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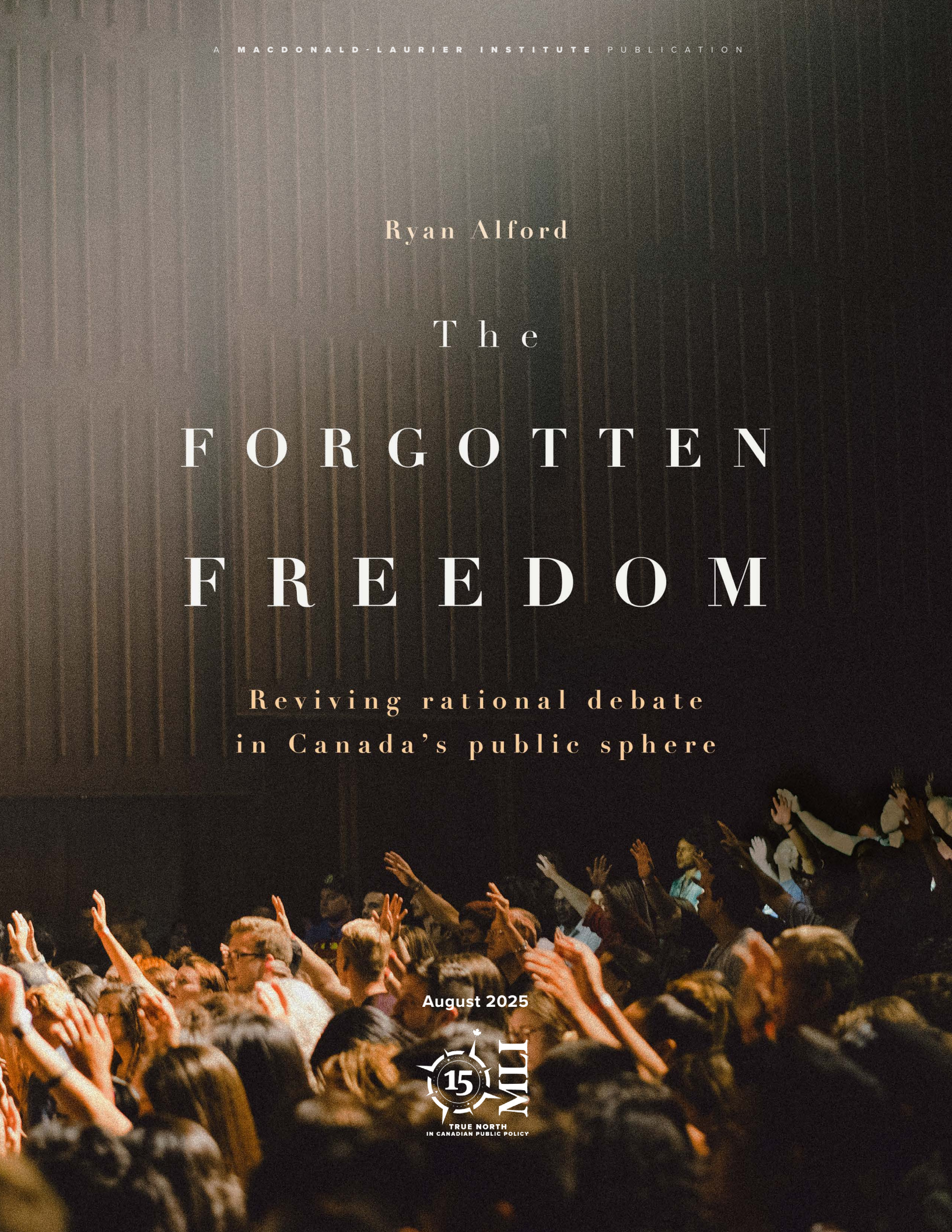
The FORGOTTEN FREEDOM

Reviving rational debate in Canada's public sphere



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TRUE NORTH
IN CANADIAN PUBLIC POLICY

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Canadians are facing unprecedented threats to their freedom of speech. And just as sweeping legislation that clamps down on political expression is being introduced, the young people who stand to lose the most seem indifferent to the loss of their right to speak freely. Young Canadians do not even recognize the importance of that right because of how earlier generations transformed free speech into merely a licence for individual self-expression.

There is precious little time to recover the concept of freedom of speech that animated our once-vibrant political culture. Rightly understood, freedom of speech makes it possible to engage in rational debate that can yield solutions to even the most challenging issues. It can also generate a binding national consensus, something that the stultifying ideological dogmatism that dominates our institutions has prevented to our great detriment. We can recover our inheritance, if we understand what we once possessed, and how we almost lost that birthright.

Canada owes its free speech tradition to classical Athens, where *parrhesia* – bold, truthful speech – was considered essential to rational public deliberation. This concept was championed throughout the Western tradition from Aristotle to the Glorious Revolution in England. At Canada's founding in 1867, the Fathers of Confederation, notably Thomas D'Arcy McGee, argued that this tradition of free speech was vital to liberty and governance and that it formed the foundation of the Dominion's constitutional order.

A century later, the rise of expressive individualism has shifted the rationale for free speech from collective truth-seeking to individualistic self-expression. This realignment gained momentum in Canada after 1982 due to the judiciary's interpretation of the *Canadian Charter of Rights and Freedoms*, which redefined the meaning of free speech as a seemingly expansive right that could be trimmed in order to support other values. For example, the Supreme Court of Canada's expansion of the right to include the possession of child pornography, as seen in *R. v. Sharpe* (2001) and *R. v. Barabash* (2015), shows how far its approach now diverges from our traditional and deliberative conception of free speech: a protection for the free exchange of rational ideas that allows us to participate in a genuinely democratic society.

Expressive individualism and the resulting shifts to our understanding of the right to free speech didn't come out of nowhere. Nineteenth-century political philosopher John Stuart Mill's approach to liberty was grounded in subjectivity and expression. He prioritized the idea that power should only be exercised to prevent a certain kind of harm to others. This redefinition relied on the importance of self-actualization rather than political engagement in civic discourse. In line with Mill's understanding, the Court's new approach to balancing rights against increasingly vague notions of harm empowered the judiciary to limit expression at will, as illustrated by *Ward v. Quebec* (2021), in which a four-justice minority would have limited speech because it hurts the feelings of members of purportedly vulnerable groups. Judicial overreach, coupled with the growth of expressive individualism into a victimhood culture after 2015, is now the principal justification for censorship.

The emergence of victimhood culture, marked by the "Great Awokening" of 2014–16, is a further threat to free speech, as it reconfigures moral worth based on victimhood and vulnerability. This new moral culture equates challenging speech with violence and amplifies calls for institutional censorship, particularly in universities. A powerful spiral of silence, in which individuals self-censor to fit in with what they perceive is the majority opinion, is exacerbated by "safetyism" – a belief that uncomfortable ideas are harmful. A return to the classical notion of parrhesia should be the watchword for principled dissenters seeking to challenge prevailing narratives and seeking to renew open discourse in academia and the public sphere.

Practically, these ideas are playing out in the policy sphere through the revival of the *Online Harms Act*, which threatens to restrict speech that the government deems harmful. Modelled on deeply flawed legislation such as the European Union's *Digital Services Act* and the United Kingdom's *Online Safety Act*, the *Online Harms Act* reflects a global trend of targeting populist and dissenting voices. Canada, as a Westminster democracy with a robust tradition of free speech, must resist these encroachments in order to preserve our democratic heritage.

To restore Canada's tradition of free speech, universities must reject safetyism and bureaucratic overreach and instead focus exclusively on truth-seeking through open inquiry. Faculty should model bold and rational engagement, making use of the looming crisis in higher education to push for the recognition that freedom of speech is essential to teaching and research. More broadly, Canadian citizens must embrace freedom of speech, even on divisive issues like immigration, demanding rigorously rational rules of engagement despite emotionally driven objections or concerns about the effects of certain arguments on the safety of minorities or other purportedly vulnerable groups. Genuine democratic debate requires that all voices can participate; the spiral of silence that enforces ideological orthodoxy must be interrupted.

By engaging in parrhesia in academia and public life, Canadians can reclaim their democratic heritage and ensure that contentious issues are debated openly to

achieve positive outcomes grounded on rationality and democratic legitimacy. Young Canadians, who face a bleak future of diminished prosperity, would benefit the most from a society that makes use of bold speech to address its most pressing challenges, thereby reconnecting with the vision of liberty articulated by the Fathers of Confederation. Only a renewed commitment to freedom of speech can empower Canadians to rebuild a free and prosperous democracy, free of authoritarian control of public discourse. **MLI**

***Les citoyens canadiens font face** à des menaces inédites en matière de liberté d'expression. Et, au moment même où des lois répressives sur l'expression politique sont en cours d'adoption, les jeunes, qui ont le plus à perdre, paraissent indifférents à leur droit de parler librement. Cet article avance qu'ils n'en reconnaissent même pas l'importance, en raison du traitement qu'ont fait de la liberté d'expression les générations précédentes, en la réduisant à une simple forme d'expression personnelle.*

Il est urgent de rétablir la signification de la libre expression qui caractérisait notre dynamique culture politique d'antan. Correctement comprise, elle rend possible de s'engager dans un débat rationnel apte à résoudre des questions complexes et engendrer un consensus national contraignant, un résultat que l'étouffement idéologique de nos institutions prévient, à notre détriment. En comprenant notre héritage historique et les raisons de sa perte, il nous est possible de le restaurer.

