Immunizing Canada from Pandemic Populism:
How to Uphold Equality, The Rule of Law, Trustworthy Institutions, and Civil Order
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In Canada, are individual citizens ends in themselves, or are they "simply tools of collective national policy" as in China? This philosophical question is brought into sharp focus when we analyze the rights and freedoms that unvaccinated Canadians are denied. Contrary to popular belief, vaccine passports do not clearly violate a citizen's rights because the government does not mandate him to do or not do anything.¹ Instead, the government mandates that *businesses* ensure that their guests be vaccinated. The *Canadian Charter of Rights and Freedoms* protects individual rights more than business rights, so this essay will focus on vaccine mandates where a governmental body imposes an obligation to be vaccinated on an individual, in violation of a right. I will argue that the law should not give the vaccinated more rights than the unvaccinated. We otherwise become a segregated and unethical nation with partial and illiberal institutions. This invites the background intolerance, violence, and distrust that is the default state of mankind to re-emerge.²

The first reason to not deny unvaccinated Canadians some rights and freedoms is because it delegitimizes our constitution and judiciary. Vaccine mandates are unjustified because their objective is unjustified. They are not there to prevent the spread of COVID-19, because doubly vaccinated people can spread it too.³ Nor are mandates there to prevent hospitalizations and deaths, because vaccinated people get hospitalized too - in Alberta, 24% of Alberta's hospital COVID cases are fully vaccinated.⁴ Vaccine mandates are there to incentivize, pressure, and blackmail people into getting vaccinated. That is their purpose.

¹ Letters from a Contrarian, "Bruce Pardy - Vaccine Passports," podcast audio, March 30, 2021, https://anchor.fm/dashboard/episode/e16o31l.

² Thomas Hobbes, Leviathan (Project Gutenberg, 2002), xx, https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2HCH0013.

³ Michelle Roberts, "Covid: Double Vaccinated Can Still Spread Virus at Home," BBC News, last modified October 28, 2021, https://www.bbc.com/news/health-59077036.

⁴ "COVID-19 Alberta Statistics," Government of Alberta | Alberta.ca, accessed October 31, 2021, https://www.alberta.ca/stats/covid-19-alberta-statistics.htm#vaccine-outcomes.

If the judiciary prioritizes the objective of a policy like vaccine mandates over the right or freedom it violates, then it delegitimizes itself and the constitution. ⁵ This would turn rights and freedoms into political tools, and the judiciary into a political body, lowering the status, authority, and utility of both. But rights and freedoms are not carrots on sticks to goad citizens to get vaccinated. They are instead the birth rights of Canadian citizens and are protected as such by our constitution. They are supreme, above any policy objectives, and thus must be limited very carefully. ⁶ Canada's constitution is more than mere paper and protects the rights of Canadians because we have a separation of powers. ⁷ The judicial, legislative, and executive branches of government check and balance each other in our legal system to prevent the politicization of rights and to ensure the Rule of Law. ⁸

The judiciary likely will not protect the rights of unvaccinated people by striking down vaccine mandates because it tends to give great deference to governments during emergencies.⁹ Even after states of emergencies end, judges may prefer to "balance" rights and freedoms with policy objectives, rather than safeguard rights and freedoms from policy objectives. If the rights of unvaccinated people are not protected by the judiciary, then 10-15% of our population (the unvaccinated) will see the constitution as mere paper and the judiciary to be a political body.

The next reason that vaccinated citizens should not have more rights than unvaccinated citizens is because it leads to systemic inequality. Unvaccinated people now have less access to

⁵ TWU v. LSBC (2018), at paragraph 305.

⁶ See section 1 of the Charter of Rights and Freedoms and R. v. Oakes for a reasonable way to limit Charter rights in a free and democratic society. R, The Constitution Acts 1867 to 1982, (Minister of Justice, 2021), https://laws-lois.justice.gc.ca/PDF/CONST TRD.pdf.

⁷ Antonin Scalia said this about the US, but it applies to Canada too.

⁸ David F. Hardwick and Leslie Marsh, "Origins of the Rule of Law," in *Reclaiming Liberalism* (Basingstoke: Springer Nature, 2020), 198.

