A Legislative Program For Promoting Open, Democratic And Rational Policymaking

Re-Enlightening Canada

Bryan Schwartz

A PUBLICATION OF
FRONTIER CENTRE
FOR PUBLIC POLICY

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A Legislative Program For Promoting Open, Democratic And Rational Policymaking

BY BRYAN SCHWARTZ

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Professor Schwartz holds a doctorate in law in Yale and has recently received the King's Counsel designation. He has four decades of experience as university professor, legal practitioner and public policy adviser and commentator. He is the author or editor and contributor to thirty-four books and over three hundred publications in all. His latest book, which represents his own independent views, is a sequel to *Revitalizing Manitoba,* which was also published in 2011 by the Frontier Centre.

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FRONTIER CENTRE
FOR PUBLIC POLICY

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The Frontier Centre for Public Policy is an independent, non-profit organization that undertakes research and education in support of economic growth and social outcomes that will enhance the quality of life in our communities. Through a variety of publications and public forums, the Centre explores policy innovations required to make the prairies region a winner in the open economy. It also provides new insights into solving important issues facing our cities, towns and provinces. These include improving the performance of public expenditures in important areas like local government, education, health and social policy. The author of this study has worked independently and the opinions expressed are therefore their own, and do not necessarily reflect the opinions of the board of the Frontier Centre for Public Policy.

"Re-Enlightening Canada", by Bryan Schwartz.

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Introduction

Peter Holle
President,
Frontier Centre for Public Policy

The Frontier Centre for Public Policy shares the objectives of most Canadians. Much of what we do is to foster alternative and fresh approaches to achieving those objectives. Our work tends to promote the idea that promoting healthcare and education for all can require empower students and parents, rather than bureaucracies; that responding to epidemics requires a proper cost-benefit analysis of all the impacts of difficult governmental choices; that facilitating the advancement of Indigenous communities in light of past mistakes requires the promotion of strong local economies; that addressing climate issues requires a genuine commitment to scientific probity and a realistic considering of the cost and benefits of various options.

The Frontier Centre has, however, found that attempts to discuss these challenging issues is seriously impaired by unwarranted interferences in the marketplace of ideas. Those advocating non-conforming opinions can find themselves fired from their positions, excluded from entering professions or particular career opportunities, censorship by government, employers or professional bodies.

As the title of this book conveys, Professor Bryan Schwartz relates that in his own independent observation he finds that Canada, including its academy, is not an environment where open debate and rational analysis is adequately welcomed. This work is his attempt to lay out a specific program of legislative reforms that would help to re-establish the best in the Enlightenment political tradition including free speech, rational and scientifically-based policy making, and equal opportunity for all based on individual merit.

Bryan Schwartz has been a Professor of Law at the University of Manitoba for forty years. Significantly, he is not a member of any political party, and he prides himself in being a non-partisan "honest broker." Consequently, this book does not bolster the policies of one political party over another, but it simply provides a way to improve decisions made by governments, in the face of an increasingly polarized country, and an unapologetically progressive mainstream media. Even the most progressive legislator or civil servant will finally reach limits on how far they can go with a progressive agenda. The ideas that Bryan Schwartz presents here are simply to facilitate better information gathering and achieve better decision making by governments.

Professor Schwartz has presented his arguments in 12 chapters, and each one can be read as a stand-alone piece, or in conjunction with the other chapters. Although he is a legal scholar, Bryan Schwartz has written this book to be read by the average Canadian. This personalization of these ideas allows Bryan to utilize his own life experiences and stories to illustrate his points. For instance, despite the incredible contribution of Jews to academic life in modern Canada, his own experience is that antisemitism is prevalent.

The issues that Bryan Schwartz examines are:

- Freedom of speech;
- Human rights codes;
- Political belief;
- Higher education;
- Rationalizing environmental policy;
- Subsidiarity, the notion that Canada is a confederation in which most power reside with provinces and municipalities;
- What should be the limitations of Affirmative Action?
- And reviving a commitment to democratic and legal values.

This work by Bryan Schwartz is brave in many ways. He

is clearly going against the academic trend of blindly accepting the notion that free speech is subservient to minority rights and other progressive or woke ideas. His advocacy for the long-held tradition of Jews in academic life is a voice that needs to be heard. Jews have been instrumental in the success of law, human rights, science, business, finance, social sciences, and the arts. Think about how much poorer our country would be without the amazing contributions of these people

This work is important in understanding Canada today.

Over the last eight years we have seen the massive expansion of government, the so-called "nanny state," and the frightening rise of totalitarian identity politics as recently shared internationally by Britain's *Telegraph* newspaper's documentary "Canada Woke Nightmare–A Warning to the West".

All this mirrors a declining effectiveness of policies, productivity, and creativity across the country. It is vital that this work must be read by many Canadians, but particularly by legislator and policy makers, and university administrators. Finding common ground in determining how to solve the many problems we are facing is really the only hope we have for our country. If we continue to develop policies and run governments on untested beliefs that defy common sense, rather than on a deeper understanding, we are bound to continue to drift towards national stagnation and irrelevance.

With that as a foreword, I leave you to read and ponder Bryan Schwartz's insightful, heartfelt, and intelligent ideas. I hope you enjoy this book as much as I did.

Part I

A Legislative Freedom Agenda

The Frontier Centre for Public Policy approached me with a concept. Would it be possible to develop a set of policy points, or draft model legislation, that could potentially be drawn upon by legislators who want to move society in a more traditionally small-l liberal direction?

The idea intrigued me. I teach my law students that you should not bring a decision-maker a problem without also offering a solution. The more you can bring a specific and reasonable potential fix for a challenge, the more likely you are to get meaningful action. Decision-makers have many demands on their attention and competing files, so why not make their job of actually doing something much easier?

But what would be the focus for an initial project?

We cannot think effectively if we cannot speak freely and listen to others doing the same. We cannot address the many challenges in our society if we do not have an open conversation—one in which everyone, not just experts, feels they can speak their mind and that means everyone. There are abiding issues in Canadian society that the pandemic, and at times, the government responses to it, have highlighted. We should be more aware than ever of issues such as ensuring dignified lives for seniors, effective schooling for children and timely access to medical are. And we need to do some fresh thinking in which we do not 'mouth pieties', but in which we acknowledge what is wrong in our systems and try to find new ways to improve them.