Le Canada tient sa tradition de liberté d'expression de l'Athènes classique, où la parrhêsia*, c'est-à-dire le fait de parler franchement, de dire la vérité était un élément essentiel des discussions publiques fructueuses. Ce concept a été farouchement défendu à travers toute l'histoire de l'Occident, depuis Aristote jusqu'à la Glorieuse Révolution anglaise. Lors de l'établissement du Canada en 1867, les Pères de la Confédération, parmi lesquels Thomas D'Arcy McGee, ont affirmé que la préservation de la liberté d'expression était cruciale pour la gouvernance et constituait le fondement de l'ordre constitutionnel du Dominion.*

Un siècle après, l'individualisme expressif a commencé à transformer la liberté d'expression en une forme d'expression de soi individualiste plutôt qu'en un effort collectif pour atteindre la vérité. Ce réalignement s'est accéléré à partir de 1982 avec l'interprétation judiciaire de la Charte canadienne des droits et libertés*, qui a redéfini la liberté d'expression comme un droit expansif et malléable qui permet l'intégration de nouvelles valeurs. Par exemple, la Cour suprême du Canada a étendu ce droit à la possession de pornographie juvénile, comme dans les affaires* R. c. Sharpe *(2001) et* R. c. Barabash *(2015), ce qui illustre la divergence actuelle de son approche par rapport à notre conception traditionnelle et délibérative de la liberté d'expression : une protection pour la libre circulation des idées rationnelles qui nous permet de participer à une société authentiquement démocratique.*

L'individualisme expressif et ses conséquences sur notre conception du droit à la liberté d'expression ne sont pas apparus soudainement. La conception de la liberté par le philosophe politique du XIXe siècle John Stuart Mill reposait sur la subjectivité et l'expression. Celui-ci était convaincu que le pouvoir devait être utilisé uniquement pour prévenir un certain type de préjudice envers autrui. Cette nouvelle définition repose sur l'accomplissement personnel plutôt que sur l'engagement politique dans le discours civique. En accord avec la philosophie de Mills, la récente orientation de la Cour vise à concilier les droits individuels avec des concepts de préjudice de plus en plus vagues, autorisant ainsi le pouvoir judiciaire à restreindre l'expression à sa discrétion, comme dans l'affaire Ward c. Québec *(2021), où une minorité de juges (quatre) a limité la liberté d'expression afin de prévenir toute atteinte aux sentiments de groupes considérés comme vulnérables. La judiciarisation croissante, associée à la transformation de l'individualisme expressif en une culture de la victimisation après 2015, est devenue le principal motif invoqué pour justifier la censure.*

L'avènement de la culture de la victimisation, marqué par le « Grand Réveil woke *» de 2014-2016, menace aussi la liberté d'expression en réorientant la notion de valeur morale autour de la victimisation et de la vulnérabilité. Cette nouvelle culture morale se caractérise par une tendance à assimiler la contestation verbale à la violence et à encourager la mise en place d'une censure institutionnelle, en particulier au sein des universités. Une dynamique de silence renforcée par le sécuritarisme – une idéologie considérant les idées non conventionnelles comme préjudiciables – pousse les individus à s'autocensurer pour se conformer à ce qu'ils perçoivent comme l'opinion dominante. Les opposants idéologiques doivent encourager le regain de la notion traditionnelle de* parrhêsia *afin de remettre en cause les discours dominants et revitaliser les échanges dans les universités et l'espace public.*

*Dans la pratique, ces idées se traduisent politiquement par la réactivation de l'*Online Harms Act*, une loi visant à restreindre les discours considérés comme préjudiciables par les autorités gouvernementales. La loi sur les préjudices en ligne s'inspire de lois très imparfaites, comme la* loi sur les services numériques *de l'Union européenne et* la loi sur la sécurité en ligne *du Royaume-Uni, et fait état de la tendance mondiale à réprimer les voix populistes et dissidentes. Le Canada, en tant que démocratie de Westminster, doit s'opposer à ces intrusions afin de protéger sa longue tradition de liberté d'expression – son patrimoine démocratique.*

Afin de rétablir la tradition de liberté d'expression au Canada, il est essentiel que les universités mettent l'accent sur la quête de la vérité par le biais d'enquêtes ouvertes, en rejetant le sécuritarisme et l'excès de bureaucratie. Il est essentiel que le corps professoral fasse preuve d'un engagement ambitieux et raisonné, en saisissant l'opportunité offerte par la crise naissante de l'enseignement supérieur pour promouvoir l'importance de la liberté d'expression dans le domaine de l'enseignement et de la recherche. De manière plus générale, il est essentiel que les citoyens canadiens

défendent le principe de la liberté d'expression, même lorsqu'il s'agit de questions controversées comme l'immigration, en promouvant des normes d'interaction strictement basées sur la rationalité, et ce, en dépit des objections motivées par l'émotion ou les inquiétudes quant aux conséquences de certains discours sur la sécurité des minorités ou d'autres groupes considérés comme vulnérables. Pour qu'un débat démocratique soit authentique, il est essentiel d'encourager la participation de toutes les parties prenantes; la spirale du silence qui tend à renforcer l'orthodoxie idéologique doit être arrêtée.

En pratiquant la parrhêsia *au sein des universités et dans l'espace public, les Canadiens et Canadiennes peuvent reconquérir leur héritage démocratique et veiller à ce que les questions controversées soient débattues de manière ouverte pour engendrer des résultats positifs basés sur la rationalité et la légitimité démocratique. Ce sont les jeunes, confrontés à un avenir incertain caractérisé par une prospérité réduite, qui bénéficieront le plus d'une société qui use de franc-parler pour relever les défis les plus urgents, renouant ainsi avec la liberté promue par les Pères de la Confédération. Seule une réaffirmation de l'engagement envers la liberté d'expression peut contribuer à la reconstruction d'une démocratie libre et prospère, affranchie du contrôle autoritaire de la parole publique.* **MLI**

Introduction

In June 2025, influential voices in the Parliament of Canada began to call for the reintroduction of a bill proposed earlier by the government of Justin Trudeau, the *Online Harms Act* (Halper 2025). This bill heralds the introduction of a vast bureaucratic regime to enforce broad bans on so-called "harmful speech," which would "capture a wide range of [previously] lawful expression" (Geist 2022). The Act would rely on private companies to enforce vague standards, potentially creating a powerful chilling effect on the few remaining venues for discussing political ideas that run counter to official narratives. This is likely to impede discussions of extremely controversial issues, such as immigration regulation and the teaching of gender identity theory in elementary schools.

This bill is modelled on legislation from other jurisdictions that have addressed what they consider a systemic risk of disinformation (including the European Union's *Digital Services Act, 2022*, in which the concept appears to have been defined to address populist speech in particular) and the United Kingdom's *Online Safety Act, 2023,* which identified various categories of "legal but harmful" material, including political speech that constitutes disinformation that might create a risk of harm. What is considered illegal speech in the United Kingdom is also defined expansively, as demonstrated by the 31-month prison sentence given to Lucy Connolly in 2024 for a single social media post that was deemed to incite racial hatred – a decision that was affirmed in May 2025 by the Court of Appeal (Attenborough 2025a). At present, approximately 1,000 people are arrested each month in the United Kingdom for what they post online, a figure that does not include recorded "non-crime hate incidents" (Attenborough 2025b).

The Canadian public square is merely one front of an unprecedented global assault on freedom of speech. The United Nations reiterated in 2019 that countries should create early warning and prevention systems to prevent hate speech, while UNESCO's action plan on disinformation and hate speech calls for regulation of digital platforms, as they are purportedly "major threats to stability and social cohesion" (UNESCO 2023).

It is sobering to observe how nations founded upon the recognition of freedom of speech as a constitutional principle, such as the Westminster democracies, could align their legislative agendas so easily with nations that have entirely different political traditions, in particular those that have traditionally prioritized bureaucratic efficiency or governmental authority over civil liberties and civil rights. Canada should be a key locus of resistance to this transnational clampdown on the right to engage in vigorous political argument on the most serious and contentious issues, but it is not.

I will explain why Canada has failed to live up to its formative principles when confronting these threats to freedom of speech. The paper's first section will explain how the recovery of its unique and powerful tradition can provide a basis for the reconstitution of a political culture that does not accept restrictions on free speech. This is predicated on the recognition that it is necessary for rational deliberation in every forum, and therefore non-negotiable to anyone devoted to uncovering the truth or determining how we should be governed. In order to demonstrate that the recovery of Canada's original conception of freedom of speech is essential to addressing threats and challenges to liberty, I will begin by outlining the tradition of free speech in rational deliberation from its inception in classical Athens, and detail in brief how it came to be preserved within the tradition that Canada enthusiastically received at Confederation, by way of scholasticism and the Glorious Revolution.

Canada maintained its commitment to the understanding of the meaning and purpose of freedom of speech that defines that tradition despite the development of a rival concept in the form of freedom of expression, which quickly took root in societies that embraced expressive individualism. Notably, we resisted the trend toward giving the courts and the judiciary the power to define and curtail the right to freedom of expression as seen in the United States — that is, until the patriation of the Constitution and the enactment of the *Charter*.

The second section will detail how the judiciary's proprietary attitude towards the *Charter* right to freedom of expression has proved disastrous. The Supreme Court of Canada expanded the scope of the right to include things that Canadians found abhorrent – including child pornography – but reserved the right to determine whether it considered that this could be limited on the basis of its assessment of a nebulous concept of harm (which it did not in a number of leading cases involving the possession of child pornography). This set the stage for the Court to curtail free speech once the populace had soured on the concept as it had been redefined by the Court itself in the era of expressive individualism.

The third section outlines how the threats to freedom of speech have been magnified after the "great awokening," as the culture of expressive individualism has become replaced by a culture of victimhood. In this new moral culture, the traditional rationalizations of freedom of expression no longer have any currency. Additionally, there are particular features of the culture of victimhood that make it particularly difficult terrain for the advocates for freedom of speech and they must be addressed in considerable detail.

In order to understand why young adults seem so indifferent to the values this right protects, we must explore specific features of victimhood culture, in particular, the orientation to potential harms known as safetyism. Safetyism – which goes beyond even the most hyperbolic extensions of the precautionary principle – has an almost unparalleled power to reinforce what is known as a spiral of silence, in which those who believe they hold unpopular opinions are less likely to voice them. These dynamics demonstrate why the traditional understanding of the importance and meaning of freedom of speech provides the only path forward, since victimhood culture is uniquely brittle and vulnerable to repudiation.

The fourth section demonstrates how best to implement a strategy to reinstate the traditional concept of freedom of speech into Canadian public life. Special attention must be given to the importance of the universities, which are in a parlous state. The case must be made forcefully that in any institution dedicated to finding the truth, any restriction on the right to speak freely is antithetical to that purpose.

The advocates in that forum must make their advocacy a demonstration of the traditional approach, differentiating it clearly from earlier advocates for

freedom of expression. This should be connected to a broader and more fulsome defence of the right to speak freely within the realm of politics, broadly defined, making the case that the seriousness of public affairs reinforces the paramount importance of bold speech, dispensing with any concern that it be "balanced" against any other social good.

