

BOOK REVIEW

Free to Believe: Rethinking Freedom of Conscience and Religion in Canada by Mary Ann Waldron

M I R A N D A G R A Y S O N *

We are confronted with difference, not as a remote and interesting phenomenon, but as a part of our daily lives. The differences in our beliefs lead to different preferences about the way our lives are lived and governed. They are often irreconcilable. This is the reality Canadian society must acknowledge and with which it must cope.¹

Free to Believe: Rethinking Freedom of Conscience and Religion in Canada² begins with the proposition that all human action is directed by belief. Religious opinion and conscience determine every individual's morality, political preference and social policy stance. In turn, these fundamental attitudes guide expression and action in the public realm. Canada's multiculturalism has fostered a wide variety of beliefs and expressions, which quite often conflict with one another. While there are some who may wish to quell the dissonance, preferring that Canadian society included only those whose morality matched their own, Mary Anne Waldron argues that true democracy demands divergence. Only by upholding the right to free belief

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¹ Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada*. (Toronto: University of Toronto Press, 2013) at 229 [Waldron, *Free to Believe*].

² *Ibid.*

can Canada discover these conflicts and democratically decide which side should advance.

Free to Believe is an evaluation of the past with a view towards the future. It exposes potential flaws within religious freedom jurisprudence by drawing similarities between cases. In essence, the book is about the need for free belief within a democratic society and the Canadian judiciary's supposed impairment of religious freedom. Waldron has three main criticisms of the courts: (1) the prohibition of religion to stop offence or coercion; (2) the equation of religious freedom with equality rights; and (3) the protection afforded to other human rights when they conflict with free belief. While Waldron presents valid concerns about the need to protect free belief and the occasional failure of the courts to do so, the book failed to convince this reader that the judiciary has been wrong to uphold human rights that conflict with religious freedom.

Waldron begins her discussion of free belief by analyzing the historic case of *R v Big M Drug Mart*,³ along with three of its successors,⁴ to explain the early treatment of freedom of religion. In three of these cases, the courts stifled religious majority expression, so as not to offend the minority. She raises the interesting point that freedom of religion and free expression of belief as guaranteed by the *Charter* were quickly interpreted as freedoms to not be offended or coerced by the religious practices of others. Throughout the book, Waldron argues that belief and expression are fundamental to democracy as they encourage debate and allow change. Thus, she takes great concern with the original freedom of religion jurisprudence and provides a justified criticism of the courts' exclusion of religion from the public domain.

In the third chapter, *Culture Wars: Majority versus Minority Values*, Waldron uses *Syndicat Northwest v Amselem*,⁵ *Multani v Commission scolaire Marguerite-Bourgeois*⁶ and *Grant v Canada (Attorney General)*⁷ to argue that judges wrongfully equate freedom of religion with equality rights. Minority

³ *R v Big M Drug Mart*, [1985] 1 SCR 295, 60 AR 161.

⁴ See *Zylberberg v The Sudbury Board of Education*, (1988), 65 OR (2d) 641, 52 DLR (4th) 577 (CA); *Freitag v Penetanguishene*, (1999), 47 OR (3d) 301, 179 DLR (4th) 150 (CA); *Allen v The Corporation of the County of Renfrew* (2004), 69 OR (3d) 742, 117 CRR (2d) 280 (Ont Sup Ct J).

⁵ 2004 SCC 47, [2004] 2 SCR 551.

⁶ 2006 SCC 6, [2006] 1 SCR 256.

⁷ [1995] 1 FC 158, 81 FTR 195.

religious rights often succeed in court because of judicial ameliorative biases, while majority religious rights are ignored. On this point, Waldron makes a convincing argument. While religion is a prohibited ground of discrimination, it also has its own protection as a fundamental freedom. Parliament has not provided any additional protection to minority groups under religious freedom legislation; therefore, courts should not base their decisions on the prevalence of the claimants' religion. Nonetheless, Waldron's observation is not universal. I only had to search as far as chapter four to discover the case of *Alberta v Hutterian Brethren of Wilson Colony*,⁸ in which a minority group was denied religious freedom by the Supreme Court of Canada. Such contradiction occurs quite frequently throughout the book. While inconsistent at times, it appears less that Waldron's arguments are flawed and more that the jurisprudence is convoluted and varied, providing legitimacy to the author's efforts.

Waldron's final criticism of the courts arises out of cases in which freedom of religion is in direct conflict with human rights code provisions. She begins by rejecting the long-standing principle that the freedom to hold a belief is wider than the freedom to act on it.⁹ Were it up to Waldron, courts would not engage in the "balancing" process in which one right often makes way for another. Instead, courts would consider the full scope of both rights and locate a common space within which each right can be exercised without significantly interfering with the other. In support of this analysis, Waldron presents a number of cases in which religiously motivated parties discriminated against homosexual individuals and discusses how courts may allow the rights of both parties to co-exist in future litigation. I agree with Waldron that there may be cases in which courts can accommodate both rights so as to not fully extinguish freedom of religion or freedom from discrimination. However, Waldron's approach to discriminatory speech does not follow this same formula. She advocates for absolute protection of speech while denying defence to individuals that hate speech provisions were enacted to protect. This approach does not seek to uphold the rights of both parties and has failed to convince this reader that Canada should eliminate provisions against discriminatory speech.

While Waldron places great importance on the ability of all parties to express themselves and take part in the democratic arena, she fails to

⁸ 2009 SCC 37, [2009] 2 SCR 567.

⁹ Waldon, *Free to Believe*, *supra* note 1 at 167-171.

recognize that hate speech quite often aims to exclude those targeted from the debate. She believes hate speech provisions to be too broad and too often upheld to the detriment of free belief and human rights.¹⁰ Instead, she supports the analysis taken in *Lund v Boissoin*¹¹ at the tribunal level that required discriminatory speech to cause discriminatory action rather than mere hatred or vilification. This analysis was rejected at the Alberta Court of Appeal and while it may or may not resurface in the future, my refusal to accept this approach in the context of *Free to Believe* stems from, in my opinion, an inherent contradiction within Waldron's argument. The proposition that hate speech silences the voices of its victims was recently acknowledged by the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v Whatcott*,¹² and was a significant factor in the Court finding discriminatory speech less worthy of *Charter* protection than other forms of expression. If the true aim of the book is to promote a democratic arena within which every voice and opinion can be heard, Waldron's failure to recognize that hate speech may prohibit such discussion is devastating to her argument. By silencing the victims of discriminatory speech, absolute expression of belief is not promoting the democracy that Waldron advocates, and so, I am left with the question of how to reconcile its promotion in *Free to Believe*.

Mary Anne Waldron challenges her readers to consider the full significance of free belief in Canada. She teases complex issues out of case law and relates them to her audience in a way that can be comprehended and applied to current legal problems. In her fight for a free and expressive democracy, she raises valid criticism about the ways in which courts have dealt with the religious freedoms of both majority and minority religious groups. After reading *Free to Believe*, I am left with a greater understanding of the shortcomings of religious freedom jurisprudence and agree that human rights legislation necessitates a wider protection of free belief than has been granted thus far. However, I remain unconvinced that in the drive for true democracy, expressive protection must be absolute; where the beliefs of one have silenced the beliefs of others, true democracy is no nearer and human rights have not been bettered.

¹⁰ *Ibid* at 191-194 and 234.

¹¹ *Lund v Boissoin*, 2007 AHRC 11, rev'd 2012 ABCA 300.

¹² *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at 114-117, 355 DLR (4th) 383.