Yet, during the COVID period, we should have been concerned about the restrictions imposed on freedom of

debate. It has been alleged that in the United States the federal government colluded with big social media to suppress alternative views to those of top bureaucrats or politicians.

Medical professionals have complained that their employers or regulators limited their ability, based on their own experience and judgment, to express dissent from official positions. During a pandemic, as always, a free discussion will include opinion that is reasonable though mistaken, and opinion that is unreasonable to the point of being paranoid. But I believe government, the media, and society would have benefitted from a more robust discussion of all the scientific evidence and of all the benefits and costs—short term and long term—in all important dimensions of various responses. Not that free expression has no costs—but the costs of suppression tend to be higher.

If you want to look at things from the "progressive" prospective, ask yourself who was advantaged or disadvantaged by the various measures? Lockdowns to deal with epidemics may be relatively easy for the symbol moving class—people whose occupation mostly exists of producing word, numbers or images. We basically switched to working at home and conferencing by internet. It was much harder on people who work in essential industries like the transportation and retailing of groceries.

At my university, the University of Manitoba, we continued mask mandates long after most institutions had ceased them. Was it because we have superior scientific insight? Or, is it possible that, due to internal politics, the instructor lobby tends to have more clout than students? Professors could spend most of their work time without masking, but students often did not have that luxury. And what were the health and educational impacts of masking? Did they actually have a positive outcome on the spread of COVID among students? And, what were the negative impacts—such as students avoiding classes or dropping out, or of experiencing

psychological harm by not being able to engage in the normal, in-person social life of a university student?

Among the issues that have concerned me most in the past decades—and the threat only appears to grow—is the extent of enforced ideological conformity in universities, and the wider attacks on freedom of expression in our society. A more particular issue for me is the renewed antisemitism in our society, including at universities as well as in wider society.

So, my initial effort will be to try to make some suggestions for legislative reforms to promote freedom of expression across society, including at universities.

If the problem of ideological conformity is so bad at universities, is it not self-contradictory that I am openly addressing it? Not really. I do not feel unafraid. There is a passage in the Talmud that states, "I have lived my whole life in the company of scholars, and now I find that nothing so becoming as silence." Another passage, however, advises, "In a land where no one is prepared to stand up, try to be someone who does". So I will.

Let me first set the stage.

I am not a "party animal." I have never felt comfortable being an official member of any political party, although at various times, I have supported each of the mainstream parties. As an individualist, and as an academic with a traditionalist view of the role, I never wanted to feel tied down to any particular partisan camp, or to be seen as such. At times, as a paid consultant, I have provided law reform advice to both the NDP and the Progressive Conservatives in this province and for First Nations and Inuit organizations. My role within governments was always to propose innovative ideas for law reform, not to act as an advocate or apologist for them.

It is unfortunate that that there tends to be a partisan split over free expression. There are some contradictions in the tendency for today's political left to be hostile towards free speech. If you favour standing up for the

weak against the powerful, consider who is actually in power in specific contexts. Sometimes the legitimate foe is the overreaching of big business; other times, it can be the overreaching of big unions. You may think teachers' or professors' unions are the embattled underdogs standing up to government; but sometimes the government is the one standing up for the interests of the vulnerable, such as school children or young university students who may suffer when not enough is demanded from instructors.

If you are concerned about the emotional impact of degrading speech, consider the impact—on society and on actual human beings—of freely labelling people you disagree with as racists, sexists and fascists. If you favour a strong role for science in guiding public policy, consider the extent to which actual science is based on open debate and willingness to revise one's thinking in light of new evidence. This principle holds particular significance when addressing matters such as epidemic response or climate change, where there have been widespread attempts to suppress legitimate discussion based on rational arguments about evidence and inferences.

Protection of the environment is important, and just about everyone agrees upon that. However, there should be room for debate about the sensitivity of the environment to various human impacts, about the extent to which various climate outcomes are hurtful or beneficial, and the human costs of various options. Well-intended policies, like promoting the use of biofuels, can have unintended impacts such as raising the price of raw food, which in turn can immiserate some of the most vulnerable people in the world.

If you have an equal interest in the well-being of all human beings, you might want to consider what are the actual health impacts of various measures intended to fight epidemics. To what extent did various measures reduce rates of morbidity or mortality? And to what extent did they cause collateral damage? I have been

vaccinated four times, but it is still of interest to me to see the emerging evidence regarding how many people suffered serious or lethal side-effects from the vaccine itself, as well as assessing the effectiveness, ineffectiveness or potential counterproductive nature of mass immunizations. To what extent did lockdowns cause economic damage, which in turn had serious adverse effects on the health of people beyond their financial well-being? Economic deprivation and insecurity are strongly associated with adverse health outcomes in various ways. To what extent did lockdowns themselves cause anxiety, depression, the adoption of coping mechanisms such as alcohol and drug use, and the discouragement of healthy activities such as socializing and physical exercise?

If the issue is comforting the afflicted and afflicting the powerful, consider how a genuine and open exchange of ideas might adjust your perception of who actually is comfortable and powerful. It might also adjust your ideas of what the best means are for helping those in need. Every child, regardless of initial disadvantages, should have access to a first-rate education; depending on the overall context, school choice for families (funded by government) might in some contexts succeed better in accomplishing that than a single and uniform public school system.

The future of conservative parties should be focused on advocating for the modernized best of Enlightened liberalism. A supremely important part of that philosophy is a belief in the value of openness, including freedom of thought and expression. Another is the equal value of every person in all their individual. The state is not supposed to define and typecast its citizens in terms of the groups they were born into or choose to identify with.

Enlightenment liberalism embraced economic freedom as a means to promote prosperity, but also as a good in itself. Part of freedom is that individuals have meaningful choices in how they choose to make a living, in the

places they work, and in the businesses they start or maintain. Government should not crowd out the private sector and it should intervene in the private economy in ways that promote the ability of citizens to pursue occupations or enterprises that suit their talents and interests.