Freedom of speech at Confederation and after patriation

The adoption of the *Charter* was not intended to inaugurate a revolution (Morton and Knopff 2000, 28), but it became a watershed between two theories of constitutional rights. Its enactment had profound effects on the popular conception of freedom of speech, which would be transformed into freedom of expression. The first iteration of this concept was the product of a tradition that spanned the two millennia prior to Confederation. The second would emerge gradually in the century between the founding of the Dominion and the patriation of its Constitution, but would quickly became dominant in Canada after 1982.

The concept of freedom of speech was part of the political tradition Canada inherited in 1867; it had been an integral element since its inception in the classical period of the Athenian democracy. In politics, bold and outspoken speech (παρρησια/parrhesia) was not merely a right, but an obligation, as it was necessary for rational deliberation on matters of public concern. This was an extension of another broader intellectual tradition, which also would span the millennia. Its hallmark was the notion that truth emerges from the testing of propositions by rational debate. The works of Aristotle were foundational to both traditions, and remained pre-eminent from his own time until the dawn of the modern era.

In the early modern era, the constitutional order and political institutions that would define Westminster democracies were forged. The classical conception of freedom of speech and debate was integrated at their very heart by the Glorious Revolution, and protected in its seminal rights instrument, the *Bill of Rights,*

1689.[1] In this country, the Fathers of Confederation considered themselves the inheritors of two traditions – that of classical learning and ordered liberty, both of which were predicated on the time-tested notion of freedom of speech and debate. In creating the Dominion of Canada, these framers (the paragon of which was the "first Canadian," Thomas D'Arcy McGee) founded a nation upon that ideal (Wilson 2011, 3–10). However, our commitment to those traditions would be tested by the transformation and evangelization of the culture of our neighbour to the south, which would be redefined by expressive individualism.

In the realm of ideas, the redefinition of the civil right of freedom of speech into a human right of self-expression began with the work of John Stuart Mill. That seed was planted into the good ground of the United States, and it yielded influence by the hundredfold during the "me generation." Its fruition coincided with the institutional entrepreneurialism of the judiciary and its seizure and redefinition of rights discourse. The Supreme Court of the United States would blaze a trail to the moral and political high ground by wielding the concept of freedom of expression. Later, this country's Charter enabled the Supreme Court of Canada to follow the same path. However, the brittle and unstable concept of freedom of expression required redefinition after the era of expressive individualism gave way to victimhood culture, identitarianism, and cultural socialism (Kaufmann 2023).

Freedom of speech and its displacement by freedom of expression

Freedom of speech at the dawn of the West: Parrhesia and the polis

The nineteenth-century context of Confederation was, not coincidentally, the zenith of classical studies. Accordingly, the speeches of its statesmen invariably contained allusions to their Greek and Latin forebears. This could hardly have been otherwise considering the nature of their education and the general esteem for Athens and Rome. These civilizations were lauded as the originators of our most valued traditions — not merely the tradition of oratory, but the tradition of politics. However, the central concept of both traditions at their inception was the same, and that remained the case until a century after the inauguration of the Dominion of Canada.

The connection between the concept of truth and the vision of politics in the Western tradition has been explored by many great thinkers, among

them Hannah Arendt. In her essay "Truth and Politics," she notes that our idea of truth is the older of the two, but only just: "The disinterested pursuit of truth has a long history; its origin, characteristically, precedes all our theoretical and scientific traditions... it can be traced to the moment when Homer chose to sing the deeds of the Trojans no less than the Achaeans.... This is the root of all so-called objectivity—this curious passion, unknown outside of Western civilization, for intellectual integrity at any price" (Arendt 1967/2006, 256).

That integrity shines through the speech of the Athenians from Euripides to Demosthenes, who were devoted to speech in the service of the search for truth: parrhesia. This term is translated in different contexts as "candid speech" or "speaking boldly," although these definitions only describe facets of this priceless inheritance. In the Athenian conception of freedom of speech, one rises in the assembly because of a "duty to improve or help other people (including himself). In parrhesia, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence... criticism instead of flattery, and moral duty instead of self-interest and moral apathy" (Pearson 2001, 19–20).

> *"The concept of freedom of speech was part of the political tradition Canada inherited in 1867.*

As Socrates presented a master class in parrhesia in his trial (Plato ca. 399 BCE/1892, "Apology," 29d–e), it is not surprising that it features prominently in the works of his students, and that of his students' students. Notably, this concept infused Aristotle's treatises addressing the fields of politics and rational disputation. In the Nichomachean Ethics, the great-souled man is deemed to be fit for public affairs, as "he must be open in love and in hate, since concealment shows timidity; and care more for the truth (ἀληθοῦς, alethous: the truth revealed by uncovering) than for what people will think; and speak and act openly... he is outspoken and frank (παρρησιαστής, parrhesiastes, a "free speaker") (Aristotle ca. 350 BCE/1934, 1124b26–31).

Aristotle's works on rational disputation, known in the medieval era as the *Organon*,[2] demonstrate the deep connection between outspoken and frank debate and the process of finding the truth. It is difficult to overstate the importance of Aristotle's approach to rational disputation to the development of the West over the last millennium. The recovery of the treatises in this area that had been lost to Europe for centuries (the *logica nova*) led to what was known as the renaissance of the twelfth century, when the adoption of Aristotelian standards for rational argumentation provided a basis for the foundational texts (and methodologies) of philosophy, law, and theology (namely Abelard's *Sic et Non,* Gratian's *Decretum*, and Aquinas's *Summa Theologica*).

These texts, and the disputational methodology used to teach them, along with the preparatory curricula known as the *trivium* (which was also thoroughly Aristotelian), provided the model for the medieval university, which was replicated successfully from Bologna to St. Andrews to Krakow. Students were expected to be able to argue both sides of every position boldly, and by means of reasoned disputation with others, discover truths in areas where opinion was divided. The conclusions outside of mathematics and logic would always be considered tentative, and subject to refutation by means of the same process of vigorous but rational argument.

Freedom of speech in debate: A cornerstone of constitutionalism

After the Reformation, scholasticism and its methods no longer had pride of place in the canon of the universities, but the importance of rational procedures for achieving reliable knowledge remained entrenched in the deep structure of all the disciplines taught there. The development of the scientific methods (first outlined in Sir Francis Bacon's *Novum Organon*) (Pérez-Ramos 1988, 104–108) led to the introduction of hypothesis testing and the notion of falsifiability, in which a theory that cannot be refuted cannot be right, but in Wolfgang Pauli's formulation, one that isn't even wrong, since there no criteria available for making that determination (Peierls 1985, 184).

In the realms of law and politics, the early modern era showcased the vitality of the tradition defined by parrhesia, which expanded its boundaries significantly during this period. The Stuart monarchs attempted to protect certain topics from criticism and disputation, which included the royal prerogative. Sir Edward Coke held firm, arguing that it was King James I's lack

of background in the disputational procedure that animated the common law that made the King unfit to proclaim the laws (Blackstone 1765, ch. 7, 243). While Coke, the pre-eminent jurist of his (or perhaps any) time was dismissed from his position as chief justice, he brought his inspirational gift for bold speech to the House of Commons, which would become the principal battleground over the meaning and importance of free speech until the Glorious Revolution.

In 1629, Sir John Eliot and two members of Parliament defied royal censure to criticize the Duke of Buckingham (and by extension, the King) during a debate on whether to grant the Crown revenue from tariffs. For reading the text of a purportedly seditious bill, Eliot was put on trial in the Court of King's Bench. In a rebuke to the tradition of free speech defined by parrhesia, Justice Croke said in his judgment that legislators "have no privilege to speak at their pleasure. The Parliament is a high court, therefore it ought to give good example to other courts" (*R v. Eliot, Holles and Valentine* (1629) 3 St Tr 293, at 309–10).

This decision led to outrage, which would be vindicated after the Glorious Revolution. In the *Declaration of Right,* Parliament presented its grievances to William and Mary; this included the charge that the Stuarts had infringed the laws and liberties of the kingdom "by prosecution in the Court of King's Bench for matters and causes cognizable only in Parliament." As the joint monarchs took the throne after hearing these grievances without objection, Parliament proceeded to enact the *Bill of Rights, 1689,* which provided in Article IX: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

The constitutional settlement of the Glorious Revolution formed the template for every Westminster democracy. For over three centuries, no country with that form of government – however far it has drifted away in spirit – has ever attempted to punish a legislator for what he or she has said in the course of debate. The freedom to speak boldly on controversial matters has led to solutions and compromises on even the most contentious of matters.

In what would become the Dominion of Canada, a range of contentious issues divided the colonies and the linguistic and ethnic communities of the populace. While there are numerous examples of the Fathers of Confederation drawing upon the traditions that run from Greece to Canada through Westminster when championing the project of Confederation, it is

perhaps the words of the framer who became the "first Canadian" that are the most instructive.

Speaking boldly in the Confederation debates, McGee made it clear that he was a "strong believer that the parliamentary system was animated by ideals of liberty... [drawing on] Polybius, Montesquieu, Blackstone and Burke.... Liberty, he said, was 'the saving salt which preserves the formation of the Government of a free state from one generation to another.' We built on the 'old foundations' of the British Constitution, said McGee, but animated by the 'electrical stimulus' of the *Magna Carta* and the *Bill of Rights* – the idea that maintains that wherever there is a parliament, citizens have rights" (Gillespie 2017, 30, quoting McGee 1865).

McGee's speech demonstrated why a Parliament in the Westminster tradition guaranteed citizens' rights because he represented the national interest boldly – he was an exemplary parrhesiastes, risking all in the service of truth through debate, and paying the ultimate price for having remained true to the constitutional order that makes liberty possible, founded, as it is, upon freedom of speech and debate. McGee was assassinated in Ottawa, but his legacy lives on, only proving that while you can kill a man, you cannot murder a tradition. Traditions only die when they are abandoned.

From McGee to Mill: The shift from parrhesia to freedom of expression

McGee was eminently correct in his assessment that Canadian society would become something new: neither British nor American. In not merely retaining but choosing to treasure its traditions, the Dominion would create a more cohesive society than its neighbour to the south, which along with the United Kingdom was undergoing a more rapid transformation, adopting political liberalism generations before the Dominion did. Paradoxically, Canada would only align itself with this trend after it obtained the full measure of independence at Patriation. Until then, even its liberals remained conservative.

