

THE LIMITS OF PHENOMENOLOGICAL AND EXPERIENTIAL ECUMENISM

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Kathleen Brady argues that in order to continue protecting religious freedom in American law, it is necessary to understand what “religion is all about” (101) or what is distinctive or unique about religion in the American political and legal experience. While she does not aim to offer a “definition” of religion, she is interested in describing a “phenomenon” that is common to most religions (92). She draws on the understandings of some of the founders, particularly those of James Madison, about the nature of religion to conceptualize it as relating to the “divine-human encounter.” Religion is “fundamentally a relationship to the ultimate Reality or Power that grounds all that is” (82). And this Reality shapes the way that religious people act and live life—appears to them as something “good and trustworthy.” Religious people desire communion with this ultimate Reality or Power. Finally, this type of relationship to the divine is something that everybody can appreciate and agree to protect at law, even if not everybody will accept it, and some may even flatly reject it.

Brady is extremely concerned to answer the charge of sectarianism as to her conception of religion. She very much wants to persuade those whom she believes will be most skeptical about her proposals—those who champion the equality paradigm that she discusses at length, for example. She answers the criticism of sectarianism by making several claims about common human experience that are interesting, though I wonder if they are true. She argues, for example, that the “phenomenon that is at the heart of the First Amendment is related to experiences that we all share” such as “finitude” and “creatureliness” (93). These experiences are said to be “rooted in our nature as human beings” (93). Everybody, she writes, “can care” about religion so conceptualized because everybody has some connection to or awareness of these experiences—particularly at a few unique moments in life like the birth of a child or a funeral. Brady relies several times on Paul Tillich’s view that religion is about the “power of being” or the “ultimate concern” in any person’s life.

One preliminary question concerns Brady’s method. She relies extensively on American history to justify her conception of religion. But if what she says about human nature is true, then what difference does it make what Madison or any other early American may have believed? It may be interesting that they shared the view of religion espoused by Brady, but that historical fact does not seem to have any normative force in her account. That is, her account seems to be primarily philosophical or psychological, not historical. And yet she relies on history, and American history in particular, to justify it. Whether it is true that these phenomenological or experiential features of religion truly are commonly shared as a part of human nature is an empirical matter about which the evidence is probably mixed.

A second issue concerns administrability. Brady’s definition of religion will be extremely difficult to administer as a legal standard—constitutional or otherwise. She addresses some of these concerns in the book’s last chapter, where she discusses the issue of religion’s legal definition. Here I am not certain whether she takes the legal definition of religion to be different than the phenomenological conception that she offers earlier in the book. Brady seems to say that these understandings might be different, but I am not sure why they should be. If the reason is the danger of excessive entanglement by courts, then there may be a parallel danger of legal incoherence if courts are not

given an intelligible, let alone a stable, conception of what it is that they are supposed to be protecting.

A third issue is conceptual. Excessive ecumenism, not sectarianism, is the primary problem with Brady's phenomenological, experiential approach. Indeed, her definitional arguments in the book's final chapter—particularly those that limit religion's legal definition—are extremely important in rendering Brady's extraordinarily capacious conception of religion feasible as a legal matter. Indeed, it is a pity that these limitations are not foregrounded and highlighted. True, they would probably be even more unsatisfying to those who already find her view excessively sectarian. But such critics are not really persuadable anyway. You can't please everyone, and in striving to bring along those who will be most skeptical about her proposals, Brady may stretch her conception of religion so thin as to be unappealing to those who might otherwise have been sympathetic to it.

The limitations that she discusses, therefore, seem to me critical in rendering her broad understanding of religion administrable as a legal standard (see, for example, 292). She says first that a "serious and sustained" religious commitment will result in a set of "practices," so that the beliefs will be "lived in some way" (292). Second, and this is an absolutely crucial limitation in my own estimation, Brady argues that a "serious, sustained, and developed religious belief will express itself in a comprehensive system of beliefs that touches on many facets of human life and conduct (292). Indeed, she argues further: "A religious belief system need not be internally consistent or make sense to outsiders. It need not seem reasonable. It need not be complete or address all aspects of human existence. It can be rudimentary. However, it should involve a comprehensive theory and developed framework for understanding human identity and purpose and the relationship between these and the divine" (292).

This sort of limitation is eminently sensible inasmuch as the prevailing accommodation inquiry requires an evaluation of whether the religious claimant has been burdened by a law, or burdened substantially. To render that inquiry intelligible will require the claimant to adhere to a religious system of some kind. Finally, Brady plausibly raises the "communal dimension" of religious practice: "[u]sually, religious faith will be lived out within a religious community with a particular organization and structure and shared beliefs" (292). This limitation fits rather nicely together with the requirement of system. It is possible for an individual disconnected from a community of believers to believe and practice according to a religious system. But it is much more likely that communities will support systems of belief over time. Time, then, is another dimension of religious belief that might help to limit the capaciousness of Brady's experiential view of religion.

Unfortunately, though Brady raises these limitations, it is not clear how committed to them she is. She is, as many scholars are, rightly concerned about excessive entanglement by courts in religious affairs. Too prying an inquiry risks these types of establishmentarian dangers. Yet are not courts already entangled? Does not the state systematically promote a particular, non-neutral conception of religion when it holds that religion means whatever an individual claimant says it means? If courts make no effort to distinguish religion from other phenomena, like ordinary moral commitment? If courts say that anyone who believes in the power of crystals today, the power of the stars tomorrow, and the power of yoga and yogurt the next day constitutes his own religion? There are, at the very least, some unresolved tensions in Brady's instincts toward super-inclusivity of every last person's spiritual experiences and the reasonable limitations she describes.