Governments in a liberal society have a role in providing assistance to people who need help in order to lead reasonably secure and comfortable lives. Not everyone has the skills or health to succeed in the marketplace. Where government programs are needed, they can be implemented in a way that maximizes individual choice. A person with a disability might be empowered to hire their caregiver, rather than having to accept the ones assigned by a bureaucracy. Renters who need help might be given vouchers to assist them in making free market choices, rather than finding that rent control has the unintended consequence of driving investors away from building rental units and towards building condominium buildings which many cannot afford.

Rather than making arbitrary choices about which universities or colleges to support, for example, it might be better for governments to fund students as they graduate from high school and leave it to each individual to decide which university to go to, which apprenticeship to take, perhaps even which small business to join as an investor and participant.

Right-of-centre parties have, in recent times, often ended up with the same kind of government-controlled, centralized and bureaucratically administered approach to meeting challenges as left-of-centre parties. The left in practice tends to favour centralized government control for a variety of reasons, including a trust in the power of government to do good and remedy oppressive power imbalances in society. However, some individuals on the left may, consciously or unconsciously, be influenced by the natural human tendency to enjoy being in control, and the potential monetary and personal benefits associated with it.

The right often ends up with centralized control for some of the same personal reasons, but a different philosophy: that government should balance its books, not burden further generations with debt; and not crush the economy or overly burden individual choices through excessive taxation. Those on the right then mistakenly conclude that "eliminating overlap and duplication" is the right way to achieve efficiency and promote rational outcomes. It very often is not. The slogan often results in reducing the personal choices of both clients and providers of services, stifling innovation, reducing healthy competition, and actually raising the costs of governance.

We need fresh thinking on how to bring meaningful choice and drive innovation across various sectors, such as healthcare delivery, education, and personal care homes.

No political party ever adopts an overall philosophy and program that is better than all of its competitors in all respects. It should never be viewed by its supporters as representing the one true religion or ideology. No political faction is supremely and completely righteous in its ideals, and impeccably prudent in its choice of policies to achieve to implement them.

A party should genuinely be open to being influenced by those different starting points or the different notions of how a society functions in practice. It should have a coherent philosophy, but not one that is rigid, fixed and close-minded. One of the most important features of a valuable party, in my view, is that it not only offers a reasonable perspective on what policies a government should choose, but also recognizes the limits on what can and should be done by government altogether.

Creating laws and policies is, in some ways, an exercise in engineering. You try to build a program that achieves positive objectives, adapt it initially and regularly revise it in light of how it actually works in practice, trim and supplement it in ways that build acceptability or

support from people with different views than your own, recognize that there are trade-offs in design, and try to come up with ways to balance and harmonize the benefits and costs in different dimensions.

Thinking and debate can and does change minds and improve laws. Right-wingers in the United States, for example, recognized that brutal or discriminatory policing or prison policies backfire. Many have moved away from the excesses of the past, such as brutally long prison sentences for non-violent crime. Perhaps some left-wingers in the United States are beginning to realize that the other extreme—non-enforcement of the law—can be especially harsh on disadvantaged people, who cannot afford to move away from high-crime areas or buy private security.

The Enlightenment movement embraced the scientific method. An essential part of that methodology is the quest to observe how nature actually works, and adapting theories accordingly. Scientific thinking is not about deferring to the authority of the most credentialed person or the majority view among specialists; it is about testing ideas against empirical evidence and engaging in thorough, rigorous, and open debate.

A non-expert should not be precluded from drawing their own conclusions about scientific debates, and even contributing to them. A layperson might be able to pose questions otherwise not considered, identify biases and conflicts of interest among those giving opinions, probe the relationship between an expert's credentials and title and their actual expertise, and compare and contrast opinions given by various experts within the same specialty or different specialties.

When public policy choices must be made, the burden and responsibility of those choices lie with democratically accountable officials, who should be informed by public input. An appreciation of what the choices and trade-offs are can inform what scientific questions are asked and what answers are deployed in the course of making difficult decisions.

We almost all agree on civilian control over military experts; but I am not sure so sure there is a consensus about civil control over environmental and health experts. In my view, democratic control and accountability is needed in those areas as well, even in times of crisis—indeed, especially in times of crisis, when the stakes are the highest and when freedom and equality before the law may be in peril.

The freedom to speak your mind is an essential part of living an authentic life, of being yourself. But it is also crucial for making sound choices in our individual lives and as a democracy. If we are free to speak, we are encouraged to test our ideas, to influence others, and to learn from them.

In my impression—which is supported by some powerful empirical studies—freedom of speech has never been under greater pressure than it is here and now, in 2023.

There have been times when censorship pressure came from the right rather than the left, such as during the McCarthy era. In modern times, however, the pressure comes primarily from the left. The pressure comes not only from the government, but also from universities, a large part of the traditional media, and the social media giants.

Conservative parties must acknowledge the reality and take positive action to promote free expression. That does not mean censoring views they disagree with, including repressive ideologies of the left (which are currently dominant in many arenas) or the right. It means adopting principled and consistent measures, including legislative reform, that protect everyone, regardless of their views. In many cases, this means tolerating the expression of views that seem themselves to be intolerant—including the intolerance of the "progressive" left.

Universities should be a place where freedom of expression is protected robustly. As the Cloutier study of Quebec higher education recently concluded, higher

education should not be a "safe place," in the sense of not being shielded from views that upset you. Instead, there are empirical studies showing that universities are more discriminatory than ever in hiring against people who do not share the dominant ideological perspective, and are places that do not encourage or protect the production or expression of ideas that challenge the prevailing orthodoxies.

"Politics is downstream of culture." Centre and right-of-centre parties are delusional if they think they can compete electorally in the years ahead, when the universities are so one-sided in their ideology and so ready to engage in indoctrination rather than education. Many influential big corporations—including mainstream media and big social media, like Facebook—are filled with people who have emerged from university thoroughly inculcated in woke ideology.

Ask Mark Zuckerberg himself; he testified at the U.S. congress that Silicon Valley is an "extremely left leaning place", although he also claimed that his company tries not be biased in what it does. The universities are churning out tomorrow's leaders, including its public servants; the leaders of the autonomous professions like medicine; social media pundits and influencers. The impact of the monoculture in the universities cannot be overcome by creating think tanks or making arguments during political campaigns. A fair-minded person looking at issues such as collusion between social media and the current U.S. government on censorship would not agree that big tech in practice overcomes their ideological biases.

