chasidic religion as a Protestant might read it. While the appellant in this case won his case, projecting one's own religious understandings to other religions can undermine their rights, as several other authors observe.

In Chapter Two, Jennifer Nedelsky and Roger Hutchinson consider the debate within the United Church of Canada as a model of accommodation in the wake of Parliament's decision to legalize same-sex marriage. While religious opponents received most of the media attention when this was being debated, the United Church supported same-sex marriage. However, according to the authors, it

accommodates opponents within the church by allowing individual congregations to decide whether or not to permit their pastors to perform same-sex marriages. The UCC has adopted an official policy endorsing same-sex marriage but permits considerable local control, to the point where congregations may even prohibit their pastors from celebrating same-sex marriages outside the congregation.

How the legalization of same-sex marriage affects the state of marriage, and the rights of its opponents, is still getting played out. Some provinces, despite the wording of the federal legislation, have infringed the rights of marriage commissioners who object to same-sex marriage, while others have recognized and affirmed their objections of conscience. Using the UCC model of accommodation, Nedelsky and Hutchinson suggest Canada can do better to accommodate opponents of same-sex marriage, including ceasing prosecutions by human rights tribunals against marriage commissioners and those who publish materials critical of it (and of homosexual behavior).

One wishes Nedelsky and Hutchinson would have been a little clearer on their efforts to accommodate. In the wake of the legalization of same-sex marriage, the political fights have now moved to education and public schooling. There have already been cases. In TRINITY WESTERN UNIVERSITY V. BRITISH COLUMBIA COLLEGE OF TEACHERS (ruled before Parliament legalized same-sex marriage), the B. C. agency that accredits university education faculties so their graduates may teach within the public schools refused to accredit TWU because its student behavior code prohibits students from engaging in homosexual behavior (and all forms of premarital sex), which it considers as sinful. The B.C.C.T. argued the university graduates homophobic teachers who would harm public school students. The Supreme Court ruled in favor of TWU, but as Benjamin Berger notes in his contribution to this volume, it did so only for evidentiary reasons, as the B.C.C.T. could provide no examples of TWU students discriminating.

But if Nedelsky and Hutchinson genuinely advocate a "thicker" version of accommodation, should they not advise the B.C. Ministry of Education to ensure graduates of T.W.U. (or any other university) are free to express their views? Failure to accommodate implies mere disagreement constitutes "discrimination" even when disagreement is conducted respectfully and sympathetically. This failure to distinguish disagreement from "discrimination" represents a truncation of rights because it redefines "acceptable" speech suitable for "public" debate where "public" has now been imperiously taken over by a particular faction defining terms of access. The problem of how "law" defines the "public" or "culture" gets thematic treatment in Benjamin Berger's contribution, discussed below.

For example, the B.C. Human Rights Tribunal and the British Columbia Supreme Court have ensured that teachers are prohibited from expressing their views even outside the classroom, as was the case for Chris Kempling, who lost his B.C.C.T. accreditation for writing letters to a local newspaper (KEMPLING V. THE BRITISH COLUMBIA COLLEGE OF TEACHERS, 2004). More recently, the B. C. Ministry of Education has introduced a "Social Justice" curriculum in response to a human rights tribunal decision that requires schools to promote not just tolerance but acceptance of homosexual behavior. While part of its intent is to prevent bullying, one wonders whether stifling ethical debate actually exacerbates bullying.

Moreover, it consists in what one critic of same-sex marriage calls "sexual dogma" (Benson, 2005). If proselytizing religious dogma is forbidden in public schools, then poetizing "sexual dogma" should be too, for both are forms of dogma. Better to use the approach suggested by Lois Sweet, who suggests pluralism means "teaching about religion" (conveying information) is acceptable while "teaching religion" (prosletyzing) is not; similarly, should not pluralism mean "teaching about sexual viewpoints" be acceptable while "teaching sexual dogma" is not? Those who support what the B.C. Ministry of Education's action might suggest such freedoms are a luxury when the danger of bulling to homosexual students is so great. This argument seeks to restrict freedoms in the name of a purported public good or public safety. One sees similar arguments made to curtail the rights of religious minorities in public health fields, including pharmacists who refuse to prescribe abortifacients and doctors who refuse to refer patients for abortions. But is this not the same "logic" – of restricting freedoms in the name of "safety" - that brought about infringements of freedom like the Patriot Act?

