THE IMPERATIVE OF CONSCIENCE RIGHTS

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Introduction

This paper tackles critical but neglected questions affecting diverse societies today. What activity does freedom of conscience protect? Why protect this activity in a bill of rights? When can governments limit this freedom? Can governments pressure citizens to adopt beliefs against their conscience? How does freedom of conscience differ from religious freedom? What is the relationship between human dignity and freedom of conscience?

Freedom of conscience appears in all major bills of human rights. Besides conscientious refusals to fight in wars, this human right has historically received little attention—but recent actions by governments in Canada and abroad have increased its visibility. Conscientious objection in health care, for example, has become a hot spot of controversy for this human right. Debates on freedom of conscience raise many pressing issues, including whether state power should be used to compel belief. This use of state power may stem from the view that moral convictions which clash with what the state has legalized should not be accommodated in the public square. A related basis for excluding moral convictions that diverge from what is legal may be the idea that what is legal is moral—that the law is our collective conscience. Use of state power to compel belief is especially troubling when it forces citizens to choose between violating their moral commitments or enduring adverse consequences or penalties, such as the loss of a job. This paper grapples with the current relevance of freedom of conscience and makes the case for robust protection of this fundamental human right.

This paper is divided into five parts. Part 1 briefly considers the nature of conscience. Part 2 proposes that freedom of conscience protects the freedom to live in alignment with our moral commitments, while religious freedom deals with faith-based beliefs and practices. Part 3 identifies the reasons for including freedom of conscience in a bill of rights: integrity, identity, and human dignity. Part 4 explores when freedom of conscience can be limited by governments. Finally, Part 5 examines current issues in Canada that engage freedom of conscience.

What Is Conscience?

Over the centuries, conscience has been the subject of much scholarship and debate. "Conscience" traces to the Latin *conscientia*, and is related to the Greek *synderesis*. While *conscientia* refers to the application of our moral knowledge to particular situations, *synderesis* refers to the moral awareness built into each person and that urges us to do good and avoid evil.[1] It is, as St. Jerome wrote, the "spark of conscience." As early as the fifth century before Christ, conscience—understood broadly as moral or ethical self-awareness—appeared in the works of Roman and Greek playwrights.[2] In the third and second centuries before Christ, the Roman comic playwrights Plautus and Terence refer to conscience in the sense of sharing knowledge with oneself.[3] This understanding of conscience maps onto the Latin *con* (with) + *scientia* (knowledge). In the first century before Christ, Cicero also described conscience in this way, drawing a connection between conscience and good works.[4]

> *Most scholars subscribe to the idea that matters of conscience relate to a person's "core moral beliefs."*

Of the major religious traditions, Christianity has deeply studied conscience. In his Epistle to the Romans, Saint Paul notes that when Gentiles (non-Jews) follow God's law, they "show that what the law requires is written on their hearts, while their conscience also bears witness" (Romans 2:15 RSV Catholic Edition). This statement seems to suggest that moral knowledge is not acquired from an external source (such as God), but rather that it is built into each person.[5] Many centuries later, in his *Summa theologiae*, Saint Thomas Aquinas defined conscience as the application of knowledge to activity.[6] The knowledge Aquinas speaks of is moral knowledge that flows naturally from our built-in moral awareness (*synderesis*). Aquinas situates conscience (*conscientia*) and *synderesis* in our rational dimension.[7] Once individuals grasp the basic principles of moral behaviour from *synderesis*, the exercise of conscience applies these principles to particular situations and is thereby formed over time.[8]

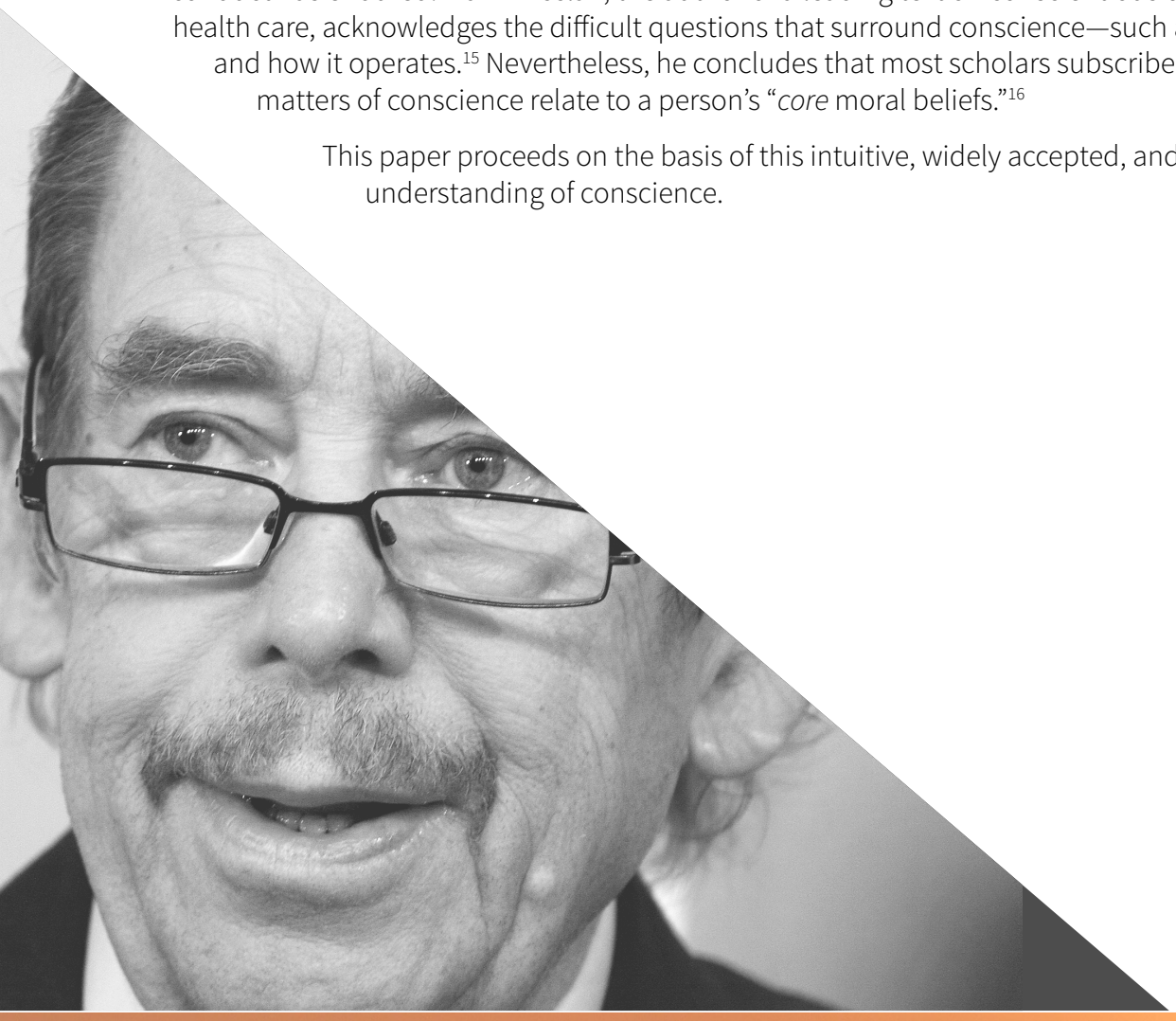
As for modern thinkers, John Locke saw freedom of conscience as a natural right. In his *Letter Concerning Toleration* (1689), he argued that religious tensions in England at the time would only