In the following series of articles, I will try to suggest a series of concrete legislative reforms that would promote the restoration of free expression throughout our society—not only in the universities, but for all of us.

Part II

Amending Human Rights Codes to Include Freedom of Expression

The *Canadian Charter of Rights and Freedoms* does acknowledge freedom of expression as a "fundamental freedom." That sounds like a good start. But the *Charter* only applies to action by governments, not society generally. The *Charter* will not help you if you are an employee fired by a private company for a political stance you took on social media in your private life. The *Charter* will probably not even help in the case of a university that fires a faculty member for taking controversial views.

There are other limitations on the Charter Right of Freedom of Expression. Rights protected by the Charter are subject to "reasonable limits." A government can censor you in various ways if it has a valid reason to doing so; for example, revealing a military secret. The government also has to go no further than reasonably necessary in securing that objective.

In practice, it can be difficult to or impossible to effectively use your Charter rights. You might have to take action in court, which can incur significant legal costs, stress, exposure to publicity, and delays.

Our system has another mechanism for protecting human rights. In all of the provinces and at the federal level, there are human rights codes. These apply to private action as well as government action.

Human rights codes are generally much easier to use than Charter rights. Generally, you file a complaint with a Human Rights Commission, which can lead the investigation, rather than you having to conduct a lawsuit. The arbitrator will apply this, and there is no need to go separately to the human rights commission. In many cases, you do not have to file a separate complaint with the Human Rights Commission. If a regulatory scheme involves a particular complaint and dispute resolution system, you can raise the human rights issue in that context. If you are in a unionized environment, you can raise the human rights issue in the grievance and labour arbitration process.

You can also rely on human rights codes in a sweeping range of legal contexts: commercial transactions, employment situations, the sale or rental of housing.

While the *Charter* is the supreme law in Canada, human rights codes are almost at that level. A human rights code ordinarily prevails over all other legislation.

But the human rights codes at the federal and provincial level usually apply only to issues of non-discrimination. Unlike the *Charter*, they do not address a broad range of human rights. They generally do not set out rights like freedom of expression.

Why is that? The reason is largely historical. Human rights codes emerged in the aftermath of the atrocities of the Second World War and during the rise of the civil rights movement in the United States. Legislatures were justifiably eager to promote respect for individual equality in arenas like commerce, housing, and employment.

Several jurisdictions in Canada, however, do address freedom of expression. Specifically:

- The *Saskatchewan Human Rights Code* includes not only prohibitions on discrimination, but also a "Bill of Rights" that encompasses freedom of expression and freedom of conscienceand religion, the right of assembly and the right to participate in

the democratic process;

- In Quebec, the *Charter of Human Rights and Freedoms* addresses a wide spectrum of human rights, including not only non-discrimination but other rights such as freedom of expression and the right to privacy.

At the federal level, the 1960s-era *Canadian Bill of Rights* recognizes freedom of speech, assembly and of the press. No such guarantee can be found however, in the *Canadian Human Rights Act,* which is more powerful in its legal impact than the *Canadian Bill of Rights,* and which has an administrative complaints mechanism.

Human rights codes have priority over ordinary legislation. But when they give priority over one important value, non-discrimination, they can sometimes be applied in a way that fails to give sufficient weight to other important values, including free expression.

The *Alberta Human Rights Act* says that its restrictions on discriminatory speech should not be applied in a way that is contrary to freedom of expression. But that "defensive" language for freedom of expression is not likely to be as effective as positively affirming freedom of expression as an integral and enforceable part of a human rights code in its own right. Currently, the *Alberta Bill of Rights*—which does includes freedom of expression—stands separately and without a dispute resolution system attached.

The federal level and all the provinces and territories should amend their human rights codes to include, at the very least, the fundamental freedoms recognized in section 2 of the *Canadian Charter of Rights and Freedoms.* That includes freedom of expression, religion, and conscience.

These rights should be protected by the same complaints mechanism that applies to non-discrimination complaints.

What about limits on these rights?

Rights in the *Canadian Charter of Rights and Freedoms* are subject to certain balances and limitations.

Some involve balancing fundamental rights.

A Charter right, such as freedom of expression, must be interpreted in light of other Charter rights, such as equality or the right to a fair trial. Right now, however, most human rights codes in Canada are not balanced, in the sense that unlike the Charter, they do not provide any up-front and explicit recognition of freedom of expression as being a value in the same realm of fundamental importance as anti-discrimination.

Charter rights can also be limited for public interest reasons. The Charter places that most of the rights it recognizes—including freedom of expression—are subject to "reasonable limits" that can be justified in a "free and democratic society." The courts do not easily agree that a limit is "reasonable"; they have found that it must have a valid purpose and that the good it does must not be disproportionate to its injury to the exercise of a fundamental right. Non-discrimination rights in human rights codes are limited by express provisions such as the ability of an employer to maintain a job qualification if it is "bona fide and reasonable," even if it has a discriminatory impact. An employer might have some requirements for physical strength, for example, for firefighter or military jobs.

In Saskatchewan, the human rights code does not place any express limits on freedom of expression, but courts and tribunals have found that it is implicitly subject to some limitations. In Quebec, the exercise of all rights by private citizens must be with "proper regard" for other values, including the general good of society.

I would suggest that if freedom of expression were added to human rights code, in Manitoba or at the federal level, it would be subject to the following limitations:

1. The scope of the free expression parts of a human

rights code might extend to the same kinds of activities—such as selling goods and services to the public—that are referred to in the context of anti-discrimination norms.

The idea is that human rights codes generally do not and should not extend to strictly personal and family matters.

2. Measures by government entities or private entities that limit freedom of expression should only be permitted—to borrow the language of the Charter—when they are demonstrably justified in a free and democratic society.

The idea is that fundamental freedoms are recognized in the Charter, and it would be potentially confusing and complicated to have a different set of limiting doctrines applying to government action. In considering limitations on free expression by private entities, interpreters must still keep in mind that we are a free and democratic society. Simply stating that a business has an economic concern, such as avoiding complaints by politically censorious customers, should not be sufficient to validate the political censorship of employees. And note: an employer is better positioned to avoid being pushed into censoring employees if it can say, "We do not agree with what our employee said in their off-duty political blog, but human rights law in this province requires us to respect free expression."