In the late nineteenth and early twentieth centuries, the social development of the United States was shaped by its formative ideal of rugged individualism. As Robert Bellah noted: "By the middle of the nineteenth century, utilitarian individualism had become so dominant in America that it set off a number of reactions... [as it] seemed to leave too little room for love, human feeling, and a *deeper expression of the self*" (Bellah 1985, 33 (emphasis

added)). Bellah defined the cultural orientation that emerged in response to this demand as "expressive individualism," in which the central question of meaning is how to achieve one's own goals of self-fulfillment and forge a unique and (therefore purportedly authentic) personal identity (see Bellah 1985 more generally).

It should come as no surprise that Mill, who successfully reconfigured the matrix of liberty and self-expression, would quickly achieve pre-eminent fame in the United States, but would only do so much later in Canada. What is more surprising is that American libertarians would show so much appreciation for an English philosopher, especially given that John Stuart Mill's political orientation was unabashedly liberal. The political philosopher and historian of ideas John Gray noted: "If anyone has ever been a true liberal, it was John Stuart Mill.... Mill was an unblemished liberal, but it is this conviction of the inherently progressive character of man and history that is hardest to give any rational credibility" (Gray 1983).

Despite the ample historical evidence refuting the core assumptions of Mill's liberalism (which relate chiefly to his vision of human nature derived from Rousseau), it was precisely this naïve progressivism that ensured *On Liberty's* warm reception in the United States, especially as Mill's surreptitious romanticism (and his covert reliance on Rousseau and Coleridge's interpretation of that tradition) allowed it to fit perfectly into the intellectual void created by the emergence of expressive individualism. As Charles Taylor observed, Mill integrated "a disengaged, scientific utilitarianism with an expressivist conception of human growth and fulfillment, and which owes a lot to German Romanticism" (Taylor 1989, 458).

What is more surprising than the positive reception of Mill's reconceptualization of liberty[3] in a society now defined by expressive individualism is the degree to which it transformed America's rationale for freedom of speech. In the early nineteenth century, Americans considered free speech a sacred inheritance that defined the nation's political culture. The degree to which the reception of Mill's work effected a radical transformation of that understanding is a testament to the dominance of political liberalism in the United States, which was until recently so hegemonic as to not only escape notice, but capable of inducing retrograde amnesia. In essence, we have granted the premises of political liberalism and forgotten that they were once hotly contested, and remain contestable.

Mill's concept of freedom of expression lacks any organic connection with the tradition dedicated to the co-operative search for objective truth by means of participation in the public sphere. Instead, it was derived from Mill's desire to justify the development of an abundance of purely subjective truths, which are inextricably connected with his *desideratum:* the personal liberty of fully autonomous individuals. Mill's own theory of *eudaimonia* relies on the notion that every human being will flourish in his or her own way, a doctrine lampooned archly as "the Sanctity of Idiosyncrasy" (Wolff 1968, 19).

> *The second most important milestone in Canadian constitutional history occurred in 1982: patriation.*

In *On Liberty,* Mill does admit there is value in the "collision of adverse opinions," but not because this is part of a process of testing the truth and refining our opinions collectively. Rather, it is because this process allows each person to understand their own views more adequately; one's own views will now be held more rationally, rather than as a result of mere prejudice: it is "central to Mill's argument, that liberty of thought and expression is valuable... non-instrumentally, as a condition of that rationality and vitality of belief which he conceives of as characteristic features of a free man" (Gray 1983, fn. 10, p. 107).

Indeed, Mill's concepts of liberty and free expression turn the Aristotelian tradition on its head: liberty is no longer connected to active participation in the collaborative project of politics, and freedom of expression is now merely singing the song of myself. However well-disguised, Mill's arguments are subversions of the Western tradition, which were articulated at roughly the same time as the Dominion of Canada was rooted in that venerable tradition. Mill argued that "The despotism of custom is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called, according to circumstances,

the spirit of liberty, or that of progress or improvement" (Mill 1859/2011, ch. III, para. 12). Accordingly, it is not surprising that Canada, founded as it was on respect for peace, order, and good government rather than the pursuit of happiness, would not replace freedom of speech with freedom of expression as quickly as a nation that had already embraced expressive individualism. However, as the influence of the United States grew ever stronger, that it would do so was only a matter of time.

The judiciary and the transition to freedom of expressive individualism

The second most important milestone in Canadian constitutional history occurred in 1982: patriation. Along with the ability to redefine our constitutional order, Canada entrenched freedom of speech by means of Section 2(b) of the *Canadian Charter of Rights and Freedoms.* Few could have imagined at that time that, in a democracy built upon the ability to speak freely on political matters, this right would be transformed by that entrenchment. Granting the judiciary the power to protect freedom of speech – from what the judges perceive as encroachment by the politically responsible branches of the state – would license the redefinition of one of the fundamental freedoms of a dispositionally conservative society into a different form, one aligned with American popular culture. This realignment would, in time, catalyze a broader transformation of uniquely Canadian ideals into the homogenous rights-based norms of political liberalism. The principal actor in this transformation of Canadian society was a newly politicized judiciary.

Before the *Charter*, the most important court decision on freedom of speech in Canada was the *Alberta Press Act Reference*, a judgment from 1938 in which the Supreme Court of Canada ruled that Alberta's *Accurate News and Information Act* was unconstitutional. In its reasons, freedom of speech was defined as a "right of public debate" that was guaranteed at Confederation by the granting of a constitution similar in principle to that of the United Kingdom. Justice Cannon noted that this guarantee prevented governmental censorship: "At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State" (*Reference Re Alberta Statutes*, [1938] SCR 100, 134 (*per* Cannon, J.)). McGee could not have said it better.

Canada's traditional approach to the scope and purpose of freedom of speech was reaffirmed in 1960, with the enactment during the government of Prime Minister John Diefenbaker of the *Canadian Bill of Rights*. Section 1 of that quasi-constitutional instrument states: "It is hereby recognized that in Canada there have existed and shall continue to exist... fundamental freedoms, namely... freedom of speech" (*Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1). This formulation is noteworthy, because by that time the reframing of this right into a human right to freedom of expression was already underway in international law; in 1957, the draft of the *International Convention on Civil and Political Rights* stated that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" (United Nations 1966, 999 UNTS 171, art 19(1)).

The transformation of freedom of speech in Canada from a civil right that guarantees productive debate in all spheres of civil society to a human right that enables personal fulfillment did not occur overnight, and it was not a direct result of the text of the *Charter*, which was itself the culmination of a longer battle in the war of ideas between conservatism and political liberalism. It took almost a century for the ideas of John Stuart Mill's *On Liberty* to become the unparalleled *apologia* for the right to freedom of speech (Berlin 1969, 173–206). Its victory was not secured primarily by defeating its predecessors. Rather, it was because by the 1960s American society had come to resemble Mills' ideal: a highly individualistic society where the right to define one's own values was becoming not merely sacrosanct, but paramount.

In the wake of America's defeat in Vietnam, the expressive individualism that defined the consciousness of the rising generation of baby boomers would receive unparalleled constitutional protection. Between 1969 and 1975, the right to freedom of speech was unmoored from civic participation and reattached to any desire for self-fulfillment, however dubious. In *Stanley v. Georgia,* the Supreme Court of the United States unanimously overturned a case from 1957 that held that the possession of obscene material was not constitutionally protected (*Stanley v. Georgia*, 394 U.S. 557 (1969)). Subsequently, in *Erznoznik v. Jacksonville* the Court struck down an ordnance that prevented drive-in theatres from showing films containing nudity if the screen was visible from a public street (*Erznoznik v. City of Jacksonville*, 422

U.S. 205 (1975)). This line of cases culminates with the decision in *FCC v. Pacifica,* which elevated bawdy comedy to the ranks of protected speech (which will be discussed in detail later in the section titled "Fighting for free speech in a victimhood culture").

These judgments were the first skirmishes of the campaign to turn freedom of speech into a right to free expression, in which the coherency of a message and its function in public debate was of little to no regard, and the fact that someone had a feeling that they were expressing their innermost truth became all-important. Notably, the time-tested social judgment that the production and distribution of obscene materials – which motivated the laws that were struck down – was caricatured as paternalism, bigotry, or mere prejudice derived from the tyranny of custom, as Mill would have it.

The decisions of the Burger Court, as the US Supreme Court was called from 1969 to 1986, consolidated the revolution in jurisprudence that had taken place during the earlier Warren Court, which is frequently described as the most liberal and influential period in its history. Not coincidentally, the Warren Court (1953–1969) was the most popular in American history, with public approval reaching approximately 75 per cent in the 1960s, while public approval for the legislative and executive branches of government plumbed new lows (Stone and Strauss 2020). By realigning constitutional protections framed in the eighteenth century with the liberal values that dominated the late twentieth, the Court in the United States secured an unassailable moral high ground; subsequently, no Republican president, not even one as popular as Ronald Reagan, could coerce it with threats in the same manner as Franklin Roosevelt had during the New Deal era (Leuchtenberg 1995).

It is trite to observe that the Court did not obtain this popularity by convincing the public of the superiority of its interpretation of the limits of governmental authority. Rather, in reformulating its view of rights to give itself the power to strike down the laws of an earlier dispensation, it adapted itself to the ideological preferences of its constituency, which retained some coherency for the moment, despite the centripetal force of an ideology founded on a desire for individual autonomy, subjective truths, and self-fulfillment at any cost.

In essence, the great success of this liberal Court was merely a testament to the greater successes of the liberal project, which "moved away from being merely a negative reaction and toward to positive political vision... [which] transcends national borders" (Kekes 1995, 3). While the parochial liberal

tradition in Canada had a clear conservative streak, as seen in the Liberal Party of Canada's appeal to the "radical centre" during this period (Aivalis 2018, 229), it would be the purest and most advanced version of this ideology that would prevail. The most advanced development of the tradition of the French enlightenment that extended from Rousseau, Kant, and Mill to its American apotheosis would arrive in Canada and transform not merely its jurisprudence, but our society.