⁹ Colleen M. Flood et al., Vulnerable: The Law, Policy and Ethics of COVID-19 (Ottawa: University of Ottawa Press, 2020), 22, 211. the judiciary is not equipped to review complex administrative decisions.

jobs, education, recreation facilities, and other basics of civil society which make human flourishing possible. For example, after Dr. Julie Ponesse refused to be vaccinated, her employer Huron College prevented her from teaching philosophy classes. Huron College is one of many publicly funded higher education institutions in Canada that mandate vaccinations for all university members. Those who cannot or will not be vaccinated are excluded from institutions, opportunities, and civil society. It is legalized segregation.

Equality is a core value of Canadian society. It is protected by the Canadian Charter of Rights and Freedoms in both Section 7 and in the values that underlie the Charter. Government attempts to pressure citizens to get vaccinated goes against substantive equality. If a law burdens a marginalized group whose identity is protected by the Charter, then it is substantively unequal. For example, both black and Metis people have been oppressed by Canadian governments, making them marginalized racialized groups. The Charter would then protect them from discrimination because race is a protected class. As it turns out, only 56.4% of black people and 67.8% of Metis people are willing to get vaccinated, compared to the national average of 76.9%. This means that a vaccine mandate burdens black and Metis people more than others,

¹⁰ "Ont. Professor on Paid Leave After Refusing to Get Vaccine or Wear a Mask," Leaderpost, last modified September 9, 2021, https://leaderpost.com/diseases-and-conditions/coronavirus/masks/julie-ponesse-huron-paid-leave/wcm/caa5e586-c1e0-40c7-9500-327b4383b345.

¹¹ Brian Bird, "The Charter of Rights and Freedoms — and Values?," Policy Options, last modified November 22, 2018, https://policyoptions.irpp.org/magazines/november-2018/the-charter-of-rights-and-freedoms-and-values/.

¹² Jesse Hartery, "In Defence of Substantive Equality," Advocates for the Rule of Law, last modified February 8, 2018, https://www.ruleoflaw.ca/in-defence-of-substantive-equality/. It looks like the Supreme Court finds arguments based on substantive equality to be more persuasive, so I will critique vaccine passports based on substantive rather than formal equality in this essay. To see an excellent defence of formal equality and a deconstruction of the idea of substantive equality as being truly "equal", see Bruce Pardy, "Substantive Equality: Some People Are More Equal Than Others," Advocates for the Rule of Law, last modified February 8, 2018, https://www.ruleoflaw.ca/substantive-equality-some-people-are-more-equal-than-others/.

¹³ I couldn't find demographic data based on race or sex for vaccination rates, so here I use a willingness to get the vaccine as a substitute for vaccination rates. "COVID-19 Vaccine Willingness Among Canadian Population Groups," last modified March 26, 2021, https://www150.statcan.gc.ca/n1/pub/45-28-0001/2021001/article/00011-eng.htm.

making it substantively unequal. To deny rights to the unvaccinated is to segregate society into two tiers, further exclude the marginalized, and make us more unequal.

The third reason to give unvaccinated Canadians the same rights as vaccinated Canadians - specifically the S.6 mobility right to leave Canada – is because it is otherwise deeply illiberal. You can vote with your ballot, your money, or your feet.¹⁴ John Locke, father of liberalism, argued that political power was legitimate only if it had the consent of the governed, which made a "social contract." ¹⁵ The clearest way to revoke your consent to the social contract is to leave the country that binds you to it. This idea is now codified as Article 14 of the Declaration of Human Rights. ¹⁶ To stop someone from leaving the country is illiberal because it prevents him from revoking consent for the social contract. It is ironic that "vaccine refusenik" now refers to a vaccine refuser.¹⁷ Refuseniks were Soviet Jews who applied to leave the USSR to flee antisemitism and persecution by moving to Israel. The USSR refused, subjugating them to ... anti-Semitism. Vaccine refuseniks are a good way to describe the unvaccinated who cannot leave Canada. People should always be free to leave their country (or province) to revoke consent for the social contract when they think it is illegitimate *before* they become refugees. Every immigrant knows this, every graduate who leaves Alberta because it is too conservative knows this, and every company who moved from Montreal to Toronto in the 1970s to respond to

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¹⁴ Tim Ferriss, "Balaji Srinivasan on The Future of Bitcoin and Ethereum, How to Become Noncancelable, the Path to Personal Freedom and Wealth in a New World, the Changing Landscape of Warfare, and More (#506)," The Blog of Author Tim Ferriss, last modified April 10, 2021, https://tim.blog/2021/03/24/balaji-srinivasan/. You vote with your money by hiring lobbyists and marketers, in the case where you can't just pay off a politician.