Nedelsky and Hutchinson, along with others in the volume, argue the legalization of same-sex marriage constitutes an "expansion"; it has become more inclusive. All accept that it is fully supported liberalism, though they seem not to be aware of some philosophical efforts arguing otherwise (Shell, 2004; Farrow, 2007; Farrow, 2004). They also seem unaware France rejected it because of fears it would lead to further state intrusions into family life.

Even so, none of the contributors explain what the new line of exclusion is. The function of a legal category (one might say the very essence of a category) is to include some attributes and exclude others. The authors celebrate the legalization of same-sex marriage without considering what it excludes. They assume but do not consider whether the new marriage category is a coherent category. David Schneiderman celebrates the new category because it explodes the supposed reduction of heterosexual marriage to procreation (74). One wonders whether same-sex marriage, in restricting marriage to people engaged in procreative and nonprocreative is any less arbitrary or reductionistic. In Canada marriage remains restricted to two unrelated individuals engaged in sexual relations. So Canada currently excludes polygamy (the Supreme Court may soon face a constitutional challenge, but I expect it will uphold the prohibition on equality grounds), polyandry, and polyamory. The advocates of polyamory, such as those who were involved in R. V. LABAYE, [2005] and in a case in Belgium where a man "married" two women and all were sexually involved with one another (Kay, 2006), celebrate sexual relations among all partners (as opposed to polygamy for example, where the multiple wives have sexual relations only with the husband). Polyamorists have strong a strong case of further "expanding" (or reducing or debasing, as the opponents of same-sex marriage would claim) marriage.

Perhaps polyamorists would have a better case than Platonic friends who seek the advantages of marriage. Indeed, the contributors of this volume are at pains to describe the social or cultural origins of legal categories. One can easily identify the traditionalist and biologically deterministic roots of the current definition of restricting marriage to two people (of different or of the same sex). But,

if we are to avoid the reductionism Schneiderman fears, then there is nothing about the current legal category of marriage to overturn that restriction.

An entrepreneurial legal activist, like those who first litigated cases involving pensions and other material benefits on behalf of same-sex couples, might devise a "small steps" strategy whose ultimate aim is to render marriage as so plastic that it can be defined any way its members define it. Except, of course, if those members do not engage in sexual relations with one another. That would upset the new "sexual dogma." A libertarian might celebrate this plasticity, but this move might conflict with the best interest of child. Children tend to love their mother and father more than numerous aunts and uncles, who lack that special and exclusive parental connection, and thereby have ample opportunity to "pass the buck" when baby is up all night with a fever.

David Schneiderman's contribution provides the beginnings of a theory of Canadian political pluralism. In promoting (and in some cases finding) a view of the Canadian public sphere as a having multiple, overlapping, and contesting authorities, he appeals to Alexis de Tocqueville and the British political pluralists including Harold Laski and John Figgis. He covers terrain nearly identical to that covered previously by neo-Calvinists including Jonathan Chaplin (Chaplin, 2000, 617-76), who have explored pluralistic models of law in Canada. He argues for the importance of associations in organizing political life. Associations enable individuals to organize themselves for collective action, one of those actions being protection against the state. Schneiderman's analysis of Canadian political life is relatively balanced, but, like many other contributors, he has a tendency to confuse "secular" with "sectarian" (79), which was a distinction the Supreme Court maintained in TRINITY WESTERN V. B. C. C. T. His pluralism strains at an undercurrent that treats the "secular" as monistic.

Bruce Ryder compares Canadian law with the United States, Turkey, and France, and finds Canadians have been more successful in accommodating religious practice than the others. Like Nedelsky and Hutchinson, he returns to the wake of same-sex marriage and the plight of marriage commissioners and their consciences, and finds requirements to accommodate them a good thing, and criticize human rights commissions for refusing several complaints made by marriage commissioners (102).