It is the power and momentum of this ideological current that explains why the Supreme Court of Canada, which heretofore had been staid and quiescent, would seize upon the *Charter* in 1982 as a means of obtaining a similar role and stature as its new American role model, the Supreme Court of the United States. This, in turn, is what will explain why our most fundamental freedom would be misconstrued, repudiating the tradition that had defined it throughout Canadian history in favour of a conception that would rise and fall in tandem with expressive individualism over the course of only a few decades.

The judiciary and the diminution of freedom of speech

The Supreme Court of Canada seized the opportunity presented by the entrenchment of a *Charter* right to redefine freedom of speech. This led to two profoundly negative consequences, although they would not become fully apparent until after 2015 when the era of expressive individualism drew to a close and the era of identitarianism was inaugurated. However, in the first three decades after patriation, freedom of speech began to be seen principally as a legal concept; as its legal rationale became less compelling, the concept itself was rendered thin and weak.

What is worse, after the judiciary captured the concept of free speech, it was stunted by the elaboration of a justification for the limitation of rights in *Charter* jurisprudence. This was part of a broader pattern, namely, the development of a jurisprudential framework for rights in which even

fundamental freedoms could purportedly be balanced against a broad and open set of factors, including compelling governmental objectives, *Charter* values, and group-based social rights.

The road from a narrow and well-defined right to political speech with very few exceptions to a broader right to free expression that exists at the judges' pleasure has led Canada to a precarious impasse in the past decade, as the right to engage in the forms of speech that lie at its historical core is now also required to be "balanced" against another very compelling consideration: the right of members of protected classes not to be offended. Accordingly, we must not fail to observe how the judiciary smoothed the way towards totalitarianism by producing justifications for the limitation of freedom of speech and outright censorship.

Charter rights and freedom of speech: A mile wide and an inch deep

When the Supreme Court of Canada began to construe the *Charter* right to freedom of expression, it began precisely where the Supreme Court of the United States left off. What qualifies as expression was not merely speech, but rather any "activity" that has "expressive content" (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927). As in the United States, this extended constitutional protection to nude dancing and pornography. In the first decade after patriation, the Court recognized the essential connection between freedom of speech and participation in the political process (*R. v. Keegstra*, [1990] 3 S.C.R. 697). It also recognized the importance of free speech to the search for truth; however, this soon gave way in the decades that followed in favour of paeans to the value of "fostering individual self-actualization, [and] thus directly engaging individual human dignity" (Canada, Department of Justice 2024).

Little Sisters Books v. Canada, decided in 2000, is emblematic of this transformation. A Vancouver bookstore challenged a law prohibiting the importation of obscene material, and the Court struck down the provision that placed the burden on the importer to demonstrate that what they brought across the border was not obscene. In his reasons concurring in part with the judgment, Justice Iacobucci noted that the detention of books at the border caused harm because "artists have suffered the indignity of having their works condemned as obscene" and because "literature [i.e., erotica] has the potential to

show individuals that they are not alone and that others share their experience" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 2000 SCC 69, para. 247).

Elaborating further upon its new approach in this area, in the next year the Court decided *R. v. Sharpe,* which held that child pornography was protected by the right to freedom of expression, concluding further that certain forms of material depicting sexual activity involving children that "pose a negligible risk of harm to children" could not be criminalized, owing to "their potential connection to self-fulfilment and self-actualization" (*R. v. Sharpe*, 2001 SCC 2, para. 120). This judgment created what was called the "private use exception" to the offence of making or possessing child pornography and remains firmly embedded in the jurisprudence of the Supreme Court of Canada as of 2025.

> *The inflation of rights and the ability to limit them at will gives the Court unparalleled power over fundamental freedoms.*

The inclusion of the production of child pornography within the constitutional protections of the right to freedom of expression was repeatedly reaffirmed, including in the 2015 case of *R. v. Barabash,* in which a unanimous Supreme Court allowed an appeal against the judgment of the Court of Appeal for Alberta that had concluded that the private use exception should not apply in the context of two 14-year-old drug addicted runaway girls, whose sexual acts had been filmed by a 60-year-old man who ran a crack house (*R. v. Barabash*, 2015 SCC 29). The Canadian Civil Liberties Association lauded the Court for applying the private use exception, as the judgment accepted the CCLA's submission that this would "ensure meaningful protection for free expression and to avoid unnecessarily intruding into young people's privacy" (Canadian Civil Liberties Association 2015).

Barabash, while abhorrent in itself, must be understood as the end result of the realignment of the right to free speech with the conceptualization of

society in accordance with the priors of a thoroughgoing political liberalism: the value of expression is relocated from the field of productive discourse with others to the barren domain of solipsistic self-actualization, where the only limitation on what is permissible is Mill's harm principle. Accordingly, whereas Section 2(b) of the *Charter* protects every form of expression, including the possession of child pornography, the Court's interpretation of Section 1 in accordance with the harm principle would define Canada's interpretation of fundamental freedoms: expansive in theory, but restricted in practice.

The Supreme Court noted that its reconfiguration of rights into presumptive privileges was in line with the transnational project of political liberalism in *Canada v. JTI-Macdonald:* "Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective" (*Canada (Attorney General) v. JTI-Macdonald Corp*., [2007] 2 SCR 610, para. 36). In *Barabash,* the Court purported to balance the fundamental freedom of expression and the "important governmental objective of protecting children from harm" (or to be more precise, depraved sexual exploitation) (*R. v. Barabash*, 2015 SCC 29, para. 15). This should have been a wake-up call for those who had not grasped the import of the transformation of freedom of speech into freedom of expression. If a constitutional right to freedom of expression has been construed so broadly that the Court needs to consider whether the criminalization of child pornography is a reasonable limit because of the harm it inflicts on children, perhaps it is time for the Court to reconsider that approach to freedom of speech.

Naturally, the Court did not, and likely will not reconsider. The inflation of rights and the ability to limit them at will gives the Court unparalleled power over fundamental freedoms, especially freedom of speech. When it comes to the Supreme Court of Canada's jurisprudence, one can paraphrase Job: "The Court gave, and the Court hath taken away." However, for the Supreme Court to maintain its institutional dominance and sacrosanct unquestionability, it must remember that when it comes to giving and taking away from the scope of rights protection, for each of these, there is a season. Certain members of the Court were more alert to the chill winds of identitarianism than others, but unfortunately, as we will see below, they took the opportunity not to change course, but merely to trim the sails.

The Great Awokening and the retrenchment of the right to free speech

After the upheavals of the early twenty-first century, it did not take long for the social ethos to change from "if it feels good, do it" to "check your privilege." It is difficult to pinpoint the crystallization of this transition, but it seems to have occurred sometime between 2013 and 2016. When discussing the Canadian jurisprudence on freedom of expression, this transformation is best illustrated by the legal battle between the singer Jérémy Gabriel and the comedian Mike Ward.

On the basis of a short bit in a comedy routine, the Quebec Human Rights Tribunal found Ward to have interfered with Gabriel's "right to full and equal recognition of the right to the safeguard of his dignity" and was fined $42,000 (*Gabriel v. Ward*, 2016 QCTDP 18). The Supreme Court was the final arbiter of whether Ward's "freedom of expression had been used to disseminate expression that force[d] [Gabriel] to argue for [his] basic humanity" (*Ward v. Quebec*, 2021 SCC 43, para. 63). The majority, while it concluded that the jurisdiction to penalize comedy routines was a constitutionally valid limitation on freedom of speech, determined that Ward's speech had not crossed that threshold. The minority disagreed, agreeing with the decision below that Ward's jokes were "a particularly contemptuous affront to the... identity and one that has grave consequences" (*Ward v. Quebec*, 2021 SCC 43, para. 160 (*per* Abella, J.)).

The Court's decision was split five to four. Had one more Justice joined the dissenters, the law of the land would be that laws that punish comments on the basis of harm to members of protected groups are constitutional, as this would not be protected by freedom of expression. Notably, Justice Abella's dissenting reasons collapsed the distinction between speech and action in a manner characteristic of the transition to identitarianism: "We would never tolerate humiliating or dehumanizing conduct... there is no principled basis for tolerating words that have the same abusive effect. Wrapping such discriminatory conduct in the protective cloak of speech does not make it any less intolerable" (*Ward v. Quebec*, 2021 SCC 43, para. 116 (*per* Abella, J.)).

The dissenting justices argued "it is immaterial whether Mr. Ward intended to mock Mr. Gabriel because he has a disability [or] whether Mr. Ward was joking or being serious" (*Ward v. Quebec*, 2021 SCC 43, para. 50).

Applying this argument to other types of speech, it is possible to conclude that speech that makes a thoughtful political point may be punished, even if there was no intention to cause harm. Justice Abella candidly admits that this goes beyond the category of hate speech as it exists in Canadian jurisprudence (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11), as here what falls outside of constitutional protection is that which causes harm to individuals by means of discriminatory interference with their right to dignity.

> *We should take note of the deception inherent in the idea of "balancing" rights.*

Accordingly, the question of whether freedom of expression protects the speaker is determined by how this is balanced against the "dignity and honour" of a member of a protected group. Justice Abella states that the right to freedom of speech "may not be exercised in a way that is disproportionately harmful or abusive" to that honour and dignity (*Ward v. Quebec*, 2021 SCC 43, para. 190 (*per* Abella, J.)), where the disproportionality is evaluated by reference to an expansive (and open-ended) set of factors, some of which are particular to the circumstances of the case in question. Accordingly, she concluded that awarding punitive damages against Ward "benefits society as a whole" (*Ward v. Quebec*, 2021 SCC 43, para. 223 (*per* Abella, J.)).

Three themes of Justice Abella's reasons deserve particular consideration. First, we should take note of the deception inherent in the idea of "balancing" rights. Whenever rights are purportedly balanced, the reality is that the jurist accords priority to one or the other, while the range of considerations that are recited serves as a smokescreen that conceals the jurist's considerable freedom of action to prefer one to the other. In Ward's case, the dignity and honour of the member of the protected class was simply prioritized over the freedom of speech of the comedian who criticized him.