disappear if "churches were obliged to lay down toleration as the foundation of their own liberty, and teach that liberty of conscience is every man's natural right, equally belonging to dissenters as to themselves."[9] In his *Essay Concerning Human Understanding* (1690), echoing Aquinas, Locke argued that conscience is governed by reason.[10]

In the twentieth and twenty-first centuries, conscience has remained of interest to academics, politicians, and philosophers, both religious and secular. American legal scholar Robert Vischer, in his book on conscience and the common good, describes a life lived according to conscience as a life lived according to a coherent narrative.[11] Fellow legal scholar Nathan Chapman, in his writing on the relationship between religious freedom and freedom of conscience, views conscience as the "moral judge" of each person. The idea of conscience as an inner judge or court of morality reflects how philosopher Immanuel Kant understood conscience.[12] Legal philosopher Kimberley Brownlee, in her text on conscience and civil disobedience, writes that living conscientiously offers us a greater capacity to "live much of our life in a range of wholesome states including kindness, compassion, generosity, forgiveness, and love."[13] Vaclav Havel, the first president of the Czech Republic after the fall of the Iron Curtain, said that to resist totalitarianism, we must "trust the voice of our conscience," be guided by reason, and serve the truth.[14]

Over the centuries, the idea of a closeness between conscience and assessing the morality of our conduct has endured. Mark Wicclair, the author of a leading text on conscientious objection in health care, acknowledges the difficult questions that surround conscience—such as its nature and how it operates.[15] Nevertheless, he concludes that most scholars subscribe to the idea that matters of conscience relate to a person's "*core* moral beliefs."[16]

This paper proceeds on the basis of this intuitive, widely accepted, and accessible understanding of conscience.



Defining Freedom of Conscience

If conscience refers to our capacity to discern moral right from wrong, what does the human right of freedom of conscience protect? Section 2(a) of the Canadian Charter of Rights and Freedoms guarantees "freedom of conscience and religion." Freedom of conscience also appears next to freedom of religion in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. There are three major competing interpretations of freedom of conscience: (1) freedom of religious conscience, (2) freedom of secular conscience, and (3) freedom of any conscience.

Interpreting freedom of conscience as protecting only *religious* conscience (moral judgments stemming from religious formation) enjoys little support in Canadian case law. This interpretation is understandable, however, in light of Canada's history of providing conscience rights to specific Christian churches: for example, the statutory right of conscientious objection to military service during the two world wars.[17] This interpretation, however, ignores the fact that section 2(a) protects two interests: conscience *and* religion. It does not give conscience and religion independent meaning.[18]

> *Understanding freedom of conscience as moral freedom for all individuals respects principles of statutory interpretation and the common understanding of conscience.*

The placement of "religion" and "conscience" together in the Charter and most major bills of rights suggests that mundane matters are not the concern of this human right. The Supreme Court of Canada said as much when it noted that the purpose of section 2(a) of the Charter is to "ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."[19] These beliefs, the court noted, heavily influence a person's way of life. Martha Nussbaum proposes that liberty of conscience relates to the search for the "ultimate meaning of life."[20] Charles Taylor and Jocelyn Maclure distinguish between core and less than core commitments: the former play a role in a person's moral identity and integrity, while the latter do not.[21] This idea does not mean that

cases of religious freedom are unrelated to conscience. The case of St. More is, on the surface, a case of religious freedom. More refused to support a schism from the Catholic Church, yet he is one of the most celebrated examples of following conscience. In large part, More's case is one of forced religious conversion. Today, forced conversions occur in India and some Muslim-majority countries. These cases, like that of More, also implicate conscience.

The idea that freedom of conscience only protects non-religious persons would restrict this freedom to moral commitments inspired by worldviews such as humanism, atheism, and agnosticism. Moral convictions inspired by religion, meanwhile, would be protected by freedom of religion.[22] While this interpretation gives independent meaning to "conscience" and "religion," it betrays the common understanding of conscience. The idea that conscience only relates to non-religious persons ignores the ordinary sense of this word. While philosophers have debated conscience for centuries, no credible school of thought views conscience as exclusively the domain of non-religious persons.[23]

Canadian judges have endorsed the view that freedom of conscience benefits both religious and non-religious persons. In one Supreme Court ruling, Justice Bertha Wilson stated that "conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience."[24] The implication is that freedom of conscience protects convictions of conscience that are inspired by either religious or non-religious sources. While conscience is often interwoven with religion, the view of Justice Wilson reflects the common understanding that *everyone* has a conscience. Article 1 of the Universal Declaration of Human Rights declares that all humans are "endowed with reason and conscience."[25] If the Charter had intended to depart from this common understanding of conscience, one would have expected a clear statement by the drafters that such a departure was being made.