3. In the specific contexts of institutions of higher learning, human rights codes might specifically provide that any limits on freedom of expression must be assessed in light of the principles of academic freedom and recognition that fostering free and open debate is an essential part of the mission of higher education.

The idea is that universities should live up to their own highest traditions. University autonomy is supposed to be in the service of free intellectual exploration and expression. An even better alternative, to be discussed

later in this essay, would be to enact an entire additional statute to address freedom of expression and political non-discrimination in the context of higher education.

Universities have rarely complained about the fact that ordinary laws, like labour standards, workplace safety laws, or anti-discrimination laws apply to them no less than to anyone else. Yet the 'woke' elements in academia often complain when it is suggested that human rights legislation involving free expression should be applied to them.

In the United States, it has been incontestable that the First Amendment, guaranteeing free speech, applies to public and publicly funded universities. On what basis is there a separate Canadian version of academic autonomy, where such notions are unthinkable?

With respect to places of higher education that are created by private communities, even if publicly funded, there is a case for allowing some room to promote ideas that are based on a traditional faith or creed. What is proposed here, however, would be to include freedom of conscience and religion along with freedom of expression in human rights codes. In concrete circumstances, the norms would have to be balanced against each other.

Summary:

- The *Canadian Charter of Rights and Freedoms* protects a wide range of human rights, including freedom of expression, as well as non-discrimination;
- The *Charter*, however, only applies to government activities;
- Human rights codes across Canada apply to various private activities, such as commerce and the activity of professional bodies;
- Human rights codes in most jurisdictions focus only on non-discrimination, and do not address fundamental freedoms, including freedom of expression;

- The human rights codes in Saskatchewan and Quebec, however, do address fundamental freedoms;
- Freedom of expression in Canada can sometimes be unduly limited by institutions to which the *Charter* does not apply, e.g. employers punishing employees for legitimate off-duty political expression or universities limiting the free expression of employees who do not agree with the dominant ideology;
- Human rights codes across Canada should be amended to expressly add fundamental freedoms, including freedom of expression, religion, and conscience;
- The addition of these freedoms would promote respect for them, but not make them absolute. They would be interpreted and applied in the overall context in which they appear—including guarantees against discrimination—and be subject to a "reasonable limits" clause;
- Human rights codes should expressly provide that when interpreting applying fundamental freedoms, including freedom of expression, the mission of higher institutions to provide a forum for free and open intellectual inquiry must be taken into account.

In the next part of this essay, I will further suggest that human rights codes across Canada should, in their prohibition of discrimination, include "political belief, expression or activity." I will suggest legislative reforms that would specifically apply to universities, modelled after the 2023 legislation in the United Kingdom, to ensure that they fulfill their mission as places of special commitment to open inquiry.

Part III

Adding Political Belief and Activity to Human Rights Codes

In the last section, I proposed that human rights codes across Canada be amended—following the lead of Saskatchewan and Quebec—to include freedom of expression and other fundamental freedoms such as conscience, religion, and assembly. Right now, almost all of the codes across Canada focus only on anti-discrimination.

Let me suggest improvements—again with a focus on promoting freedom of expression—to the anti-discrimination provisions of human rights codes.

Some human rights codes in Canada refer to "political belief" as a prohibited ground of discrimination. Many codes, like the federal human rights code, do not. As a result, discrimination on the basis of personal politics cannot be investigated or remedied by human rights commissions. Yet this kind of discrimination is a serious practical concern in our society.

To a large extent, "personnel is policy." Whom you hire has an enormous impact on how the institution functions. Looking at higher education, we can and should take vigorous steps to promote free expression in universities for students and instructors—but how much changes if the overwhelming majority of faculty members have been hired and retained to promote one particular ideology? How much value is there in providing that you can sing your own song if everyone

who is hired is expected to own the same songbook?

Where is the genuine intellectual and creative diversity?

How are students going to be equipped and inspired to consider different perspectives, to be lifelong learners and independent thinkers, if they have mostly or entirely been exposed to only one viewpoint?

How can research be trusted without the competition of perspectives in the academy and the ensuing debate over controversial public policy issues?

The domination or monopoly of ideas in various parts of the academy is self-perpetuation. Nowadays, progressives tend to hire only more progressives. In the humanities and social sciences, academics are bunched in the left end of the political spectrum. University faculties do not resemble or mirror the distribution of opinion in the general public.

That is not because people on the right choose to avoid academic careers as they pursue lucrative pursuits. In Canada, academics are generally paid quite well. They have a freedom and job security that many can never hope to achieve.

It has been argued that academics do not discriminate on political grounds when they hire; it is just that people who dissent from left-wing ideology do not see any potential mentors in the community, so they are not encouraged to pursue graduate studies and employment. Even if that were true, the situation speaks to a genuine form of systemic discrimination. In many contexts, we recognize that even in the absence of conscious ill-intent, systems can be operated in ways that unfairly discriminate.

The fact is, however, that many academics do discriminate on the basis of political viewpoint. In surveys, they admit to doing so. It is likely that many right-wing academics would also discriminate if given the opportunity, but currently they have very little chance to do so.

Some surveys also show a tendency among those who managed to get into academia to self-censor their views. They are afraid of social retaliation, denial of career advancement, rejection of funding applications, or outright discipline or dismissals. You do not have to fire many Frances Widdowsons to make sure that people toe the ideological line. If you have invested your young adult years in getting three university degrees and have finally secured a job, you tend to not want to risk it, or any of its perks.

The Enlightenment liberal idea is that in the humanities and social sciences, there is a certain amount of subjective judgment involved in academic activity. But it is still possible to hire and retain people on the basis of merit. If that is done, there will inevitably be a great deal of intellectual diversity in the academy. That is because our general society is diverse, and intellectual talent can be found across a broad spectrum of opinions.

In a university that has real intellectual diversity, students in classrooms and readers of research will be able to learn from different general approaches in an area. The audience for academic products should themselves have received an education that permits them to evaluate critically. The whole objective of higher education should be to produce students who are able to think for themselves. This includes considering different perspectives, trying to take the best from each, developing your own view, and always being prepared to modify your opinion in light of further reflection, information, or debate.