Alvin Esau's essay on the status of Anabaptist communities and other "illiberal" communities under Canadian liberal law provides an excellent test for the limits of Canadian pluralism. While most other contributors focus on the plight of individuals (which is where most of the case law is), Esau considers the capacity of religious communities to flourish under, and in some cases at arm's length, from Canadian law. His is a subtle analysis of the interface between the "inner law" of communities and the "outer law" of Canada. While religious communities have generally prospered in Canada, he sees a danger in applying administrative law to the church (which assumes the church is a statutory body exercising public powers) (122). This occurs when there are disputes among church members, which enables courts to intervene in internal church disciplinary procedures or hiring policies. As we saw the in the case of the Chasidic succah, the Supreme Court wants to avoid interfering with church matters when it views conflict in terms of rights and

constitutional law; however, "only rarely do courts even ask whether this judicial review is really appropriate" when they consider the conflict a matter of administrative law.

Esau further defends a form of pluralism that combats the kind of liberalism that would want "liberalism all the way down" into all parts of civil society, as this notion assumes liberal virtues can generate themselves and do not require alternate accounts of human flourishing to test, challenge, and develop liberalism (131). He also challenges "illiberal" religious groups to develop a better understanding of the liberal order. After all, "illiberal" groups survive if not flourish under conditions of the liberal order; the opposite would not be true. Indeed, "illiberal" groups may not even flourish in their own "illiberal" state!

Pascale Fournier provides the first of two analyses in the volume of the effort in Ontario to import sharia law into the Arbitration Act in order to enable Muslims to resolve divorces according to their own customs (Weinrib also analyzes it). After much public outcry, mostly by women, the Ontario government decided not to amend the Arbitration Act. The effort to amend it was spearheaded by former Ontario Attorney-General, Marion Boyd, who wrote a report detailing reasons for amending the Act. She argued that religious freedom, pluralism, multiculturalism, and even equality support inclusion of sharia. Fournier argues that the Boyd Report, titled DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION, treated the realities of Muslim women in overly abstract terms that missed the costs they would unfairly bear in such proceedings. She illustrates the concrete realities with a fictional account (reconstructed using details of real cases, though) of how the *mahr*, a bargaining endowment, gets negotiated before marriage and how it is handled when divorce becomes an option. Islamic customs simply provide too many obstacles for women in cases of divorce that Ontario could not justify amending the Arbitration Act without infringing on fundamental liberal principles of equality. Fournier concludes that calls for the state to maximize the cultures it "recognizes" has the danger of "misrecognizing" some minorities who would rather not receive the favor of such recognition (154). Fournier doubts all religious practices can "travel to Western liberal courts without carrying a very complex interaction among several parties whose interests are often opposed as to its recognition." In other words, not all religious beliefs and practices comport with the liberal order, which means cutting and pasting them into Canadian law can do more harm than good.

This brings us to John Borrows' discussion of the incapacity of Canadian courts to recognize aboriginal beliefs, most notably of the living earth, and so to extend protection under constitutional religious freedom provisions. As I write this review, the Canadian Political Science Association has a complaint before it against Frances Widdowson and Albert Howard, authors of *Disrobing the Aboriginal Industry* (2008). The complainants allege that criticisms made in the book of aboriginal beliefs, including earth worship, constitute hate speech. The authors argue that governmental solicitude toward such beliefs have hindered economic and social development (which, for many on-reserve aboriginals, compares with conditions in the developing world) and equality to resources (as resources are

distributed to chiefs, and the government relies on them to distribute them to members of the tribe without further ensuring they do so).