Understanding freedom of conscience as moral freedom for all individuals respects principles of statutory interpretation and the common understanding of conscience. On this interpretation, freedom of conscience protects physicians—atheist, agnostic, or religious—who refuse to perform abortions because they deem the procedure to be immoral. They are equally protected by freedom of conscience because their refusal stems from the same moral judgment: the fetus is a human being and it is immoral to kill a human being.

If freedom of conscience protects the conscience of all persons, what is left for freedom of religion? This topic cannot be comprehensively addressed here, but the short answer is that freedom of religion protects faith-based—rather than morality-based—beliefs and practices. The Christian who believes that Jesus Christ is the Son of God does not believe it primarily because of a moral obligation. It is a matter of faith. Likewise, the Catholic does not wear a crucifix in order to follow her conscience. It is an external manifestation of a faith-based belief. The same principle applies to religious worship, liturgy, and rituals. These activities usually represent articles of faith, not moral convictions.

Why Protect Freedom of Conscience?

If moral freedom is *what* freedom of conscience protects, *why* we protect this freedom boils down to the fact that this freedom affirms and protects human dignity and the moral commitments that sustain our identity and integrity—who I am and what I stand for.

Integrity refers to the state of being whole or undivided, usually in relation to morality or ethics. It refers to a unity of life—not being one person in some contexts and a different person in others. Opposites of integrity include dishonesty, deceit, hypocrisy, and corruption. Most individuals hold integrity in high esteem. It is peculiar to call a lack of integrity a positive personality trait or an example of public virtue.

Identity is shaped more by moral judgments than by interests, tastes, or preferences. Matters of conscience often sit at the core of a person's identity. Devotion to a sports team may be deeply important to a person, but it is odd to say that an inability to foster that devotion damages core identity or leads to a violation of conscience. Between the sports fan and the person who abandons his moral compass, the latter is more likely to be described as no longer the same person as before.

Given that integrity and identity are damaged when a person betrays her conscience, it should be no surprise that a person's dignity is also engaged by conscience. The Catechism of the Catholic Church captures the link between dignity and conscience in this way:

> The dignity of the human person implies and requires *uprightness of moral conscience*. Conscience includes the perception of the principles of morality (synderesis); their application in the given circumstances by practical discernment of reasons and goods; and finally judgment about concrete acts yet to be performed or already performed. The truth about the moral good, stated in the law of reason, is recognized practically and concretely by the *prudent judgment* of conscience. We call that man prudent who chooses in conformity with this judgment.[26]

In other words, living conscientiously is both a feature and a demand of human dignity. The Christian understanding of human dignity flows from the belief that the human person is made in the image and likeness of God. The dignity of the human person cannot be erased because

the characteristic of being made in the *imago Dei* cannot be erased. Human dignity is intrinsic to the human person, and our conduct can either uphold or deny it. The intentional termination of human life, for example, is a grave violation of human dignity—while safeguarding human life always affirms human dignity. In a similar vein, to deny freedom of conscience is to deny part of what it means to be truly human. The fact that each person has a conscience supports this idea.

At times the law has grasped the intimate relationship between conscience and dignity. These concepts appear together in article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." In the first ruling of the Supreme Court of Canada on freedom of conscience and religion under the Charter, the court traced the historical events that led to the inclusion of this freedom in bills of rights.[27] That history, the court noted, originated in European countries in which the dominant religious tradition sought—with the help of the state—to coerce minority religious traditions to join the majority or face punishment. This violation of human dignity, the Supreme Court noted, makes it easy to grasp why freedom of conscience is categorized as a "fundamental freedom" in the Charter.

In liberal democracies such as Canada...compelled violations of freedom of conscience are more subtle.

A person that finds herself in a crisis of conscience has two unattractive choices: retreat from the threat to conscience (which might mean the abandonment of a cherished career) or violate conscience—and in so doing commit a harmful act of self-betrayal. The harm that flows from a betrayal of conscience has been termed moral distress.[28] Moral distress can arise where a person is hindered from doing what she believes to be moral. This type of distress seems especially likely where a person is coerced to do what she believes to be immoral, with the threat of some consequence if she fails to do so. While moral distress reveals itself in a variety of ways depending on the person and the nature of the constraint on her conscience, the symptoms of moral distress include "frustration, anger, guilt, anxiety, withdrawal, and self-blame."[29] The consequences of violating conscience reflect the gravity of such a violation. One author writes that "among the worst fates that a person might have to endure is *that he be unable to avoid acting against his conscience*—that he be unable to do what he thinks is right."[30] Building on this point, another writer says that even one violation of conscience can be "devastating and unbearable."[31]

Moral distress has been investigated in relation to military service. The Moral Injury Project at Syracuse University studies the experiences of members of the armed forces who have suffered moral distress and psychological injury. The project defines moral injury as the damage sustained by a person when the person commits, witnesses, or fails to stop acts that violate his or her moral compass.[32] The US Department of Veterans Affairs has acknowledged that moral injury can occur when a person's conscience is compromised on the battlefield.[33] In the context of armed conflict, moral injury has been compared to a "deep soul wound that pierces a person's identity, sense of morality and relationship to society."[34]

There is a significant body of scholarship on the immorality of war and the duty of governments to respect the wishes of citizens who refuse on moral grounds to participate in armed conflict.[35] In 1921, during the devastating aftermath of World War I, the antiwar organization known as War Resisters' International (WRI) began. WRI's founding declaration labels war as a crime against humanity. Advocacy for conscientious objection to military service is an area of focus for WRI. Devi Prasad, the former general secretary and later chair of WRI, wrote a book on the organization's history. As he put it, World War I erased "any doubt there might have been as to how disastrous and inhuman the institution of war can be, particularly when supported by modern technology."[36] Prasad sees recourse to war as a humankind's failure to follow its conscience.

