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HOWARD KISLOWICZ*

MARY ANNE WALDRON'S *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* is an important and welcome contribution to the discussion of religious and conscientious freedom in Canadian law. In addition to being the first Canadian book to examine conscientious freedom specifically, it provides a thorough and incisive examination of the case law. Further, Waldron develops an alternative approach to addressing some apparently intractable conflicts.

Waldron argues that the Supreme Court of Canada (SCC) has made a number of missteps in its jurisprudence of conscientious and religious freedom dating back to the earliest decisions in the *Charter* era. She offers three main lines of criticism. First, Waldron claims that judicial accounts of freedom of conscience and religion do not sufficiently explain the conscientious aspect of that freedom and its connection to a free, democratic society. Second, Waldron argues that when Canadian judges state that they are deciding cases on principles of religious freedom, their reasons often show them to be motivated by concerns related to equality rights. This, Waldron argues, leads them to make incoherent decisions that often arrive at the wrong result. Third, Waldron takes issue with courts and tribunals that engage in the balancing of rights. Rather than seeking balance, where one right is gained at the expense of another, courts should understand rights as relational, each defining the other's limits. I will discuss each of these arguments in turn.

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1. (Toronto: University of Toronto Press, 2013) 312 pages.

Waldron's most pervasive criticism of Canada's religious and conscientious freedom jurisprudence is the absence of conscience from the discussion. This stems in part from the fact that litigation has centred principally on religious practices rather than on non-religious claims of conscience. Waldron writes that the Court's definition of religion requires faith in a divine being[2] and that the "emphasis on connection with the divine" highlights the "private aspect of religious belief."[3] Though Waldron believes that "[c]onscience is integral to the human personality,"[4] the prominence of private aspects of religious practice[5] obscures the public dimension of religious freedom and, concomitantly, the similarities between religions and other "organizing belief system[s]."[6] For Waldron, freedom of conscience is a fundamental freedom primarily because it is part of the necessary foundation of a democratic state.[7] The constitutional protection of divergent belief systems is a part of a democratic state's commitment to free thought and a bulwark against totalitarianism. In her view,

> [a] mature democratic state [copes with disagreements of belief] … not by requiring its citizens to pretend that "better," "true," and "preferable" do not exist, but by requiring its citizens to commit to the proposition that the only legitimate way to achieve victory for our vision of "better," "true," and "preferable" is by persuasion.[8]

Waldron argues in her second major line of critique that instead of drawing the link between conscientious freedom and democracy, courts have often been motivated by concerns related to equality.[9] But the purpose of equality rights "is to protect particular claimed rights for individuals, not to open the understanding of the society to the possibilities of difference within the state."[10] This confusion

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2. *Supra* note 1 at 11. I do not think that this is a completely faithful representation of the Court's definition of religion; I address this point more fully below.
3. *Ibid*.
4. *Ibid* at 197.
5. Benjamin Berger argues that the treatment of religion as a private matter reflects Canadian constitutional law's liberal culture. See Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall LJ 277.
6. *Supra* note 1 at 11.
7. *Ibid* at 9.
8. *Ibid* at 239.
9. Winnifred Fallers Sullivan's study of religious freedom in the United States leads her to an opposite conclusion. For Fallers Sullivan, it is impossible for the law to legitimately define religion. In her view, disputes over religious practices are better resolved through the lens of equality. See Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) at 149-59.\\i The Impossibility of Religious Freedom\\i0{} (Princeton: Princeton University Press, 2005
10. *Supra* note 1 at 82.

of purpose leads courts into error, allowing those claiming to be protected by freedom of religion to restrict the religious freedoms of others.