Borrows describes how, for many aboriginals, "the Earth is the individual," the ultimate source of meaning and deserving not only of protection, but as a living guide to political and social action (165-7). Admitting it can be difficult to determine what the earth intends (pipe ceremonies are largely for giving thanks; he does not explain how the earth's intentions enter into the deliberations of aboriginals), Borrows suggests it provides a community for the living, the unborn, and the dead. One wonders whether Edmund Burke, for whom community is also constituted by the living, dead, and unborn, might find agreement with aboriginals on this point. Borrows contrasts the aboriginal vision sometimes with the general Christian paradigm of religious freedom, and other times the post-Reformation understanding (168). The distinction is important. For example, the medieval prohibition of usury was based on the fact that usury, or interest, was not generative. The earth produced beings that grew (i.e., crops), but money was sterile. Dorothy Sayers cites the old commentator Gelli's observation that Dante in the *Inferno* places usurers near the sodomites because one makes fertile what is by nature sterile, and one makes sterile what is by nature sterile (Dante, 1949, 178). For Dante, both disrupt the community of being in analogous ways. What might aboriginal spirituality say of same-sex marriage? Would it resemble the "earthy" medieval view? Or does Alongquin spirituality, like other aboriginal spiritualities, have a category of *berdache* "man/woman" (or more accurately a woman's spirit in a man) that might be called upon to unsettle male/female categories? Still recalling Dante, what might aboriginal spirituality say about the worldwide financial collapse? Even so, Borrows' description of the earth has affinities with the pre-Christian Platonic and Stoic myth of the *anima mundi*, which, despite the Christian differentiation, finds its way into medieval Christian attitudes toward the earth.

Despite his advocacy of extending legal protection to the earth, Borrows focuses on the rights of two individual aboriginals that were infringed when the Court ruled against their religious freedom claim to shoot a deer and burn its flesh as a thanksgiving ritual to the earth. Borrows suggests a better understanding of earth would have assisted the Court to respect the two individuals' freedoms. That could be. However, it was the freedom of those two individuals that were at issue, and are at issue for Borrows, not the freedom of the earth. Just as Christians are not concerned whether the Court recognizes Christ as a legal person, nor Chasidic Jews concerned whether the Court understands the complexities of the succah, so too is Borrows ultimately unworried about what the earth thinks, but rather whether aboriginal individuals are inhibited from practicing their religious freedoms. I emphasize "individuals" because Borrows accepts them as the appropriate claimants upon the law. In this sense, he agrees with the workings of the "post-Reformation" Canadian legal understanding of religion. Yet, he is uncertain how to reconcile earth worship and the status of the individual. This uncertainty is reflected in aboriginal self-governance, where individuals cannot claim rights directly from the state, but through tribal governance structures, mostly chiefs. This "communal" form of self-governance has contributed to the restriction of rights for numerous subminorities, including women and off-reserve aboriginals in Canada.

In her analysis of the problem of defining religion in Canadian law, Lori Beaman provides perhaps the most illuminating discussion of the complexities of law and religion. While she also criticizes the courts for perpetuating "Christian hegemony," she also reveals how much her own analysis work within the horizon established by Christianity. Beaman demonstrates how difficult (impossible?) it has been for the courts, as well as sociologists, to define religion. There is something comic in their attempts, as there always is when one uses the methods of reflection to describe an existential condition. It is as if the sociologist or jurist tries to identify the essence of a thing by counting up its external qualities, which is like trying to define a human being by counting up its limbs, organs, cells, etc. Religion poses a quandary because human beings try to relate themselves to what is infinite, eternal, or absolute. They try to define their experience and their existence by what is beyond themselves. However, we cannot detach ourselves from our existence; we can only look at ourselves from the corner of our eye, as it were. Our language, which we use to define things, derives from the objects of the world. But we cannot define that which is not an object of the world. This is as true for religion as it is true for love or friendship (which is why the best treatments of religion, love, and friendship have been in the form of dialogue, not sociological treatise, not to mention jurisprudence!).

Beaman's sociological analysis shares in some of this constrictive language in her analysis, though her analysis pushes beyond this constriction. Her example of the "Church of the Holy Shoelace" as a way of getting students to see the difficulties in defining religion and religious freedom is helpful to students as well as to scholars because it actually invites them into a sympathetic dialogue with its imaginary adherents. Beaman's discussion is organized according to what one might regard as the great polarity of concepts that the courts have ended up having to consider in defining religion: the content of a religion v. the sincerity of its believer(s). The Supreme Court has found itself skirting both these issues but never taking any of them up directly because of the illiberal implications of trying to determine 1) whether a religion is "true" and 2) whether the believer is genuine or a fraud. In trying to avoid (1), the Court ends up closer to (2), but without ever fully embracing it. Yet, the nature of the Supreme Court's role seems always to require it to confront these two related problems.