The accuracy and precision found in some of the hard sciences is unreachable in the humanities and social sciences. It is inevitable—and part of the enjoyment of the intellectual ferment in these areas—that experts bring different ideas to their analysis of what areas are worth exploring and criteria for judgment. We can still assess, with reasonable objectivity, whether a scholar or teacher has considered an appropriate range of evidence and opinion, has analyzed those materials with rigour

and precision, and has expressed their conclusions in a manner that is as accessible as the subject matter permits. Furthermore, we can determine if they are adding something to a field of study rather than merely repeating what has already been said and done.

The ethics of the classroom dictate that students are invited to express themselves freely, to explore questions and ideas, and to be open—during a course, and throughout their lives—to tempering their opinions in light of further reflection, further reading, and further listening.

"Equity, Diversity and Inclusion" (EDI) policies tend to promote the view that it is not good enough to ensure that there are fair opportunities for people of different backgrounds to get jobs in areas like academia. The proponents of the ideology tend to purposely or effectively send the message that it is a job requirement to accept the EDI ideology itself, with all of its potential excesses.

Even if the proponents of EDI argue otherwise, you do not have to be a bigot to reject some aspects of the EDI ideology or regard other parts as containing some validity, but as amounting to an oversimplified and unidimensional take on the real complexities of society.

You might believe, for example, in the Enlightenment liberal view that the primary criterion for advancement in a field is an assessment of a person's accomplishments and abilities as an individual, not as a member of a group. You might say that having employers think of you first and foremost as a member of this group or that group can, in itself, be discriminatory. You might even hold the view that the EDI perspective, in practice, is often based on pronouncing a hierarchy of privileged groups and disadvantaged groups that is sometimes founded on stereotypes, which are in many cases crude and outdated. You might also question whether the selection of groups to be characterized as favoured or oppressed sometimes reflects the self-interest and power of those in charge.

Read the human rights code in my own province, Manitoba. It continues to emphasize the importance of treating human beings as individuals, rather than as members of groups. The Manitoba code permits some exceptions, such as affirmative action programs, but its starting point is respect for the individual. You should be able to continue to embrace that vision without being disqualified for academic employment. In fact, you should be eligible based on your academic abilities, regardless of whether you favour traditional human rights liberalism, EDI, or neither. You should be required to honour the rule of law and abide by the rules in place, but still be free to criticize the philosophy behind those rules, and offer a competing vision.

Freedom from political discrimination is important in other contexts. You should have reasonable leeway to participate in political debate in your private time without worrying about being disciplined by your employer. For most jobs, your employability should generally not depend on what kind of stances you have taken on controversial issues in your previous life.

Some human rights codes in Canada mention "political belief" as a prohibited ground of discrimination, but most—including the *Canadian Human Rights Act*—do not. Even where political belief is mentioned, it is often not stated in sufficiently broad terms. It can be construed as essentially requiring a general worldview, rather than positions taken on specific issues. Unless the legislation is clear, interpreters may see the issue as being about only what you believe, rather than considering what activities you have engaged in pursuit to your beliefs—like joining a party or organized advocacy, taking part in a demonstration, or contributing financially to a cause.

A necessary legislative step towards restoring freedom of belief and expression in our society would involve:

- Amending human rights codes across Canada to include "political belief" as a prohibited ground of discrimination;

- Defining "political belief" in the amendments to encompass activity as well as thought, covering specific issues as well as a general approach.

Once incorporated into human rights codes, this change will give human rights commissions the opportunity to consider complaints, to conduct studies, and to engage in educational activities to counter political discrimination in hiring. The practical impact of law reform can be through shaping attitudes as well as producing outcomes through litigation. It is long overdue for governments to send the signal that political pluralism is part of any meaningfully diverse society and any functioning democracy.

Part IV

The *Higher Education (Freedom of Speech) Act*

In May 2023, the *Higher Education (Freedom of Speech) Act* came into legal force in the United Kingdom. It should serve as inspiration for the enactment of comparable statutes across Canada.

The new statute requires institutions to do the following:

- Promote the importance of freedom of expression and academic freedom;
- Adopt a code of practice in relation to the value of free speech;
- Take reasonable steps in practice to ensure freedom of speech for staff, students and visiting speakers;
- Ensure that when a person applies for a job, they are not adversely affected by their previous exercise of free speech or academic freedom.

Student unions are also required to respect freedom of speech.

Following the enactment of the Act, a new position was created within an existing body, the Office of Students, called the Director for Freedom of Speech and Academic Freedom. The mandate of this role includes hearing complaints about denials of free speech. The Director can make recommendations, but not issue binding orders. The Director can also choose not to deal with a matter while it is being addressed in another forum. The statute also creates a right to civil action, and the opportunity to recover compensation, for denials of

free speech.

The United Kingdom legislation defines "free speech" as the right set out in the United Kingdom's basic human rights legislation. It defines "academic freedom" as the ability to question and test received wisdom and put forward new and controversial or unpopular opinions.

Concerns were expressed by opposition parties about whether the new law overrides protections against harassment and hate speech. The government replied that existing laws in this regard remain in place.

Sometimes, existing laws may be in tension with each other in particular cases. Interpreters then must carefully determine how, in general or in a particular case, they modify the interpretation and application of each in light of the other. The enactment of strong laws to protect freedom of speech does not mean that all other laws that might apply to situations—such as privacy, copyright or anti-harassment measures—simply cease to have meaningful effect.

As argued earlier in this essay, it is past time, however, that legislators in Canada place freedom of expression on the same plane as other fundamental rights. In the hierarchy of legal norms, freedom of expression should rate as highly as other fundamental rights, including anti-discrimination law. Both should be recognized in human rights codes, rather than continuing the situation where freedom of expression is left out.

In the practical operation of the law, freedom of expression should be protected by bureaucracies and complaints mechanisms no less than other fundamental rights, such as equality and privacy. Places like universities need an official dedicated to promoting free speech and political non-discrimination no less than they need anti-discrimination officers.

Many arenas, including universities in Canada, now have EDI officers, some of whom may be inclined to push simplistic, extreme, or intolerant versions of the concept. EDI is a big business. A friend of mine who

started a non-profit street clinic program used to joke that for some people, "there is a lot of money to be made in poverty law." Similarly, there are opportunities for trainers, bureaucrats, and consultants to do very well for themselves in the EDI business. The economics might encourage some to present the need for EDI remedies in the most exaggerated and dire terms, while minimizing the existence of progress or act in a manner that is insensitive to the freedom, dignity and due process rights of individuals who are seen as standing in the path of enlightenment or inclusion.