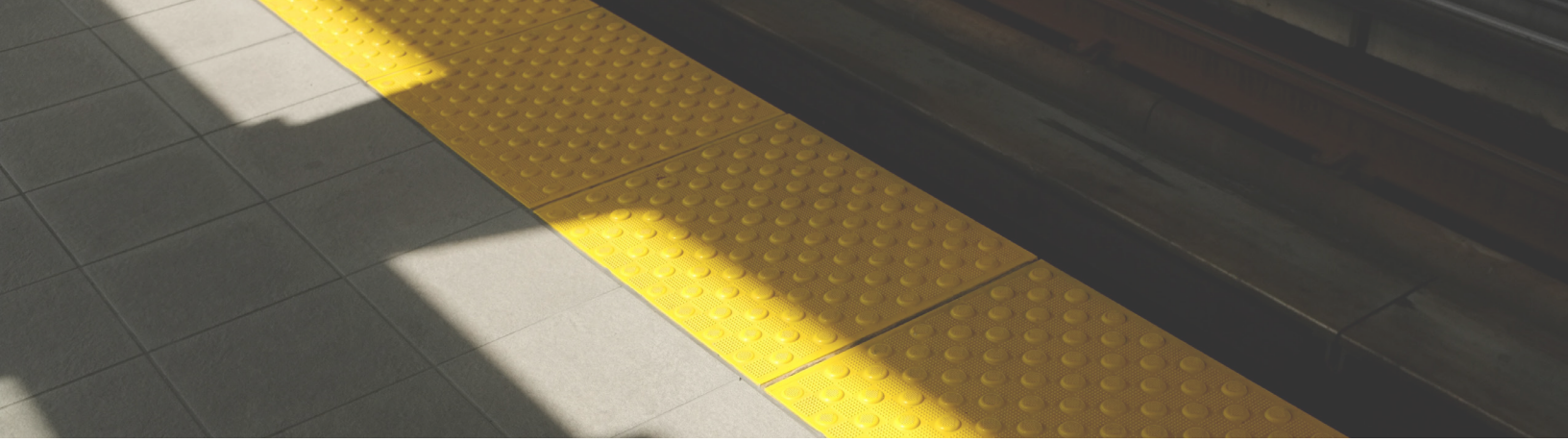
Research on moral injury in the military context sends a clear message that violations of conscience can be harmful. While the harrowing circumstances of armed conflict certainly plays a role, moral injury has been identified in the context of everyday life. A doctor in Ontario, Natalia Novosedlik, revealed in an interview that she violated her conscience by making a referral for a procedure that she considers immoral—a decision that, after the fact, caused a "really internally divisive experience" for her.[37] In the same interview, Novosedlik confessed to being fearful of going to work on account of a legal obligation to provide a referral where she conscientiously refuses to perform a procedure or prescribe a medication.

There is a spectrum of how the state might interfere with freedom of conscience. Mary Anne Waldron, a retired law professor at the University of Victoria, labels state activity that merely prohibits activity which obstructs the pursuit of a moral conviction as less concerning than state activity which compels activity that violates a person's conscience.[38] A person who considers it immoral to kill animals for food and proceeds to burn down a slaughterhouse may be following his conscience, but laws that prohibit trespass and damage to property—and thereby interfere with his ability to live conscientiously—do not force him to violate his conscience. The situation would be different, for example, if the state were to compel all citizens to eat meat or be issued a fine. In that case, the state forces the citizen to violate her conscience or suffer a penalty.

The sort of state action that compels a citizen to do something that violates her conscience or face some sort of sanction is a severe breach of freedom of conscience. Cases of compelled belief and action should, in other words, cause the most concern for this human right. The bureaucrat that is ordered to kill or be killed is a classic example. The person who is jailed simply for expressing a belief that is unpopular or unwelcome in the eyes of a government is a modern example. Amnesty International identifies such persons "prisoners of conscience."[39]

In liberal democracies such as Canada, these scenarios in which freedom of conscience is profoundly violated are not seen. Today, compelled violations of freedom of conscience are more subtle. Do X or forfeit access to a government program that is funded by taxpayers. The controversy surrounding the Canada Summer Jobs program, discussed later in this paper, is an example.

Endorse a certain belief through action or possibly lose your job. The case of obligatory referrals in health care, also discussed later, is an example of this scenario. Protection for whistleblowing—alerting the public to abuses of power by corporations or governments—has also been proposed as a matter of conscience.[40] The stakes in these cases may not be as high as life or death, but they are significant nonetheless. Choosing to follow conscience in these cases can lead to fines, exclusion from a profession, or unequal access to taxpayer-funded government programs.



Limiting Freedom of Conscience

Freedom of conscience should be robustly protected in light of the interests that it protects: integrity, identity, and human dignity. This does not mean, however, that this human right can never be limited by governments. The conscientious arsonist is an example of when limiting freedom of conscience is justifiable for reasons such as public safety and protection of property.

In what other circumstances is it acceptable for the state to restrict the exercise of freedom of conscience?

No right or freedom in the Charter is exempt from limitation. All are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[41] Freedom of expression is limited by laws that restrict communication which promote violence. Freedom of association is limited by laws that prohibit the formation of criminal organizations. On freedom of conscience and religion, the Supreme Court has ruled that subject to "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."[42]

It is intuitive that the state may—indeed should—restrict activity that, though inspired by conscience, harms others or injures their dignity. The person who considers the Canadian state irreparably corrupt and subsequently acts on a perceived moral duty to violently overthrow the government could be said to be following his conscience, but the state would certainly be justified in limiting his freedom of conscience through laws that prohibit such activity and punish citizens for it.