Beaman, like many other contributors, criticizes the Court for perpetuating "hegemonic Christianity" with its categories of "orthodoxy" or the dichotomy of belief and practice. She focuses on a case where the Court had difficulty understanding the ritual importance of a kirpan carried by a Sikh. Such practice is said to confound the categories of sacred and profane latent in Christianity because Christians or "post-Christians" regard it simply as a weapon (210). I am unsure a Christian could not recognize a kirpan as a sacred artifact, though she would need to be told why the kirpan in particular is sacred.

Beaman appeals to philosopher James Tully's notion of recognizing the other, of recognizing their "lived religion," as a way of transcending this imperialistic way of imposing "our" categories onto "them." I am unsure what to make of her claim. On the one hand, she explains it as a way of, with patience, tolerance, and sympathy, understanding another religion as its adherents understand it themselves. This

might be called the first principle of interpretation. It might also be what Christians call loving one's neighbor, which, as the example of the physically and mentally disabled shows, is extremely difficult.

On the other hand, Tully, in his *Strange Multiplicity: Constitutionalism in an Age of Diversity*, goes further than what Beaman describes (Tully, 1995, 22; see Ray and Heyking, n.d). There, Tully uses the image of Haida sculptor Bill Reid's "The Spirit of Haida Gwaii" to give his rendition of pluralism. The sculpture is a boat containing a motley crew of mythical figures representing a lively "conversation." So diverse are these voices that they cannot even understand each other. Tully observes that that is how we experience other cultures: their unfamiliarity forces us out of our comfort zones, and understanding them recedes. In the center of the boat stands Kilstlaai, whom Tully compares with the mythical Greek soothsayer Tieresias. As chief, he has authority to care for the common good. His is a universal perspective that transcends the diversity of voices in the canoe. Tully wants his reader to consider "The Spirit of Haida Gwaii" as emblematic of multiculturalism, but it is unclear what Kitlstlaai represents. A perspective that stands over pluralism seems at worst to be dictatorial, and at best managerial, neither of which are institutions political pluralists support.

Since Beaman does not consider this ambiguous embrace of benevolent tyranny that Tully's pluralism appears to endorse, it is safe to conclude she embraces the aspect whereby we offer sympathetic understanding of "lived religion," which, as I indicated, sits comfortably within the Christian horizon. Despite her criticisms of the Court's perpetuation of "Christian hegemony," her own analysis sits comfortably within it. This shared horizon is also true of one of her theoretical guides, Michel Foucault, whose analysis of "power relations and their sedimentations" presupposes a view of power that 1) singles it out as a topic of study and 2) requires power to justify itself (not simply qua particular form of power, but qua power). Only the paradoxical position of being powerless, like the example of the physically and mentally handicapped, can presuppose this. This is why, perhaps, commentators have so fruitfully compared Foucault with the first theorist of power (in these terms), Augustine of Hippo, whose own perspective is based on the person who is powerless (Dodaro, 1994; Schuld, 2004; Gregory, 2008).

Richard Moon similarly asks why Christianity retains its influence when he ponders why the Court insists on treating religion as distinct from conscience: "if autonomy is the value that underlies our commitment to freedom of religion or conscience, then the freedom's protection should extend equally to religious and non-religious beliefs and practices. Yet… *religious* beliefs and practices continue to be at the centre of the Canadian freedom-of-religion or conscience cases" (219). What accounts for the persistence of protecting a category of belief that, at least from the perspective of the state, does not differ from other categories (like the beliefs of agnostics, for instance)? Why single out religion for what seems like special protection?