Universities in particular should be places where free exploration and exploration of ideas are especially valued and protected. Instead, they have become among places of most concern in our society with respect to politically-based discrimination at the level of entry to the community—whether as an instructor or student, the limitation of free expression, and the installation of bureaucracies to oversee and punish nonconformity or even dissent from prescribed doctrine. In Canada, the courts have found that despite being public funded or established, Canadian universities are generally not governed by the *Canadian Charter of Rights and Freedoms*—including its guarantees of freedom of expression. There is a need for specific legislation, like that in the United Kingdom, to ensure that universities return to their best traditions of free inquiry and hiring and advancement through merit, not group identity or ideological submissiveness. While it would be a major step forward for the provinces and federal level to improve the protection of freedom in their human rights codes, it is not sufficient in the area of universities. In the face of the existing situation in higher education, there needs to be a specific statute in each jurisdiction that explicitly and plainly asserts the norms of free expression and non-discrimination, and ensure that there are effective enforcement mechanisms for these norms.

The *Higher Education (Freedom of Speech) Act* has

the strength of addressing university hirings, and not only limitations on free speech by existing academic staff. It also addresses the freedom of expression of other members of a university community, including students and potential visitors who wish to speak there. It emphasizes taking proactive steps by government and institutions to positively promote the importance of freedom of expression, rather than leaving that value to be invoked by embattled individuals in a defensive context.

The new statute also embodies a reasonable balance between fundamental norms and university self-governance. Institutions of higher education are encouraged to adopt their own codes of practice that achieve the core objectives of protecting freedom of speech, rather than having detailed schemes imposed by a government bureaucracy. As noted earlier, the remedial authority of the Office of Students, in the case of individual complaints, is limited to recommendations, rather than issuing binding orders. There are also provisions whereby the central government authority may postpone dealing with a complaint if it is being addressed by an internal process at a place of higher learning.

The Office of Students, a government body, is given the mandate of promoting freedom of speech and academic freedom; identifying good practices to support these values; advising to higher education providers on how to support them; and providing an annual report to the Secretary of State. Within the Office of Students, the statute creates a Director of Freedom of Speech and Academic Freedom.

Universities are also given a statutory duty to promote the importance of academic freedom and freedom of expression.

The Office of Students is required to set up a complaints mechanism. A person with a free speech complaint can ask the Office for Students to consider a matter and make a recommendation. The OFS may not however,

issue binding orders. The new law contemplates that the Office for Students might not hear a complaint that can initially be dealt with by internal processes. (The new United Kingdom statute creates a civil right of action to obtain compensation for denials of free expression. That option might not be necessary in Canadian jurisdictions that have incorporated the right of free speech into their enforceable human rights code.)

The United Kingdom statute is a model that should be followed by all provinces in Canada. The federal government should establish a similar office of a free speech champion, whose authority would extend to any institutions of higher education under federal jurisdiction. The authority of free speech champions at both levels should extend to not only institutions of higher learning, but also to funders of higher education. Currently, the federal government, in particular, uses its spending power to have a huge impact on the direction of higher education by setting up national-level research granting agencies. There is cause for serious concern that the winners and losers of this largesse are partly determined by whether applicants conform to the ideological direction of the granting agencies. A "free speech champion" could also have authority to address censorship and discrimination based on viewpoint in state-funded cultural institutions such as the Canadian Broadcasting Corporation (CBC).

Part V

The Special Case of the Erasing of Jews from Higher Education

"American universities have become whirlpools of downward mobility that target the people and the ideas that they once cherished and protected," wrote Liel Leibovitz in *Tablet* magazine in 2019. The title of the article is his advice to Jews: "Get Out." To place his article in the context of other powerful indictments, we have the British Jewish comedian David Baddiel's book "Jews Don't Count" and the novelist Dara Horn's collection of essays "People Love Dead Jews". The most meticulously argued and documented presentation of the issue I have found is David L. Bernstein's "Woke Antisemitism: How a Progressive Ideology Harms Jews." These writings may come as a surprise to many, but they each contain a disturbing amount of truth in their depiction of the reality in contemporary life, including universities.

The Jewish worldview starts with the view that everyone is created equal. Like almost all ideas in Jewish tradition, this principle is presented in a concrete, rather than abstract, manner. Genesis characterizes all human beings as descendants of the same original parents, all of us a combination of the divine spark and clay, all of us with a transcendent value and potential. The Book of Exodus is about how the normative worldview of the Jewish people is shaped by the remembrance of being an oppressed minority in captivity. The Revelation at Sinai is filled with demands to remember what it is liked

to be oppressed, and so to celebrate freedom, while also emphasizing the importance of doing justice to the outcast and impoverished.

When Enlightenment political figures looked at the Jewish tradition, they were inspired in many positive ways: no person or thing is to be idolized; political tyranny is abhorrent; and the prophet can speak out and criticize the kings, the priests, and the performatively religious. In turn, many Jews welcomed the Enlightenment liberalism for all of these reasons, and for the opportunities it presented to emerge from ghettoization and discrimination to succeed in the wider world of education, the arts, science, culture, and creativity. To be free to finally participate and succeed or fail in endeavours based on their individual value and that of contributions that they could make.

Jews, by tradition and historic experience, have often been at the forefront of enlightened liberal movements, such as the American civil rights movement of the 1950s and 1960s, striving to bring equal opportunity to black Americans.

Enlightenment liberalism—to the extent actually practiced—enabled Jews to bring their love of learning and creativity to many endeavours. Jewish scientists and artists have won about 100 times their proportionate share of Nobel prizes.

Contrary to some of the doctrine or practice of critical social justice theory, the shared ethnic origin of Jews did not inhibit the diversity of their accomplishments. You can find Jewish Nobel prize winners in economics on the left and the right. Two nerdy Jews from various struggling immigrant families in America each developed a distinct approach to defeating polio by vaccination; one, the inactivated virus injection (Jonas Salk), and the other, attenuated virus delivered orally (Albert Sabin). You can find Jewish symphonic composers who range from purely classical (Felix Mendelssohn) to pioneers of atonalism (Arnold Schoenberg). The golden age of Broadway musicals was created primarily by

Jewish composers and lyricists, but artistic and musical sensibilities vary widely, all the way from Jerome Kern to Stephen Sondheim.