It would also be legitimate to limit freedom of conscience where the expression of that freedom negates the essence of a profession: for example, the pacifist who signs up for the armed forces but later refuses to mobilize during a war in which there is mandatory conscription. This idea, however, only goes so far. Applying it is sensible in the case of a doctor who once specialized in a procedure and now conscientiously refuses to perform it. It is oppressive to apply it in the case of a family doctor who treats countless medical issues but will not refer patients for abortions or prescribe contraception. Where a small-business owner has no general objection to his line of work but refuses to provide services to a cause or event that involves him in activity that he deems immoral, the case for respecting freedom of conscience seems reasonable. If the owner of a printing

company is resolutely pro-abortion (and holds that view as a matter of conscience), it would be understandable that she would refuse to print posters for an anti-abortion rally. This scenario works the other way as well: it would be no surprise to see an anti-abortion printer refuse to print posters for a pro-abortion rally. Put simply, the owner of the printing company can not object to printing *per se*, but can object to printing products of a certain kind that go against her conscience. Likewise, the doctor can not object to providing medical treatment, but can reasonably object to referring for procedures he believes are seriously immoral.

It is reasonable for freedom of conscience to be curtailed by the state where the exercise of the freedom harms others, injures their dignity, or causes undue hardship. The challenge, however, is the unsettled understanding of these concepts today—especially dignity and harm. Beyond obvious forms of harm (such as physical assault) or injury to dignity (such as racist legal regimes), what counts as harm or injury to dignity quickly becomes contested. These concepts are increasingly being used to counter conscience claims. For example, the woman who is denied an abortion might say that the denial injures her dignity in terms of her ability to choose if and when she will bear children. What is lost, however, is the fact that the doctor who refuses does so on account of the dignity of the fetus and a desire to not harm—indeed, to not kill—a human being.

The duty of neutrality only applies to the state – it does not limit individuals from manifesting their religious or conscientious convictions in the public square.

Claims of conscience often make the headlines or arrive at the courtroom because they feature a clash of worldviews with respect to concepts such as harm and dignity. The usual response of a government in a diverse society is to allow a diversity of views rather than compel certain beliefs. The Supreme Court of Canada has recognized that freedom of conscience and religion translates into a constitutional obligation on the state to remain neutral in matters of conscience and religion.[43] Here, neutrality means that the state will neither favour nor hinder any religion or non-religious worldview. This means that the state would equally violate this duty if it were to recognize a state religion or state atheism. This duty of neutrality only applies to the state—it does not limit individuals from manifesting their religious or conscientious convictions in the public square.

Faced with fundamental disagreements between citizens on what counts as harm and dignity, a free and democratic society favours coexistence. When the Supreme Court of Canada stated in relation to assisted death that the interests of patients must be reconciled with those of physicians, the court alluded to a meaningful coexistence of the beliefs of patients who desire lawful health-care services and health-care workers who conscientiously refuse to participate in those services.[44] In the leading Canadian case on abortion, Justice Bertha Wilson noted that the "basic theory underlying the *Charter*" is that the state "will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."[45] Justice Wilson made these statements from the perspective of the woman who requests an abortion, but surely the principle she endorsed applies to both sides of this issue and others.

Taking conscientious objection in health care as a case study, the philosophical and theoretical perspectives that support advocacy against conscientious objection include legal positivism, rigid secularism, and materialism. Legal positivism teaches that the content of laws passed by legislatures are a guide to moral and ethical conduct.[46] This perspective drives the emphasis on the lawfulness of a procedure as a justification for obliging a doctor to perform it. This theory also professes a faith in the righteousness (and even the morality) of what the state has permitted—that what the law has approved is good and true because it is the law. When scholars label the legalization of abortion or euthanasia as a social good or achievement for humanity, that legal faith reveals itself. Rigid secularism (*laïcité*) aims to exclude the influence of religion in public life—especially in the context of services that are delivered by the state. This theory surfaces in the rejection of manifesting moral convictions in the provision of health care where those convictions stem from religious formation. Taylor and Maclure contrast this form of secularism (republican secularism) with pluralist-liberal secularism, in which space is made in the public square for the manifestation of religious and conscientious worldviews.[47] Finally, materialism (also known as physicalism) professes that all that exists is the material or physical world. There is no supernatural or transcendent dimension and so nothing after death. Materialism is associated with the belief that suffering is meaningless and should be avoided at all costs.[48] This perspective appears in advocacy for assisted death. The primary justifications for this procedure—to alleviate suffering and secure a dignified death—are influenced by the ideas that suffering is meaningless and that compassion demands that a life of incurable suffering be ended if the person so wishes. If assisted death enables persons to die with dignity, the implication is that remaining alive in certain circumstances is undignified.[49]

Current Issues

Before the Charter arrived in Canada in 1982, freedom of conscience appeared in Canada primarily in the form of conscientious objection to military service. Statutory exemptions to military service in Canada reach back as far as 1793.[50] They were also granted during World War I and II, often on the condition that conscientious objectors would perform alternative service such as building national parks. These exemptions were largely granted to Christian denominations that professed pacifism, such as Quakers, Mennonites, Doukhobors, and Hutterites.

Freedom of conscience—in the form of an individualized human right—first appeared in 1947 in the Saskatchewan Bill of Rights. It does not appear in the Canadian Bill of Rights of 1960. Before the Charter arrived in 1982, freedom of conscience was generally understood as freedom of religious conscience—not as freedom of secular conscience or the moral freedom of all persons. The historic closeness of conscience to religion played a role in this understanding. It also explains why the Charter protects, in one provision, freedom of conscience and religion.

Since the Charter arrived in 1982, there has been little case law and scholarship on freedom of conscience in isolation from freedom of religion. The only court ruling on freedom of conscience concerned a request by Jack Maurice, an inmate, for vegetarian meals while in prison. Corrections Canada granted his initial request, made on the basis of his Hare Krishna faith. He later renounced his faith but continued to request vegetarian meals, citing a belief that a non-vegetarian diet is "morally reprehensible and poisonous to society as a whole." Corrections Canada stopped the vegetarian meals. The judge ruled for Maurice on the basis that freedom of conscience protects the freedom of persons to manifest their moral commitments.