Waldron draws on a number of examples to illustrate this point. Her first example is the SCC's first decision on the protection of freedom of religion under the *Charter, R v Big M Drug Mart Ltd.*[11] There, a retailer had been charged under the federal *Lord's Day Act* for selling goods on a Sunday. The SCC held that the Act had a religious purpose, i.e., compelling the observance of the Christian Sabbath, rendering the legislation unconstitutional. In rendering its decision, the Court was so concerned, in Waldron's view, with an apparent inequality that it failed to satisfactorily connect the right of religious freedom with the democratic interests it is designed to protect. In her view, the SCC

> relied primarily upon a misstatement of the purpose of the statute (the "compulsion" of Sabbath observance) and, when it more accurately stated the purpose (prohibiting otherwise harmless acts because of their religious significance to others), completely failed to elucidate how that purpose limited or abrogated the freedom of religion of non-Sunday observers… .[12]

This failure of reasoning "encouraged the idea that citizens' rights to regulate their own religious practices included the right to resent the performance of neutral acts that may have benefited the practice of another's religion."[13] Waldron opposes the notion that the right to religious freedom includes the right to be free from offence. In Waldron's view, Court decisions that imply this message sully the principle of freedom of religion, as members of a majority come to fear that their own rights will be narrowed in the name of minority concerns.[14]

Waldron's third main criticism of the jurisprudence is that, when courts are faced with an apparent conflict of rights, they err when they conceive of

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11. [1985] 1 SCR 295, 18 DLR (4th) 321.
12. *Supra* note 1 at 35. In *Rosenberg v Outremont (City)*, Hilton J offered a similar observation about the effects of a Jewish *eruv* on non-Jews: "an eruv is only a religious zone for those who believe it to be one." See [2001] RJQ 1556, 84 CRR (2d) 331 at para 44 (Que Sup Ct) [cited to RJQ].
13. *Supra* note 1 at 42.
14. *Ibid* at 76.

their judgments as balancing those rights.[15] Rather, courts should understand the rights at issue as having an inherent relationship to one another wherein each defines the other's limits. For Waldron, the key notion in this analysis is human dignity, the only concept "that can provide a relational aspect to human rights."[16] It is the reciprocal recognition of human dignity between persons that provides the foundation for human rights.[17] Waldron recognizes that the SCC all but did away with human dignity as an independent analytic concept in its equality rights jurisprudence in *R v Kapp*.[18] Her contention is that the pre-*Kapp* cases had taken too subjective an approach to human dignity, converting it into a "right to feel some particular emotion."[19] Waldron claims that human dignity can be better understood in an objective sense as "the real recognition of worth that comes from full participation in our society, in its goods, its services, its democratic processes, and its debates."[20]

Waldron demonstrates how this analysis differs from the SCC's in *Trinity Western University v British Columbia College of Teachers*.[21] There, the Court was concerned with whether the College of Teachers had validly decided not to accredit a teacher-training program at Trinity Western University (TWU). Based on its understanding of Christianity, TWU required students to sign a document committing, among other things, to refrain from practices that are biblically

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15. The notion of balance, represented in iconic representations of justice, is difficult to escape even for Waldron: "we may be able to realize that protection of human dignity requires both freedom and equality – held perhaps in a difficult and creative *balance*, but of necessity operating together." *Ibid* at 114 [emphasis added]."event-place":"Toronto","author":[{"family":"Waldron","given":"Mary Anne"}],"issued":{"date-parts":[["2013"]]}},"locator":"114", "prefix":"The notion of balance, represented in iconic representations of justice, is difficult to escape even for Waldron: \"Yet if we focus on the concept of human dignity, which is the foundation of all human rights, we may be able to realize that protection of human dignity requires both freedom and equality – held perhaps in a difficult and creative balance, but of necessity operating together\": "}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}
16. *Ibid* at 139.
17. *Ibid* at 154.
18. *Ibid at 134, 143-44. See also R v Kapp, 2008 SCC 41 at paras 19-25, [2008] 2 SCR 483.*
19. Waldron, *supra* note 1 at 154.
20. *Ibid* at 155.
21. *Ibid at 167-71. See also Trinity Western University v British Columbia College of Teachers, 2001 SCC 31, [2001] 1 SCR 772 [Trinity Western].*

condemned, including "homosexual behaviour."[22] The SCC determined that the College of Teachers had acted inappropriately by failing to give proper weight to the religious freedom rights of TWU members. Of central significance to the Court was the absence of evidence that a graduate of TWU's teacher education program had acted in a discriminatory manner in the classroom.[23] Based on a distinction between holding beliefs and acting on them, the SCC tipped the scales in favour of TWU, whose members had not acted in an objectionable way on the basis of their beliefs.