Second, it should be noted that the concepts of dignity and honour are not synonymous: in fact, they are antonyms, which describe the mores

of entirely distinct eras. Cultures defined by the concept of dignity emerged after the rise of the values of egalitarianism, self-control, and strong legal cultures, as these made the earlier norms related to the defence of honour obsolete. An honour culture is typically found where there is only a tenuous state presence, where self-worth and social status are fragile and thus must be protected from insult at all costs. Duels were once fought over slights to honour; conversely, the modern individual living in a culture that prioritizes dignity should merely consider responses to these insults beneath their contempt; one cannot be tarnished by anything less than one's own failings, as no one can make you feel inferior without your consent.[4]

Honour demands respect from others; dignity is a function of stable and abiding self-respect. The conflation of these two concepts in the Court's reasons is an indication that society has undergone a transformation, as what separates honour from dignity is now seemingly a distinction without a difference. The fact that one of the leading liberal jurists of the English-speaking world has adapted to this social change so adroitly demands an explanation, which I will discuss in the next section.

That discussion must also pay heed to the third notable element of Justice Abella's reasoning, which is that preventing harm to the honour/dignity of members of protected classes is essential for the protection of society as a whole, insofar as it is purportedly essential to preserving social harmony. Once again, this element of Justice Abella's reasoning seems to blur the boundary between the modern state and what preceded it, namely, cosmopolitan empires in which defusing the tensions between social groups in the general populace needed to be the central preoccupation of the imperial authorities. Finally, one should not fail to take note of the *leitmotif* that is so omnipresent in her work that it fades almost imperceptibly into the background – the implicit premise that it is judges who should assume this responsibility, along with those of a Court which has members who consider it the "final adjudicator of which contested values in a society must triumph" (Abella 2018).[5] The fact that this point of view is discordant with democracy should not pass without mention.

Fighting for free speech in a victimhood culture

The incoherent notion of balancing rights is part of the sleight of hand that allows the justices to place their fingers on the scales of justice. In the era when emotivism was political liberalism's guiding light (indeed, as Alasdair MacIntyre noted, we lived through an era in which all moral judgments were thought to merely express feelings (MacIntyre 2007, 11 –12)), jurists did this to reinforce the moral heft of the right to self-fulfillment and self-actualization. Those values could only be outweighed in particularly outrageous examples of child pornography. If the Court adopted this paradigm of rights adjudication so that it could increase its popular appeal and institutional power relative to the other branches of the state, we should consider what the rapid movement of the justices' fingers from one side of the scale to the other might indicate about which values are becoming more appealing to society at large.

Until recently, judicial censure of a comedian would have risked unflattering comparisons to the secular martyrdom of Lenny Bruce,[6] but in 2021 Justice Abella displayed no anxiety that she would be labelled an illiberal prig for scolding Mike Ward. As her reasons in *Ward* are directly contrary to one of the most fulsome judicial endorsements of expressive individualism as the key justification for freedom of expression, this shift warrants further attention.

In 1978, the Supreme Court of the United States decided *FCC v. Pacifica Foundation*, which resolved the issue of whether a radio station in New York City that aired George Carlin's "Filthy Words" routine could be fined by a regulator. The Court ruled that it could, but noted that Carlin's act (which included the word "c*nt"), was not obscene, and thus could not be banned from the airwaves. From that point, until about a decade ago – that is, until the end of the era of expressive universalism – the notion that harm could done by means of words had been treated in the jurisprudence of both the US and Canadian Supreme Courts with great suspicion, as if, in Justice Brennan's formulation, this assertion was no more than camouflage for "the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting and speaking" (*Moore v. East Cleveland*, 431 U.S. 494, 431 U.S. 506–511 (1977) (Brennan, J., concurring)).

This section will attempt to put this reversal into context by demonstrating that the dignity culture that could exist in harmony with expressive individualism is no longer extant, having been replaced by a victimhood culture. The first subsection will explain the critical differences between these antithetical moral cultures, while the second will discuss the difficulties and opportunities this creates for those attempting to reintegrate a robust and meaningful appreciation of the importance of free speech into Canadian society.

The Great Awokening and the rise of victimhood culture

In their path-breaking sociological theory, Bradley Campbell and Jason Manning note that the new moral dispensation after the Great Awokening of 2014–16 is defined by a rejection of "long held norms about when to take offense, how to deal with offenders, and how to present [oneself]" (Campbell and Manning 2018, 21). It reconfigures the norms of both honour and dignity cultures, combining the imperative to respond strongly to minor offences of the former with the appeals to authority of the latter. More fundamentally, it creates an entirely new basis for moral standing. In an honour culture, one who defends his honour bravely is deemed worthy; in a dignity culture, one who ignores and is unaffected by slights on the basis of self-assurance is thought to be more praiseworthy. In victimhood culture, it is the status of being oppressed that grants someone elevated moral status.

Victimhood culture was not created out of thin air. Certain social groups had already received the status of being protected classes, notably from courts at the apex of their popularity and social influence in the era of expressive individualism, such that they could engage in extensive social engineering in service of liberal values such as egalitarianism. However, within victimhood culture, being part of a protected class confers a sacred status in itself, as it is taken to be a recognition of the intergenerational trauma engendered by insult and stigma, rather than a response to these groups' inability to participate effectively in the political process without assistance from the state. This shift is essential to Eric Kaufmann's (2023) definition of wokeness, in which the first component is that these social groups obtain a sacred status from marginalization.

Accordingly, in victimhood culture members of the protected classes are no longer seen as individuals who might face discrimination that prevents them

from achieving the milestones of integration into mainstream society (which is why civil rights law was developed: to address the problems of "discrete and insular minorities").[7] Instead, they are hallowed victims who are oppressed by the absence of equality of esteem, a shift in viewpoint that Kaufmann labels a transition from *economic socialism* to *cultural socialism*. Equally, one might say that our new theology is: "Blessed are the poor in the esteem of others, for theirs is the kingdom of heaven."

The corollary of the cultural socialist view that the oppressed have been held down throughout history through the withholding of esteem (rather than exploitative economic arrangements rationalized in part by dehumanizing rationalizations made after the fact) is the notion that members of these groups, which are now seen as sacred, experience offence in a different manner from others. Insults directed against them are now thought to constitute violent assaults, powerful enough to induce self-harm (or even self-slaughter). Accordingly, this provides the justification of the final component of the definition of wokeness: The making sacred of racial and other historically oppressed identity groups, leading to a moral panic over perceived slights and a demand for institutional interventions to punish offensive speech.

The final clause of this definition of wokeness is where the residuum of dignity culture can be located. When speech that is purportedly critical of or insulting to sacred identities is reconceptualized as violence, this inevitably leads to a call for society's institutions to respond. This explains the narrative of Justice Abella's reasons in *Ward*: Gabriel's identity is reduced to its sacred contours: he is a "disabled child" who is rightfully offended by a joke at his expense. Accordingly, social institutions take seriously two previously untenable claims: that this is offensive (essentially blasphemous), and that this could have led to suicide, in which case Ward would have been responsible for Gabriel's death. The sacred victim made an appeal to condemn and punish a wicked oppressor, and four justices obliged by trimming their consciences and the Court's jurisprudence to fit the current year's new fashions.

The courts, despite rampant judicial activism in the areas of rights adjudication, remain essentially a reactive institution. The only reason the courts could insert themselves into the rhetorical dispute between Gabriel and Ward is because of the power now wielded by social institutions. Legislatures set up quasi-judicial administrative bodies and gave them a roving commission to respond to any form of speech that victimhood culture considers outrageous.

That sort of inquisitorial body, which hears claims that would never have been considered within the jurisdiction of any court of law, embodies the ideology of victimhood culture: claims of offensive speech against members of protected classes must have a forum where they will be heard, and where their sacred status will be ritually affirmed. Every office of human rights, or diversity, equity, and inclusion office (and increasingly every department of human resources) is implicitly dedicated to this function.

What is worse, owing to legislative approval and funding, these institutions now exist within universities, institutions that were explicitly founded on the premise of free and open inquiry. As the education scholar Joanna Williams has noted, free speech is "integral to the collective enterprise to critique and advance knowledge" (Williams 2016, 20). Accordingly, as Greg Lukianoff notes, limitations on that mandate "endanger the entire academic endeavour" (Lukianoff 2012, 18). If students learn that free expression must be balanced against the risk of harm even within institutions that are meant to further knowledge, it is unlikely that they will ever be able to appreciate the importance of bold and controversial political speech. As difficult as it will be to fight uphill on this terrain, this is where the decisive battle will begin.

The momentum of a new moral culture and the spiral of silence

Campbell and Manning issued a chilling warning about the consequences of the entrenchment of wokeness and victimhood culture in education: "These changes can penetrate the moral socialization of children and youth and result in younger generations who are trained in the ways of the new moral culture and are much quicker to engage in its defining behaviours. The more widespread these moral ideas and practices become, the more advantageous it becomes to adopt them. This is especially so when the moral culture becomes common among elites, rendering competing moral cultures a mark of low status" (Campbell and Manning 2018).

This is precisely what young Canadians are being taught: To get ahead, you must either believe or feign adoption of the view that criticism is equal to violence, and agree that it should be suppressed. Insofar as post-secondary education remains a prerequisite for membership in the professional-managerial class that has an outsized influence within Canada's political

culture, the elimination of freedom of speech within the university is exceptionally troubling, as it prefigures the creation of a hermetically sealed political culture.

The dynamics of a victimhood culture incompatible with freedom of speech can best be explained with Elizabeth Noelle-Neumann's concept of the "spiral of silence" (Noelle-Neumann 1984). Her theoretical model proceeds from a truism of persuasion theory: humans have a powerful and natural drive to secure social acceptance. In order to achieve acceptance, they express opinions they believe reflect the prevailing dominant views, which they assess not only by means of personal interactions, but through exposure to official pronouncements and the mass media. Accordingly, their ability to accurately gauge public opinion is both skewed and easy to manipulate.

> *The elimination of freedom of speech within universities is exceptionally troubling.*

The simplest way for those in positions of power or influence to alter the popular perception of the dominance of the preferred opinion is to dissuade people from stating contrary views. This not only reinforces the perception that few people disagree with the preferred narrative, but it also causes observers to overstate the percentage of those who agree with it, creating a self-reinforcing cycle.