The judge described vegetarianism as a dietary choice "founded in a belief that consumption of animal products is morally wrong." While he acknowledged that the motivations for choosing vegetarianism depend on the person, its "underlying belief system" can be considered a matter of conscience. The view that how animals are treated engages morality influenced the judge's decision. The idea that animals have dignity and are therefore owed respect has gained traction in many societies. The topic of moral vegetarianism has generated much scholarship. At the heart of this movement is the view that it is immoral to produce and consume meat. The reasons why range from the pain experienced by animals to environmental concerns related to raising livestock.[51]

Today in Canada, several legal and policy issues raise concerns for freedom of conscience. These issues engage what was earlier described as a serious limitation on this freedom: the use of state power to compel belief through positive action by the citizen, failing which the citizen will face some sort of adverse consequence, penalty, or punishment. What follows is a primer on three of these current cases.

CANADA SUMMER JOBS

The Canada Summer Jobs program, an initiative of the federal government, helps to create summer jobs for secondary and post-secondary students by offering funds to entities such as not-for-profit organizations so that they can hire these Canadians. Many churches and religious organizations have historically relied on the program to hire individuals to support activities such as summer camps and charitable works.

For the 2018 program, any organization that wished to obtain funding for a job was required to attest that "both the job and the organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well as other rights." The problem—from a freedom-of-conscience perspective—is that the government insisted that the human rights which applicants for funding must endorse include "reproductive rights" such as "the right to access safe and legal abortions." As a result, applicants who oppose abortion on moral or religious grounds were denied funding for their summer initiatives. Many chose to not apply for funding. The attestation sparked an uproar across the political spectrum in Canada, attracting sustained media coverage for weeks. To date, the federal government has not amended the text of the attestation. Lawsuits alleging that the attestation is unconstitutional are currently before the courts.

> *The notion that people who disagree with the state on issues such as abortion must either adopt the state's view or be excluded is acceptable in totalitarian regimes.*

There is a strong, legal argument that the attestation in its current form violates the Charter protections for freedom of conscience and religion, and perhaps also freedom of expression. A government is free to believe and enforce that access to abortion is a human right. If it is also legally bound to protect conscience rights, a government cannot, given the inescapable moral controversy surrounding abortion and the Charter rights of Canadians who profess a different moral view, compel that belief through the attestation. The practical effect is to make access to a taxpayer-funded federal program conditional on agreement with the government's own views on contestable question of conscience. The policy of the federal government regarding the Canada Summer Jobs program amounts to weaponizing the Charter, using it to exclude nonconforming citizens. The federal government, in this case, has forgotten that the Charter is meant to be a shield for citizens against the abuse of state power. The Canada Summer Jobs controversy is also troubling because it requires citizens who do not wish to take a position on issues such as abortion to do so in order to receive this public benefit. A landscaper that hires extra hands in the summer

may have no interest whatsoever in taking a public stand on abortion, but the current policy forces him to do so. As an alternative to the attestation, the federal government could have required applicants to affirm that any funds they receive from the program would be used for lawful purposes. There is nothing objectionable with requiring such an affirmation, and it is unlikely that it would have posed any difficulty for applicants.

The notion that people who disagree with the state on issues such as abortion must either adopt the state's view or be excluded is acceptable in totalitarian regimes. It is not acceptable in Canada—a country that strives, in the words of the Charter, to be a "free and democratic society." Using the Charter to legitimize this tactic is disturbing given that *Morgentaler*, the Supreme Court of Canada's key decision on abortion, suggested that the state can restrict abortion in certain circumstances. The state's interest in restricting abortion becomes more compelling the closer the unborn child is to birth. There has been a deliberate distortion of what *Morgentaler* stands for as a matter of law since its release in 1988. The ruling does not constitutionally guarantee unrestricted access to abortion in Canada. The court's decision on abortion, "profound as it was, did not create a right to abortion for Canadian women, nor did it offer any resolution of the abortion issue."[52]

HEALTH-CARE REFERRALS

In Ontario, doctors may refuse to perform procedures or prescribe drugs they deem immoral. However, the public body that regulates these doctors—the College of Physicians and Surgeons of Ontario (CPSO)—has stipulated that they must provide an "effective referral" after such a refusal. An effective referral means that the objecting doctor must find a doctor who does not object to the procedure or drug and subsequently lead the patient to that doctor.

Referrals are morally problematic for some doctors. Imagine if physician-assisted death were still a crime today (as it was until 2016). A doctor would commit the crime not only by directly assisting a suicide but also by indirect involvement—by providing an effective referral, for example. For many physicians, when it comes to procedures such as abortion and assisted death, a referral is the same as saying "I don't kill people myself but let me tell you about the guy down the street who does."[53] In other words, a referral is similar to driving the robber to the bank—a degree of complicity that makes the driver no less a bank robber than the person who forces the teller to empty the safe at gunpoint.

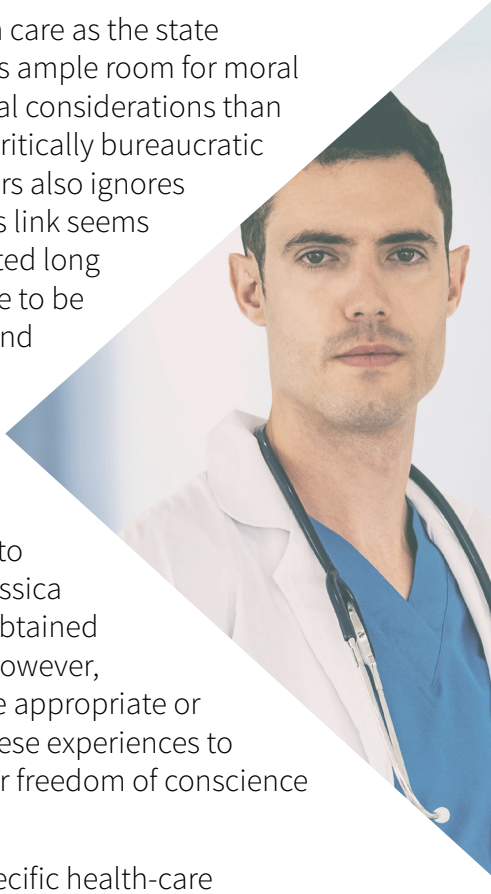
A group of individual doctors and interested organizations have launched a lawsuit against the CPSO in which they allege that this policy violates freedom of conscience and religion in the Charter. In January 2018, an Ontario court upheld effective referrals. The court found that obligatory effective referrals violate the Charter, but deemed the violation justified because referrals facilitate "equitable access" to health care. The case seems destined for the Supreme Court of Canada.