Waldron agrees with the result in the case. However, she takes issue with the Court's analysis. For her, the distinction between the right to hold beliefs and the right to act on them, though frequently cited in later cases, is not of much help. The state cannot actually police what is in people's heads; conflicts only arise when people act on their beliefs.[24] Further, instead of focusing on whether there was evidence to support the assertion that TWU graduates would discriminate against their students,

> the court could have focused on the rights of students in B.C. schools and the rights of students at Trinity Western University and considered them together as mutually dependent. Students in the public school system certainly have the right to receive from their teachers an education that treats them with dignity and respect and that does not differentiate between them on any prohibited ground. That does not mean that they have the right to be taught only by those who accept their belief systems and moral codes. The consequences of concluding otherwise would be to require schools to become impossibly ghettoized… .[25]

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22. *Ibid* at para 4. A similar debate has surfaced recently as TWU has sought accreditation of a new law school. See Elaine Craig, "Law societies must show more courage on Trinity Western application" *The Globe and Mail* (18 December 2013), online: <http://www.theglobeandmail.com/globe-debate/law-societies-must-show-more-courage-on-trinity-western-application/article16023053/>; Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 CJWL 148; Dwight G Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Constitutional Forum 1; Elaine Craig, "TWU Law: A Reply to Proponents of Approval" Dal LJ [forthcoming], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446470>.
23. TWU had previously run a joint teacher-training program with another, non-Christian university where students would complete their last year of training. There was, therefore, a pool of graduates who had completed the majority of their training at TWU, none of whom had been shown to have acted discriminatorily in the classroom. See *Trinity Western, supra note 20 at paras 32, 35.*
24. *Supra* note 1 at 168.
25. *Ibid* at 169.

In sum, Waldron advocates an understanding of conscience that focuses on its links to freedom and democracy, coupled with an approach that defines the relationship between rights through an objective concept of human dignity. In difficult cases where the relationship between rights does not admit of reconciliation, Waldron says that legislatures are better suited to choose which right should prevail. Courts should aim their analyses at preserving the opportunities for democratic debate or, where a legislature has not yet spoken on which right should prevail, "strive to create neutral spaces where all views can be heard."[26]

There is much to commend in Waldron's approach to the right of conscientious freedom. Canadian courts have given little guidance with respect to "conscience" in freedom of conscience and religion. However, it is somewhat puzzling that Waldron does not spend much time engaging with the rare occasions on which conscientious freedom has been addressed by Canadian judges. Waldron rightly notes that in *R v Morgentaler*[27] the majority of the Court failed to consider a conscience-based argument. However, she does not mention that Justice Wilson's concurring opinion grounded a woman's right to choose whether to have an abortion in the right of conscientious freedom, and that Justice Wilson specifically linked that right to the maintenance of a free and democratic society.[28] Similarly, though Waldron discusses an impressive array of tribunal and court decisions, she does not discuss some of the only cases in which the right to conscientious freedom has been specifically raised and addressed by Canadian adjudicators. These include an unsuccessful claim for an exemption from taking an oath of loyalty to the Queen in a citizenship ceremony[29] and a prisoner's successful claim, on non-religious grounds, for a vegetarian diet.[30] It is not clear from the book what Waldron makes of these decisions.

A more difficult question is whether Waldron's characterization of conscientious freedom makes it indistinguishable from the SCC's current approach to expressive freedom. As noted above, Waldron argues that the real