Other key insights from the theorists of public opinion who built on Neumann's research were that the spiral of silence was more powerful in societies that value social conformity, and that its effects were more pronounced when the opinions at issue are morally and emotionally charged (Scheufele and Moy 2000). It should be obvious that the question of whether to accept the assertion that a member of a protected class is harmed when their moral authority is questioned is exceptionally likely to create a spiral of silence, as it is a central tenet of victimhood culture that opinions that contradict it should be suppressed, precisely because they are morally reprehensible.

Contemporary arguments for the suppression of free speech have a special resonance, which can be attributed to the psychological effects of the educational paradigm that Greg Lukianoff and Jonathan Haidt labelled "safetyism." Safetyism prepares the campuses for the devaluation of free speech by promoting three "great untruths": the first, that of fragility, states that challenging ideas is harmful. The second, that of emotional reasoning, promotes the view that arguments that stem from emotion are inherently more reliable that those based on reason. The third, that of the binary nature of good and evil, fuels polarization by dehumanizing the members of out-groups who disagree (Lukianoff 2014).

These three great untruths are entirely consistent with cultural socialism and victimhood culture. Unfortunately, Lukianoff and Haidt have also demonstrated that they correlate closely with anxiety and depression. As fragile mental health reinforces the need for the bolstering of self-esteem from one's peer group (and one's larger circle of parasocial relationships on social media), it provides an environment in which the spiral of silence will achieve unprecedented levels of power and momentum.

The good news is that the stultifying environment of rigorous informal censorship also magnifies the influence of outspoken critics. Research in social psychology addressing the power of what is called minority influence has also yielded significant insights into which factors allow the dissenters to make the most of that magnified effect. Noelle-Neumann concluded that those who continued to voice unpopular opinions because of their strong commitment to deeply held and well-understood principles were far more likely to serve as a spark for the ignition of broader social change in a social context defined by a fragile majority opinion that is founded on censorship and incomplete information (Noelle-Neumann 1984).

Accordingly, one can conclude that despite the existence of a spiral of silence in certain influential sections of Canadian society that has been intensified by novel psychological and sociological dynamics, there is ample reason to believe that a coherent and principled minority committed to free speech as a basis for truth finding and political engagement might yet prevail. In other words, parrhesia has lost none of its power. What remains to be discussed is how to operationalize these insights about how it can best be deployed.

Restoring freedom of speech to Canada's academic institutions

If Canada is to avoid a slide into managed democracy controlled by the regulation of opinion in electronic fora, those committed to free speech as an indispensable element of our national identity must reassert that it is not merely a right possessed by individuals in service of self-actualization or fulfillment. Rather, we must demonstrate that it is indispensable to every institution devoted to discovering and transmitting the truth – and essential to every public body that mediates and resolves disputes about the common good when establishing public policy. The aim of those who are already active in public life must be to demonstrate that they will not accept the prospect of a managed democracy instead of the constitutional order we inherited, one predicated on freedom of speech and debate (Wolin 2008).

Accordingly, this battle for hearts and minds will be fought on two key fronts, which I will detail in the subsections that follow. The first is dedicated to the field of education, particularly at the post-secondary level. Those within the universities will be fighting uphill on unfavourable terrain, and it will be very tempting to negotiate for concessions rather than to refuse to compromise on the principle that the search for truth is the essential precondition of any university worthy of the name. While the prospect of success appears bleak owing to the state of demoralization among both professors and students, there are instructive examples of how to re-ignite the appreciation for constructive debate and stimulate genuine enlightenment.

The second front is the much broader field of political action. While not every Canadian is a student or a teacher, we are all citizens. Here, the call to action is for everyone to participate in the democratic project as the Fathers of Confederation envisioned, if only by being empowered to voice their opinions boldly and without shame. Citizens must insist they are not merely the bearers of the official values projected into our constitutional order by jurists and bureaucrats, but equal participants in the determination of society's goals and priorities. They must also demonstrate that fearless speech is absolutely necessary to maintain the practice of genuine politics, by using parrhesia to achieve desirable public policy.

In the near future, there is likely to be serious conflict on a number of particularly controversial issues, including further restrictions on immigration. Every engagement on these issues will be an opportunity to demonstrate that there can be no rational discussion or genuine political activity whenever certain opinions are deemed presumptively invalid, and no true consensus or democratic legitimacy can be achieved without a level playing field for the articulation of every political opinion on these topics.

Victory on these two fronts would position the defenders of free speech for a general counteroffensive against the proponents of managed democracy and its false consensus of compliant and officially sanctioned experts (Ajzenstat 2003). Having defeated the enemies of democracy in the course of their war of position, we can then fight a war of maneuver, in which the ideology that underpins the rejection of free speech can be exposed and defeated.

The ruin of the mass university and the return of true teaching

While it may not be obvious to the general public at the moment, our universities are in real peril. The business model is under severe stress owing to funding shortfalls that are due to shifting governmental priorities and changes to immigration policy, but more importantly, the rapid development of artificial intelligence is challenging the *raison d'être* of post-secondary education. Pedagogical models that are predicated on the transmission of information are now outdated, and the value of the credentials being conferred will soon be in freefall.

Faculty members who can instruct students in skills that involve the ability to evaluate arguments will still be in demand, especially those who are capable of inspiring students. This requires the ability to demonstrate and model the importance of learning, intellectual growth, and of attaining prudent and discerning judgment.[8] These are qualities that correlate with respect for the intellectual traditions built on the foundation of freedom of speech. Professors of this ilk – who will remain worthy of the name in an intellectual environment defined by access to information – can advocate for the primacy of freedom of speech in academia from a position of strength.

Additionally, it is becoming more apparent that the senior administrators and other controlling minds of the universities (executives of faculty associations, general counsel, boards of directors) are beginning to grasp that

the extreme restrictions on freedom of speech they have implemented are now a liability. Not surprisingly, they are now inclined to compromise. Institutional neutrality, which was a key demand of those defending academic freedom in recent years, is now being discussed in the pages of the house organ of the Canadian Association for University Teachers (McInnis 2024).[9] No more than two years ago such a conciliatory approach to the topic would have raised howls of outrage, but anyone astute enough to recognize political realities has already grasped that provincial governments are not going to provide continued funding for adult daycares that provide nothing more useful than the amplification of grievances.

Despite the importance of institutional neutrality, advocates for free speech should not accept these new policies as proof of good faith and agree to any compromise on this basis. For example, they should not agree to even pay lip service to any policy that purports to protect the emotional safety of students. Regardless of whether the trade-offs between academic freedom and the imperatives of safetyism are being struck on terms that appear less stifling, accepting this would entail conceding numerous hidden premises.

Provincial governments are not going to provide continued funding for adult daycares that provide nothing more useful than the amplification of grievances.

Most fundamentally, academics must reject the premise that the "balancing" of rights is not merely prioritizing favoured values.[10] Second, academics should be uncompromising in their disdain for the notion that administrators (i.e., bureaucrats and commissars) could ever be safely entrusted with the power to decide these issues. The idea that bureaucrats would make decisions that are not timorous, self-serving, and indifferent to the fundamental mission of the institutions in which they serve is risible at best.

Finally, we must reiterate continuously that extraneous objectives distract from the paramount goals of education. If the large universities survive, it will be because they have grasped that they must focus exclusively on education. Envisioning universities as "safe, inclusive, and respectful campuses" in which "all members [note the omission of "students"; at least "members" is better than the cloying neologism "learners"] will thrive" (Wilfrid Laurier University Undated b) inevitably creates playpens with bureaucratic babysitters, rather than fraught and perilous arenas where students experience revelation and enlightenment as the truth is revealed.

As Arendt noted in her posthumous monograph: "The life of the mind is a sheer activity, unquiet, restless, never letting up... it is a dangerous life, for the thinker is always at odds with the common sense of his time, and yet it is the only life in which the mind can find its home" (Arendt 1978, 176). If universities do not tell students the truth about the nature of this life and prepare them for living it, what they provide is not education. At best, it is the extension of an indolent adolescence by means of an inefficient transfer of information. This is not a good business model in a recession.

In short, it is not time for a strong defence of free speech in academia, but an opportunity for a good offence: it is time for speaking frankly in the service of determining the truth about the nature of a university. Those who truly love wisdom must state boldly that institutions that disregard or distract us from the only means of discovering the truth were always bound to fail. All is not lost; parrhesia may be of use. We might yet convince the best among our youth that it is still possible to have a meaningful education founded on an uncompromising search for truth.

There are salutatory examples for Canadian academics to emulate: Jordan Peterson's remarkable popularity with young adults attests to the vast reservoir of demand in that population for scholars who model an insistent demand to speak the truth regardless of the consequences. Whether or not our educational institutions will survive depends on whether we can prevail upon them to embrace the courage and clarity he has modeled. State-sponsored universities will not remain in operation merely to provide timorous scholars with employment and pensions. To preserve them, we must be uncompromising in our articulation of the truth. Within the universities, the hour is at hand, while in the broader realm of politics, the time is near.

Parrhesia in the public square: Rebuking "official values"

In this new era, defences of the freedom to articulate political opinions boldly and freely in the public square must also be uncompromising. It is rapidly becoming evident that the spiral of silence on certain topics has led to catastrophic dysfunction in a number of key areas of public policy.[11] Broad powers to censor social media would double down on this failed strategy and make it far more difficult to reverse course where necessary to the great detriment of those hardest hit, namely, the youngest generations of Canadians.

Canada sorely needs an approach that proceeds from the understanding that free speech is a political necessity. In the realm of politics, Canadians must spurn the fatal compromise – the tendency to hedge the argument. It is counterproductive to state that everyone has a right to say whatever they want, "however repugnant that is" (with the defender's mouth pursed into a moue of distaste whenever that caveat is delivered), or with the statement "though of course I am in complete disagreement" appended. These statements have the paradoxical effect of intensifying the spiral of silence, as they magnify the perception that the dissenting speech is contrary to the majority opinion. They signal that an opinion can be tolerated, but only by those who are virtuous enough to entertain statements that are ignorant, or gauche.

The same paradoxical effect will be catalyzed by weaker forms of rhetorical distancing, which include statements such as: "you might disagree, but he's got a right to his opinion." That statement is counterproductive, because it is founded implicitly on the values of expressive individualism. One's "right" here is characterized as expressive, in the service of self-fulfilment, and this defence presumes that these are still universally held values. One should say instead that "if you think she's wrong, say why; I'm not going to accept that she doesn't have a right to say that." This approach reorients the listener to specific purpose of speech in the public square, which aims to shape the debate in the service of particular outcomes; that requires assertions to be taken seriously, and not merely tolerated as expressive outbursts.