The CPSO referral policy for doctors in Ontario unjustifiably violates their freedom of conscience. Health care is not a freestanding Charter right. As for the notion of a right to procedures such as abortion and assisted death, there is an important—and often overlooked—difference between saying that the Charter precludes the state from criminalizing these procedures in certain circumstances and saying that the Charter obliges the state to deliver these procedures, on

demand, through a public health-care system. Canadian courts have said the former, not the latter. There is, in short, only one Charter right at issue: the freedom of conscience of health-care workers.

Yet procedures such as assisted death and abortion are lawful, and the state has chosen to deliver them as health care. The Supreme Court predicted the need to reconcile access and conscience when it opened the door to assisted death in 2015. Certain provinces have taken steps that better reconcile these interests than requiring referrals. Alberta, for example, created a public health office that handles assisted death. In any event, refusals to refer may not even impair access to lawful health-care services. The Ontario court, in its ruling on effective referrals, noted that there is no evidence to demonstrate that conscientious refusals to refer affect access to health care.[54] This finding of the court demands an answer as to why referrals are a justifiable breach of freedom of conscience. The Ontario court neither asked nor answered this question.

While some might say that the essence of a doctor's job is to provide health care as the state defines it, the substance of health care—the body, life, and death—counsels ample room for moral reflection. There may be no sector of society that is more imbued with moral considerations than health care. The idea of doctors and other health-care workers that are uncritically bureaucratic rather than morally sensitive is unsettling. Banishing conscientious objectors also ignores the link between human dignity and pursuing one's chosen profession. This link seems especially strong in a field such as health care. The medical profession existed long before the state involved itself in it. Most people do not consider health care to be just another job. They consider it a vocation that includes a host of moral and ethical considerations encountered each day in practice.



Barriers to lawful health-care services—whether created by geography, funding, competence, or conscience—can cause significant distress for patients. Ian Shearer, who was refused assisted death at a Catholic hospital and suffered on account of the delays associated with his transfer to a hospital that would perform the procedure, is an example.[55] Another is Jessica Leeder, a woman who encountered several regulatory hurdles before she obtained an abortion.[56] These experiences are painful; they must not be trivialized. However, restricting freedom of conscience in the form of requiring referrals is not the appropriate or just solution. This approach downloads the responsibility for preventing these experiences to health-care workers to a degree that is disproportionate to the limit on their freedom of conscience for several reasons—here we highlight three.

First, as already mentioned, there is no Charter right to health care or to specific health-care procedures, but health-care workers are granted freedom of conscience under the Charter. Second, referrals involve a high degree of complicity with the procedure or medication that the health-care worker considers immoral. Even fervent critics of conscientious objection in health care acknowledge the moral dilemma posed by referrals.[57] This dilemma leaves the health-care worker with a cruel choice: violate her conscience (and likely suffer some sort of distress) or leave a cherished profession that she may consider a calling. Forcing this choice is oppressive when one considers that, among the numerous procedures and drugs that are delivered in health care, this worker may conscientiously object to only a very small percentage. Third, there are alternatives to referrals that are feasible, affordable, effective, and that reconcile the interests of patients and

health-care workers.

Among these alternatives, the CPSO could have created a public office that manages certain procedures, such as the office in Alberta for assisted death. A related option is to require objecting doctors to inform patients of the office rather than require direct referrals. Quebec adopted this approach for assisted death. Another option is to create an online database that indicates which physicians are willing to perform those procedures to which others object for reason of conscience. The CPSO website already has a searchable database of physicians with customizable search criteria such as the physician's gender and language.[58] It would not be difficult to add search criteria for the relatively few procedures and drugs that are widely recognized to provoke conscientious objections. All of these options inflict less harm on the freedom of conscience of health-care workers than obligatory referrals. They are, by all accounts, inexpensive and effective. There is no evidence that these measures impair access to procedures or that they are inferior in this regard when compared to referrals.

GENDER IDENTITY AND EXPRESSION

In 2017, the Parliament of Canada enacted Bill C-16, which amended the Canadian Human Rights Act to include "gender identity or expression" as a prohibited form of discrimination under that statute and amended the Criminal Code to (1) criminalize the promotion of hatred or genocide in relation to persons distinguished by gender identity or expression and (2) require judges, when crafting a sentence for a crime, to consider whether bias, prejudice, or hate based on gender identity or expression motivated the offender. Bill C-16 generated heated debate over concerns that it will suppress—and even penalize—certain forms of speech and even views on transgender issues.

At first blush, these concerns are misplaced. Aside from the federal Canadian Human Rights Act, each province and territory has human rights legislation. The purpose of this legislation—often called a human rights code—is to ban certain kinds of discrimination in contexts such as employment, housing, and services available to the public. At this time, all human rights codes in Canada ban discrimination in these contexts on the basis of gender identity or expression (along with other bases such as religion, sex, and sexual orientation). If a transgender person applies for a job or books a room at a hotel, that person cannot be denied the job or the room because of his or her gender identity or expression. If an employee asks for an on-the-job accommodation connected to their gender identity or expression, the employer must grant it unless it would entail undue hardship. The changes to the Criminal Code acknowledge the evil of harming someone out of hatred toward their gender identity or expression—in the same way that the Criminal Code acknowledges the evil of harming someone because of their religion, sex, or sexual orientation.