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26. *Ibid* at 233, 224.
27. *Ibid at 201-202. See also R v Morgentaler*, [1988] 1 SCR 30, 63 OR (2d) 281 (SCC).
28. *Supra* note 1 at 176–80. See also Richard A Haigh, *A Burl on the Living Tree: Freedom of Conscience in Section 2(a) of the Canadian Charter of Rights and Freedoms* (SJD Thesis, University of Toronto Faculty of Law, 2012) [unpublished].
29. *Roach v Canada (Minister of State for Multiculturalism and Citizenship) (CA), [1994] 2 FC 406, 113 DLR (4th) 67. See also Roach v Ontario (Attorney General), 2012 ONSC 3521, [2012]* OJ No 2842 (QL); *McAteer et al v Attorney General of Canada*, 2013 ONSC 5895, 117 OR (3d) 353.
30. *Maurice v Canada (Attorney General), 2002 FCT 69, 210 DLR (4th) 186.*

import of religious and conscientious freedom is the degree to which it protects individuals' and communities' rights to *act* on their beliefs. She further argues that the purpose of conscientious freedom is related to the maintenance of a free and democratic society where ideas are continually debated and revisited. These two aspects of Waldron's argument parallel the SCC's approach to freedom of expression. Freedom of expression protects expressive activities that attempt "to convey meaning"[31] for the purposes of "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy."[32] If Waldron believes that the SCC's jurisprudence on conscientious freedom lacks a connection to conscience's public dimension, should not freedom of expression, as the SCC currently understands it, provide sufficient protection for such activities? Justice LeBel may have had similar questions in mind when, in a dissenting opinion, he wrote:

> One might have thought that the guarantee of freedom of opinion, freedom of conscience, freedom of expression and freedom of association could very well have been sufficient to protect freedom of religion. But the framers of the *Charter* thought fit to incorporate into the *Charter* an express guarantee of freedom of religion, which must be given meaning and effect.[33]

Indeed, for some of the problems that Waldron addresses, freedom of expression would appear to provide a good solution. For instance, Waldron argues that "ignoring the conscience aspects of [a proposed ban on burkas] enables the supporters of the ban to ignore the negative and anti-democratic effects of the action."[34] It is not clear, however, why freedom of expression would not be equally suited here, at least in connection with the maintenance of a public forum open to debate and discussion. Accordingly, it is not clear that the absence of a strong jurisprudence of conscientious freedom is to blame for calls to ban the burka.

Other examples that Waldron uses might more helpfully clarify where conscientious freedom might fill a gap in the discussion. One issue that is mentioned repeatedly in her book is the constitutional validity of the criminalization of assisted suicide, upheld by the SCC[35] and again, more recently, by the British

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31. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968, 58 DLR (4th) 577.
32. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 65, [2013] 1 SCR 467.
33. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 180, [2009] 2 SCR 567.
34. *Supra* note 1 at 204.
35. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 85 CCC (3d) 15.

Columbia Court of Appeal.[36] The procedures carried out by a physician who assists in suicide may not be seen, in themselves, as having expressive content if they are not carried out as part of a protest against the criminal provisions. Participation in the procedure, however, may nevertheless be regarded as an act of conscience even if the physician is not religiously motivated. In this sense, conscientious freedom covers ground that expressive and religious freedoms do not.

But does this ground relate to conscience's public dimension, which Waldron argues is the primary reason for the constitutional protection of conscientious freedom? Not in terms of the physician's right to publicly engage in protest or declare an opinion, which would be protected by freedom of expression (though perhaps legitimately limited if the protest involved the death of a patient). From the patient's perspective, the right does not truly seem to be about access to a public good, but about the right to have autonomy over one's fate, which might also be properly considered a private dimension of conscience. It might be that what distinguishes freedom of conscience from freedom of expression are exactly those private acts not intended to convey a meaning to anyone.

In sum, Waldron's book provides valuable reading for those interested in puzzling through the relationships between equality, religious freedom, conscientious freedom, and democracy. Waldron has offered a potent description of why constitutions protect conscientious freedom and has contrasted this compellingly with the purposes of equality rights. Perhaps Waldron's most far-reaching contribution is her relational analysis of human rights, in which each right depends upon and must be interpreted in light of the others. Future scholarship might further develop what distinguishes freedom of conscience from other fundamental freedoms like freedom of expression.

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36. *Carter v Canada (Attorney General)*, 2013 BCCA 435, 293 CRR (2d) 109 [*Carter], rev'ing 2012 BCSC 886*, 261 CRR (2d) 1. Leave to appeal *Carter* to the SCC was granted. See 35591 (16 January 2014). The appeal to the SCC was argued 15 October 2014.