¹⁵ Alan Tuckness, "Locke's Political Philosophy (Stanford Encyclopedia of Philosophy)," Stanford Encyclopedia of Philosophy, last modified 2020, https://plato.stanford.edu/entries/locke-political/.

¹⁶ The writers of the UDHR regretfully realized that their countries had rejected Jews fleeing from Nazi Germany. "OHCHR | Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 14," accessed October 30, 2021, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23923&LangID=E.

¹⁷ Jonathan Waterlow, "The Grim Roots of 'refusenik'," The Spectator, last modified May 22, 2021, https://www.spectator.co.uk/article/the-grim-roots-of-refusenik.

Quebec's language laws knows this. As of October 30, 2021, you must show proof of vaccination to get on a plane, train, or ship leaving Canada. Those who do not only have the US to flee to on foot or boat, and the US may close their borders again at any time. To vote with your feet against pandemic laws is a costly form of voting, but is the most fundamental. Even the ancient and democratic city state of Athens gave it to her citizens. The federal government must give it to unvaccinated travellers too for it to call itself liberal.

The fourth and final reason to give unvaccinated Canadians the same rights as vaccinated Canadians – specifically S.7 security of the person rights of health care workers – is because it facilitates trust in the health care system and minimizes unethical coercion. The mandates mean that patients will only be served by vaccinated doctors and nurses. People are now avoiding vaccines because of a distrust of government or health professionals, instead of looking dispassionately at the vaccine's safety, efficacy, and risk. They have become politicized. One unintended consequence of this will be that patients may perceive their vaccinated doctors and nurses to hold stigma. Most unvaccinated people know well the looks of derision and disgust from vaccinated people for not getting the jab. Those who are unvaccinated already do not trust medical authority, and for good reason. Stigma and condescension, whether real or perceived, leads patients to distrust doctors. Studies from the HIV epidemic show that someone is less likely to seek testing and treatment when they perceived health care providers as judgemental of their

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¹⁸ Health Canada, "COVID-19: Proof of Vaccination in Canada and for International Travel," Canada.ca, last modified September 24, 2021, https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/vaccines/life-after-vaccination/vaccine-proof.html.

¹⁹ Andrew D. Irvine and Steve Wexler, "The Other Trial of Socrates," Quadrant, April 2018, 52.

behaviour.²⁰ The same applies to COVID-19. Removing all unvaccinated health care providers reduces representation and viewpoint diversity, thus reducing trust in the system.

Knowing your doctor or nurse got vaccinated because they thought it was safe, rather than because they wanted to keep their career, is much more likely to convince you of the vaccine's safety when individuals want to get advice from their doctor instead of their government. At the beginning of the vaccine rollout, the government promoted the vaccine as safe during ad campaigns that started in May.²¹ Those who raised questions or objections to its safety were harassed and/or muzzled by other professionals and the public. For example, Dr. Byram Bridle shared concerns that the vaccines may lead to heart inflammation in young men early on, in June.²² In response, many of his colleagues at the University of Guelph harassed him.²³ The worst was perhaps "A Concerned Scientist" who bought the domain byrambridle.com and published on it critiques of him, his works, and his opinions. But it was only four months later, in October, that governments publicly addressed the growing number of patients with myocarditis and pericarditis.²⁴ Lying about vaccine safety reduces trust in the health care system, and mandating vaccines for health care workers does too.

²⁰ Ronald O. Valdiserri, "HIV/AIDS Stigma: An Impediment to Public Health," *American Journal of Public Health* 92, no. 3 (2002): xx, doi:10.2105/ajph.92.3.341.