Targeting a person because of their gender identity or expression is reprehensible, and no person should be subjected to unjustified discrimination on these grounds. An example of justified discrimination is where employment is denied due to a job requirement. A person with impaired vision who is denied a job as a pilot is discriminated against because of a disability, but we accept—given the nature of the job and interests such as public safety—that the discrimination is justified.

The significance of gender provisions in human rights codes for freedom of conscience is how these provisions will be interpreted by courts and human rights tribunals, particularly with respect to the nature of (and relationship between) sex and gender. It is one thing to acknowledge a conflict between a person's biological sex and the gender with which they identify—that a person born with male genitalia can identify as a woman, and vice versa. It is an entirely different thing to conclude, for example, that a trans woman is no different from a non-trans woman—that "trans women are women." To force persons to adopt one of these views, in violation of their moral convictions on the nature of sex and gender, may violate their freedom of conscience.

Targeting a person because of their gender identity or expression is reprehensible...

An example of where this issue might arise is the potential requirement of using gender-neutral pronouns. Professor Jordan Peterson of the University of Toronto brought this issue to the headlines, taking the view that these changes to the law will indeed mandate the use of preferred pronouns. Peterson, who stated he would not use these pronouns in light of the importance he ascribes to free speech, also expressed concern that the amendments to the Criminal Code in Bill C-16 could make refusals to use gender-neutral pronouns a hate crime. The Ontario Human Rights Commission, in its commentary on Ontario's human rights code, suggests that gender provisions could require an employer to accommodate a transgender employee by using the pronouns that the employee prefers. For some persons, however, the use of these pronouns signifies agreement with a particular view on the nature of sex and gender—one that might betray their conscience.

The tenor of the debate over gender provisions in human rights codes—along with the opinion of bodies such as the Ontario Human Rights Commission—may signal that these provisions are embedded with ideological teachings on sex and gender. For some, the imperative for protecting gender identity and expression in human rights codes may go beyond ensuring safety, security, and respect for transgender persons—all of which are pressing and legitimate concerns. Arguably, the inclusion of these grounds of discrimination are also meant to reflect certain viewpoints within the ongoing debate on the relationship between gender and sex. The Ontario Hockey Federation announced that coaches must create space for the use of gender-neutral pronouns—and failure to do so may amount to gender discrimination. Barry Neufeld, a school trustee in British Columbia who has criticized curriculum changes concerning sexual orientation and gender identity, is now the subject of a human rights complaint because of that criticism.

Transgenderism touches on issues that are contested and unresolved. But in an era when absolute truth is contested, the law has increasingly become a source of truth. This faith in the law increases the chance that acceptable views on sex and gender will change based on what gender provisions in human rights codes are interpreted to teach about these topics. This is a consequence of legal positivism, one of the forces that is challenging the freedom, on matters of conscience, to profess beliefs that differ from what the law says. If the law is understood to override private conscience, freedom of conscience—a fundamental human right—risks becoming a dead letter.

Conclusion

Freedom of conscience is a fundamental human right. It lets us live in alignment with our moral convictions. Like all other human rights, this one is not absolute. But freedom of conscience should be robustly protected given what is at stake when it is threatened. When a person betrays her conscience, she violates her integrity, identity, and human dignity.

Conscientious objectors are often persecuted in their time, but seen in a better light later on. Muhammad Ali conscientiously refused to fight in the Vietnam War. In response, the World Boxing Association stripped him of his world heavyweight championship and banned him from boxing for three years. Ali was arrested, tried, and found guilty of evading military service. The US Supreme Court overturned the conviction, but by then Ali had gone four years without boxing. Desmond Doss, a pacifist who suffered ridicule for refusing to bear arms in World War II, won the US Medal of Honor for his heroism as a combat medic. The film *Hacksaw Ridge* celebrated his story. Thomas More, the sixteenth-century Chancellor of England, lost his head for refusing to recognize England's split from the Catholic Church. Today pilgrims honour the "man for all seasons" by visiting the place where his head now lies. That place is an Anglican church in Canterbury—a poignant twist of fate, as the Church of England is what More conscientiously refused to recognize.

> *Suppressing beliefs with which we disagree or that we find offensive in the name of tolerance and liberalism is a contradiction in terms.*

Admiration for Ali, Doss, and More today—regardless of whether one shares their convictions—reveals a shared respect for moral courage. While most of us will never be forced to choose between our profession (let alone our life) and our conscience, we all hope—should that scenario ever confront us—to be free to choose the latter. Shortly after Muhammad Ali's death in 2016, a journalist reflected on how Ali's refusal to bear arms demonstrated the "varied bridges he refused to cross at the expense of his dignity, his integrity, his self-worth and self-respect, all which he held up higher than any amount of power, fame and glory."[59]

The outcomes of the current controversies that engage freedom of conscience will not only signal the extent to which Canadians can conscientiously participate in public life—in other words, whether they can live in alignment with who they are and what they stand for in matters of morality. These outcomes will also speak volumes about who we are and what we stand for—as a society. Suppressing beliefs with which we disagree or that we find offensive in the name of tolerance and liberalism is a contradiction in terms. The fact that the state has deemed something legal does not remove a person's freedom to express her moral opposition to it. This freedom is not absolute, but its roots—integrity, identity, and dignity—are necessary for human flourishing. These roots must therefore be top of mind whenever limitations on freedom of conscience are proposed. We believe that governments should only limit this human right if there is a compelling justification. In our view, this threshold has not been met in the litigation over health-care referrals in Ontario or the attestation for Canada Summer Jobs funding. The fate of these court cases rests in large part on the sincerity of our commitment to accommodate difference—even when most of us passionately oppose the difference that seeks accommodation. This commitment, though challenging, is a prerequisite to the "free and democratic society" that the Charter declares Canada to be.

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