Part of the reason is because of the existential question religion poses, as I indicated above in my discussion of Beaman's contribution. In a related manner, Moon argues that instead of focusing on autonomy as the main category of freedom of religion (as Benjamin Berger does in his contribution), it is more satisfactory to

point to "the idea that religion is a matter of identity" (217). Religion is more than a simple choice one makes: "It is a deeply rooted part of her identity or character that should be treated with equal respect. It represents a significant connection with others – with a community of believers – and structures the individuals view of herself and the world." Appealing to "identity" helps to explain why the Court considers it an infringement on a minority's religious freedom when the state materially supports another religion. Up to a point, it does not materially affect one religion if another one is materially supported. However, the minority religion takes it as an infringement when one considers politics as the realm of "recognition," meaning that choosing one over another, even when it makes little material difference for the one not chosen or supported, means the minority religion has a lesser status. Lack of recognition affects one's dignity. Appealing to identity is helpful up to a point. But just as autonomy might belittle religion by reducing it to a choice, identity seems to conflate religion with one's sense of honor. Of course, liberals since John Locke have tended to identify religious worship with one's sense of honor, as Locke uses the example of a Chinese city that tolerated a tyrant for a long time but finally rebelled when he forced them to cut a strand of hair from their heads, which was a sign of their religion and honor (at least in Locke's rendering).

Yet, despite his own constricted (and undefended) account of secularism, Moon's own analysis still moves within the Christian horizon I outlined above. Identity, it turns out, seems to be a placeholder category to explain how it is (less why it is) people assign an unchosen and absolute worth to what they believe defines them. They cannot, and Moon indicates should not, be forced to change that. Moreover, what identifies them lies beyond the grasp of regular secular categories like culture, ethnicity, class, or biology. In its own inarticulate way, this is the Court's way of expressing human freedom that, as Moon demonstrates, cannot be reduced simply to autonomy, where limitless choice entails meaningless choice. By seeing a limit on our choices and autonomy (imposed by something more divine than the state) and calling it "identity," the Court recognizes what another contributor calls the "secular humility" of the Court. Even so, one wishes Moon would have joined forces with Schneiderman and Esau in elaborating the degree to which *belonging* to a religious group is a good worthy of protection because it constitutes the vehicle for joint action that produces social goods. When it comes to charitable giving, volunteering, and other forms of "civic embededness," being religious, as opposed to having a conscience or being "spiritual," makes a difference that has been demonstrated empirically. Religion does matter for reasons more than identity.

Lorraine Weinrib's contribution attempts to show how the 1982 Charter of Rights and Freedoms revolutionized the Canadian political landscape and how it shaped the contours of the sharia law debate in Ontario. Weinrib argues the Charter rearranged political relations in Canada by establishing the relationship between state and individual "as primary and direct. To characterize this relationship as primary is to say that the state must consider each person as a full human being, abstracted from personal characteristics that historically justified both advantageous and disadvantageous treatment" (237). Weinrib describes not so much aristocratic privilege, or how minorities got the franchise, which occurred

long before 1982. Instead, she describes how the Charter "enfranchises" minorities to draw upon governmental resources to equalize their economic condition and social status. Having already attained equality of opportunity, they use the Charter to obtain equality of result through various governmental sponsored programs of redistribution. While citizens of liberal democracy can reasonably differ over what forms and how much redistribution is just, it is a mistake to describe programs that seek to establish equality of result as true democracy or even "rights-based democracy."

Moreover, she falsifies the liberal order by declaring the relationship between individual and state as primary. For instance, no social contract thinker would agree because the social contract is established among prospective (and current) citizens. Moreover, they claim their rights not on the basis of their relationship with the state, but on the basis of natural right, which constitutes the standard by which to judge and restrain state action. Utilitarians would also disagree. Citizens recognize each other as free and equal before the state – treated romantically in this chapter as an abstraction – does. Moreover, the "state" is not a monolith; the term abstracts from the concrete reality that consists of a series of competing and overlapping jurisdictions, agendas, and political players. In all the examples Weinrib cites of citizens claiming their rights from the state, one can dig deeper to identify coalitions and alliances between interest groups (which she refers to as "public interest groups" (243)) and policy entrepeneurs in the judiciary, Department of Justice, and academia.