²¹ Public Health Agency of Canada, "Government of Canada Launches New "Ripple Effect" Advertising Campaign to Encourage COVID-19 Vaccination," Canada.ca, last modified May 17, 2021, https://www.canada.ca/en/public-health/news/2021/05/government-of-canada-launches-new-ripple-effect-advertising-campaign-to-encourage-covid-19-vaccination.html.

²² Kenneth Armstrong, *U of G Prof Says He is Receiving Workplace Harassment After Sharing Vaccine Concerns*, (2021), https://www.guelphtoday.com/local-news/u-of-g-prof-says-he-is-receiving-workplace-harassment-after-sharing-vaccine-concerns-3888634.

²³ Ibid.

²⁴ Health Canada published their statement on Oct. 1, Alberta published theirs on Oct. 8. https://www.alberta.ca/assets/documents/health-myocarditis-and-pericarditis-following-covid.pdf.

Alberta²⁵ and Quebec²⁶ are two provinces with vaccine mandates for health care workers. If workers refuse, then they suffer steep and serious penalties – they lose their job, pay, professional reputation, career, and time in practice. The only consequence for not getting the vaccine should be a greater risk of dying from COVID-19, not other "consequences" enforced by other people. So not only do vaccine mandates reduce trust in the health care system, but it is also deeply unethical for exposing those health care workers to risks they might not wish to take on (*primum non nocere*).²⁷ We do not need to wait for long term consequences to pop up to know that governments, organizations, and individuals who pressure others to get vaccinated expose them to unexpected risk, as Bridle's suggestion demonstrates above.

To conclude, unvaccinated Canadians should not be denied rights that the vaccinated have for four reasons: it delegitimizes our courts and constitution, creates systemic inequality, makes us an illiberal nation, and weakens trust in our health care system. It is important we avoid this because it leads to civil disobedience, unrest, and violence. Many restaurants do not host guests indoors anymore because disgruntled and disenfranchised citizens harass and threaten their employees.^{28,29} And after the Quebec Government pushed back the curfew start time from 9:30 pm to 8 pm, a riot in Old Montreal followed, causing thousands of dollars in property

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²⁵ Alberta Health Services, "Alberta Health Services Implementing Immunization Policy for Physicians, Staff and Contracted Providers," Alberta Health Services, accessed October 31, 2021, https://www.albertahealthservices.ca/news/Page16165.aspx.

²⁶ Pierre Saint-Arnaud, "Quebec Judge Hears Challenge to Vaccine Mandate for Health-care Workers As Province Mulls Second Delay," Montreal, last modified October 27, 2021, https://montreal.ctvnews.ca/quebec-judge-hears-challenge-to-vaccine-mandate-for-health-care-workers-as-province-mulls-second-delay-1.5640606.

²⁷ Nassim N. Taleb, Skin in the Game: Hidden Asymmetries in Daily Life (London: Penguin UK, 2018), 23.

²⁸ Carolyn Kury de Castillo, "Harassment over COVID-19 Restrictions Prompts Alberta Restaurant to Pause Indoor Dining," Global News, last modified September 21, 2021, https://globalnews.ca/news/8207553/alberta-restaurant-indoor-dining-closed-covid-19-vaccine-passport/.

²⁹ Salmaan Farooqui, "Businesses Face Threats, Backlash As Vaccine Passports Take Effect - BNN Bloomberg," BNN, last modified September 24, 2021, https://www.bnnbloomberg.ca/small-businesses-face-threats-backlash-as-vaccine-passports-take-effect-1.1657118.

damage.³⁰ Canadian citizens, technocrats, business owners, and government actors should support laws and institutions that do not mandate vaccines if they care about keeping Canada strong and free.³¹

³⁰ "'Absolutely Unacceptable': Rioters Set Fires, Smash Windows in Montreal Curfew Protest," Montreal, last modified April 13, 2021, https://montreal.ctvnews.ca/absolutely-unacceptable-rioters-set-fires-smash-windows-in-montreal-curfew-protest-1.5383436.

³¹ The most effective way to protest vaccine passports, mandates, and expectations, regardless of your vaccination status, is to never share your vaccination status. Eugene Fernandes, "Don't Share Your Vaccination Status," Eugene Fernandes, last modified August 8, 2021, https://eugenefernandes.com/2021/08/08/dont-share-your-vaccination-status/.

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