At present, defences of freedom of expression inevitably wilt into futile appeals not to inhibit expressive individualism. Instead, parrhesia should be employed whenever there is an attempt to refute political speech with anything other than rational responses. At present, should someone disagree with an officially sanctioned perspective, such as permissive immigration

policy, objections will likely be predicated on *pathos* or *ethos* rather than *logos* (Aristotle ca. 400 BCE/2004). These (formulated charitably) might include "you are causing harm to me by not recognizing the importance of my lived experience" or "an uneducated person simply cannot understand the economic imperative for temporary foreign workers."

In order to defend freedom of speech as a means of getting to the truth and formulating rational responses to serious concerns, the response of those committed to free speech must point out that these responses are simply irrelevant and beside the point in a rational discussion, as pointedly as might be required in the circumstances. If free speech is to have any meaning and function within political discussions, a blunt rejoinder must be made to any attempt to shut down discussions along those lines, i.e.: "I'm not going to accept that every proposal that immigration should be reduced is racist and can't be discussed."

> *Safetyism has produced terrible effects on the mental health of our youth.*

Both the tone and content of parrhesia are vital to reorienting political discussion with the aims of rational discussion. However, given that the manipulation of our perception of majority opinion has been successful to date, it is likely that bold speech will prove shocking to those listening and will encourage them to stigmatize these rejoinders rather than to engage with them. While unpleasant, this reaction should be considered an opportunity to make an even more important point in reply: It is unacceptable to attempt to shut down speech because of the status of the speaker and the hearer, or because of their alignments with the perceived majority opinion – even if this has purportedly solidified into a sacred and undeniable truth. This must be reiterated at every possible opportunity.

Finally, by insisting that these purportedly inopportune arguments must be taken seriously, defenders of free speech can reinforce another vital point: It

is essential to air these arguments, however unpleasant that might be to those who have managed to place these topics outside of the Overton window.[12] We must make it plain that suppressing them has caused irreparable damage to Canadian society. Safetyism has produced terrible effects on the mental health of our youth, the amplification of identitarianism and its justification for discrimination under the guise of the remediation of past injustices has eroded national pride, and our inability to have difficult discussions about immigration is leading us into a crisis of faith in law and order.

Canadian society has been weakened to the point of serious decline, all for the sake of avoiding candid disagreements. Most of the harm has been inflicted on the younger generations, who now face censorship that aims to disguise the monumental failures of public policy. The incompetent management of processes and institutions at the state level has been camouflaged by irrational arguments from authority and by the manipulation of the perception of majority opinions, so that criticism of officially established political opinions could be rebranded as irrational populist outrage. Defenders of free speech need to be fearless in the service of recovering our tradition of political participation, and assert that our only path to salvation will come from engaging in all the arguments that were pushed aside by a professional managerial class that believed it had all the answers, guided only by the vision of the anointed (Sowell 1995).

Conclusion

Freedom of speech can only be preserved as a feature of Canadian public life if its advocates can demonstrate its necessity. The more serious the issue – and the greater the importance of determining whether the assumptions, premises, and conclusions undergirding public policy are correct – the more we need to engage in bold and unrestricted speech.

In order to make a timely contribution to debate, one must first know what time it is. Those who would defend freedom of speech in Canadian public life must be clear that we no longer live in a culture defined by expressive individualism. It has been replaced by the culture of victimhood. The failure to

recognize this new era has led to an intensification of the crisis of freedom of speech, as most young Canadians are completely unmoved by the justifications for freedom of expression that had resonated with baby boomers.

Additionally, within victimhood culture, young people, especially university students, are likely to perceive the spiral of silence as particularly oppressive. In that social environment, the use of parrhesia is likely to be particularly effective in breaking the spell of sustained censorship of contentious but intuitive opinions. The more that this gives space to younger citizens to discuss how they are affected directly without fear of ostracism, the more likely it is that advocates for free speech can convince them of the universal importance of bold speech.

Moreover, younger citizens are increasingly likely to understand that they are unlikely to live in a society as prosperous and meaningful as the one their parents and grandparents enjoyed unless they are free to propose radical solutions to the serious problems impeding the return to excellence in public education, economic development, public safety, and limited opportunity. The more they attempt to speak their mind, the more they will grasp the importance of free speech to achieving desirable social outcomes. As they and others search for the truth in good faith by voicing their own opinions, it will be apparent it was no coincidence that Canadian society reached its highest level of liberty and prosperity when we appreciated the importance of freedom of speech and debate, not when we entrusted it as an indeterminate human right to an unaccountable judiciary.[13]

The more that Canadian society opens itself up to free speech on controversial topics, the more difficult it will be to reimpose top-down control of a narrative of official values by means of an artificially induced spiral of silence. The practice of parrhesia will make it abundantly clear that to live meaningful lives in a political community devoted to achieving our vision of the good life, we must engage in continuous debate, as "moral life is not a science, nor is it capable of being made one; it is a practice, and its intelligibility is that of a tradition" (Oakeshott 1991, 61). This is in line with the Canadian society that the Fathers of Confederation created and their successors maintained, even as its demography was transformed: as Brian Lee Crowley noted, "Laurier thought that people would flock to Canada (as they did during his premiership in record numbers) because of our long tradition of freedom, that people could come to Canada precisely because here they would be free to be themselves,

not pieces on a chessboard to be moved around at the will of those in political power" (Crowley 2020, 321).

When young Canadians join in the battle of ideas on equal terms, they can begin to grasp that they have also joined a tradition that connects them with their forebears who constructed a free and prosperous democracy on that same basis. Accordingly, they might be inclined to be the inheritors of the same tradition as Thomas D'Arcy McGee, rather than the debilitating state-sponsored shame that empowers the spiral of silence that leads inexorably to cult-like ideologies of repudiation and self-denial. They can share in the pride of rebuilding a free and democratic Canada. The future of this nation belongs to the great-souled citizens who are willing to speak boldly. MLI

About the author

Ryan Alford received his doctorate in public, constitutional, and international law from the University of South Africa. He was awarded his master's degree from the University of Oxford and his law degree from New York University. He is called to the bar of Ontario and is an attorney and counselor-at-law of the state of New York. Upon receiving his law degree, he served as a judicial clerk for the Honorable Robert L. Carter of the Southern District of New York and the Honorable Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit.

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He also brought a successful constitutional challenge to the provisions of the *National Security and Intelligence Committee of Parliamentarians Act (Alford v. Canada (Attorney-General) 2022 ONSC 2911* (CanLII). In that case, the Ontario Superior Court of Justice struck down a federal statute that abridged freedom of speech and debate in Parliament for implicitly amending the unwritten provisions of the Constitution of Canada – the first time that any Canadian court has done so. MLI

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Endnotes

1 *Nota bene:* English statutes will be identified using the modern dating conventions in force in the United Kingdom.

2 *Note bene:* Reducing the subject of these works to "logic" is an inexcusable mistake.

3 Mill felt that personal and social progress needed individual liberty to flourish and that peoples' freedom of thought and freedom of expression should be protected from political interference or state power, as long as those expressions didn't harm others.

4 This pithy formulation is typically attributed to Eleanor Roosevelt.

5 On October 26, 2018, Abella wrote a *Globe and Mail* article entitled "An Attack on the Independence of a Court Anywhere Is an Attack on All Courts." (And yes, she really said that the Supreme Court should be the final adjudicator of which societal values should triumph; points for being candid, at least).

6 The capper of this narrative was the decision by the Republican governor of New York, George Pataki, to posthumously pardon Lenny Bruce for his obscenity conviction in 2003.

7 This is the famous "footnote four" of Justice Harlan F. Stone's opinion in United States v. Carolene Products Company, 304 U.S. 144 (1938), which provided the first foothold for civil rights protections in American jurisprudence.

8 There are numerous approaches to how this might best be accomplished, the most rigorous and challenging perhaps being that outlined by Philip Rieff: "The teacher who refuses to be a relativist, who dares to say, 'this is true, that is false,' risks all but gains the chance to save his students from the void of a cultureless world" (Rieff 1985, 47).

9 The position taken is in favour of "institutional restraint," positioned as a compromise position on institutional neutrality.

10 See, for example, the "Inclusive Freedom" section in Wilfrid Laurier University's (Undated a), Statement on Freedom of Expression: "Laurier recognizes that at times free expression may harm and/or further marginalize community members from visible and invisible minority groups, including, but not limited to those from groups based on Indigeneity, class, race, ethnicity, place of origin, religious creed, spiritual belief, sexual orientation, gender identity and expression, age, and ability. In such cases, the university encourages its community members to respond with an educational and intellectual approach that increases awareness and consideration of diverse positions. The university reaffirms its commitment to creating an inclusive environment for all Laurier community members."

11 The most pertinent timely example is the background to the announcement of a National Statutory Inquiry into Group-Based Child Sexual Exploitation and Abuse in the United Kingdom (i.e., the government's response to the on-going problem of so-called grooming gangs).

12 That is, the window of discourse – topics that are considered politically and socially acceptable. For more explanation see, generally, Mackinac Center for Public Policy, "The Overton Window."

13 Indeed, the freedom of speech that criticizes the judiciary must not be neglected either. See Sérafin and Sun (2025).

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is worth fighting for.

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MLI has been active in the field of indigenous public policy, building a fine tradition of working with indigenous organizations, promoting indigenous thinkers and encouraging innovative, indigenous-led solutions to the challenges of 21st century Canada.

– The Honourable **Jody Wilson-Raybould**

I commend Brian Crowley and the team at **MLI** for your laudable work as one of the leading policy think tanks in our nation's capital. The Institute has distinguished itself as a thoughtful, empirically based and non-partisan contributor to our national public discourse.

– The Right Honourable **Stephen Harper**

May I congratulate **MLI** for a decade of exemplary leadership on national and international issues. Through high-quality research and analysis, **MLI** has made a significant contribution to Canadian public discourse and policy development. With the global resurgence of authoritarianism and illiberal populism, such work is as timely as it is important. I wish you continued success in the years to come.

– The Honourable **Irwin Cotler**

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