David Schneiderman's contribution to this volume, where he defends associational life, is closer to the liberal view than is Weinrib. Her view is forecast by Alexis de Tocqueville who describes such a view as encroaching paternalism to which democratic societies are prone, especially when she treats the individual as an ahistorical monad shorn of characteristics. The individual has escaped class, gender, and other markers to become an empty vessel for state bureaucracies to pour their own meaning into. This is the chilling side of Weinrib's insistence that the state "consider each person as a full human being," which assumes that state bureaucracies, never mind friends, lovers, and spouses who have as much as a lifetime to get to know someone, have the capacity to consider one as such. Instead, the "state" defines the human being as it sees fit, pace the protestations of Esau, Borrows, Beaman, and other contributors to this volume.

Despite my reservations of Weinrib's account of "rights-based" democracy, her analysis of the political history of the sharia debate shows how, as the debate unfolded, the dignity of individuals came to be the center of attention. Participants in the debate increasingly focused on that instead of culture or religious accommodation. Weinrib credits the Charter and the state with this, though she would be on stronger terms if she recalled Chief Justice Beverley McLachlin's argument that the Charter provides the governing language or "hypergoods" to which all political debates appeal (McLachlin, 31). The Charter may well be the product of the post-World War Two rights revolution Weinrib describes, but this revolution works within the spiritual horizon I outlined at the beginning of this essay.

By the time we reach the final essay of the volume, Benjamin Berger's argument that religious rights in Canada get defined individualistically and on the basis of autonomy, the reader feels he or she has already trod upon a well-worn path. The other contributors, as well as numerous other commentators, have already pointed this out. The advantage of Berger's argument is that he brings together these thoughts in a more systematic form. He also crystallizes the claims made by others that legal scholars and jurists need to recall that law has its own specific view of religion, which shapes the ways it understands religion and religious freedoms.

One wishes Berger would have taken up Chief Justice McLachlin's claim (articulated about the time that he was her clerk at the Supreme Court of Canada) that it is the role of the Supreme Court to adjudicate the two "total claims" that both law and religion places upon citizen-believers (McLachlin, 14). In her response to the Chief Justice's speech, Jean Bethke Elshtain disputes her characterization of the claim that both make as "total." Religion does not make a total claim: "Render unto Caesar what is Caesar's, unto God what is God's"; politics, especially the Lockean liberalism that grounds both Canada and the United States, also makes only a partial claim (Bethke Elshtain, 36-37). In Berger's reading that law reads religion as a liberal would read religion – emphasizing autonomy, individualism, and choice, it seems there is only one side whose "total" claim counts, that of the law. Or is this so? Perhaps those liberal abbreviations are in keeping with the limited claims the liberal order makes upon us.

In addition, Berger's claim that law is a "culture," like McLachlin's statement that law is a system of "comprehensive meaning," overstates the case. Iain Benson has recently pointed out that the laws, as the property of all, ought not to be characterized as forming a distinct "community" or "culture" because that undermines the capacity of law to adjudicate between different subcultures, communities, and belief systems. "Law" becomes one competitor among many, or rather it becomes *primus inter pares* because "law" ominously has a monopoly on the means of state coercion (Benson, 2009, 309n.30). If law is a "culture," then law also becomes the prize of those who seek to define and control it. Shorn of a notion of natural rights, law simply becomes the tool of the strongest, and legal scholarship a game played by libidinous sophists.

Ironically, or not so ironically, liberalism in this reduction returns to its roots, in the tradition stemming from Hobbes to Rawls, by viewing the legal order as an essentially coercive, that is, violent order (Goerner and Thompson, 1996, 649n2). The distance between this kind of liberalism, and one more conscious of its revelatory horizon that should induce us to acknowledge the powerless, cannot be overstated.

LAW AND RELIGIOUS PLURALISM IN CANADA is a lively volume that raises a host of thorny dilemmas in thinking about the place of religious freedom in Canada. Readers can have a lot of fun reading the contributors' criticisms of the cultural assumptions of religious freedom, and then read their own contributions as perpetuating those assumptions. But that is not such a bad thing, as long as one is

clear about what those assumptions are. Unfortunately, the authors do not clarify the nature of those assumptions. This long review is an attempt to spell them out.

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