Jews have not only been extensively involved in liberal enlightenment thinking, but also theoreticians and practitioners on the left, even hard left. There were Jewish communist thinkers who were so disgusted by government and business excesses and inequalities, including those targeted at Jews, that they become enthusiasts of economic Marxism—or later, various forms of what might now be called critical social justice doctrine. ("Wokeism" is a term often used, mostly by detractors, to characterize the general movement).

But how and why would the latter be bad for Jews?

All too many reasons.

Doctrinaire thinking and the suppression of free debate is bad for Jews because Jews are, by tradition, iconoclasts and free thinkers. The Bible is full of debate and doubt. The Talmud is a record of debate. A Yiddish folk expression is "two Jews, three opinions."

The view that all success and disadvantage is the product of government and societal unfairness does not fare well for Jews, who have tended to be successful—often in the face of discriminatory obstacles, and rarely if ever due to favouritism from any quarter. For most of history, the reigning world chess champion has been Jewish. Why? Because the games were fixed? Or, perhaps, because Jews came from a tradition that prized intellectual endeavour, appreciated intellectual back-and-forth, and when deprived of power, lacked many traditional avenues to engage in competition.

Jews were at the forefront of developing the comic book and later the graphic novel, not because the industry was fixed, but because the art form was open to all comers. You did not need a university degree, formal training, or connections to get involved.

Jews thrived in physics in part because their tradition

viewed the world as the product of an intelligent creator, leading to the belief that the universe and its natural laws might be coherent and consistent. Jewish success was large "despite," not "because of," any kind of government or societal support.

As practiced, critical social justice thinking, is a worldview that purports to explain the world in terms of a hierarchy of oppressors of victims, and the apparently successful Jews are suspiciously successful. They are "white" or "white-adjacent." Judaism is allegedly not a distinct ethnic identity. The State of Israel survived and, in many ways, thrives, so they must have had some advantages.

The conflict in the Middle East, according to many "critical social justice" adepts, is a cartoon world in which the bad European colonial settlers had no business being there, and are to blame for conflict. The Jewish presence in Israel is at the root of the problem, while not acknowledging the outright rejection of that presence on the Arab side. In their view, we do not have a complex situation with humanity on both sides, rights and wrongs on both sides, and a need to find realistic ways of finding a reconciliation; just those bad settler colonial Jews making trouble.

It doesn't matter to the identarian left that the European Jews who came to Israel were escaping from hostility, including genocidal hostility, of their surrounding environment. Or that they were returning to their indigenous homeland. Or that there has always been a Jewish presence in Israel. Or that more Jews in Israel actually come from the surrounding Islamic world, where they were treated, at best, as second-class citizens, and largely harassed or threatened into leaving when Israel was created.

In the academic world, "microaggressions" are, for other groups, to be identified, denounced, and eliminated—even if that means collateral damage to free expression. When directed at Jews or the Jewish homeland, however, verbal macroaggressions are often

tolerable, even de riguer.

The internet is a cesspool of antisemitism. Jews are grotesquely ahead of almost any other group in Canada or the United States in being the object of threats of violence.

A tempting turn would be to see the solution as joining in the current "critical social justice" enthusiasm for limiting free expression in the interests of protecting the vulnerable—but to request Jews now be included among those collectivities that are in need of protection from negative speech.

That approach would lack balance. Jews should be protected against discrimination no less than any group, but anti-discrimination measures respecting all groups should respect freedom of expression. Antisemitism will continue in dark corners whether it is officially suppressed or not, and suppression efforts can backfire, with haters thinking of themselves as somehow daring martyrs who are being attacked by the Jewish-controlled power elite. At times, free expression means that ideas that are misinformed or malicious gain some purchase, but in the long run, free expression eventually can lead us to some truth on factual matters and foster some balance and temperance in our politics. I continue to believe in the ideal of the university as the forum for the most daring and unpopular thoughts.

So if you ask me plainly, should university professors be allowed, without punishment or censorship, to single out Israel for criticism, to preach a form of "wokeism" whereby Jews are dismissed as a privileged group and to create a hostile environment for Jews by selectively calling for boycotts of the Jewish homeland, the answer is yes.

At the same time, universities can and should:

- Include antisemitism in their anti-discrimination education initiatives;
- Adopt the International Human Remembrance

Association's (IHRA) definition of antisemitism as a tool in anti-discrimination initiatives based on education, not punishment or restriction of academic freedom. The University of Cambridge's language in adopting IHRA is exemplary;

- Take active steps to prohibit all forms of political discrimination in hiring;
- Expressly emphasize the importance of free expression and intellectual diversity, rather than neatly characterizing group identity as the primary or exclusive means of achieving pluralism of thought;
- Refrain from "training" sessions in which various forms of critical social justice doctrine are presented as the truth and as university policy, rather than one political perspective;
- Make it clear that they will engage with universities in Israel on the same basis as any others, and not join in boycotts.

The saying is that you can be a pessimistic Jew or an optimistic Jew, but either way you have to have hope. I am not optimistic, but perhaps at some point, a new generation will emerge that is tired of being told what to think and how to speak and there will be a new birth of freedom of thought and speech, even at universities.

Part VI

Free Expression and Crises

In this section, I wish to discuss the legislative frameworks for dealing with emergencies, such as COVID, using my own province as an example.

To begin with, all provinces should conduct "lessons learned" inquiries into what happened during the COVID period and identify the key takeaways to be applied in preparing for future emergencies. The focus should not be on blame, but on a fair and open examination of how decisions were made in practice, and what improvements can be made in the legal and logistical framework of each province as we look ahead to the next crises.

The existing provincial framework for dealing with emergencies tend be antiquated. In Manitoba, for example, *The Public Health Act* vests authority for contagious disease restrictions in a single official, the Public Health Officer, subject only to the approval of the Minister of Health. But decision-making in crises needs to be look at from many different fields of expertise and practical experience. If the entire cabinet is involved, various dimensions of measures will be considered in light of different implications—on economic outcomes, educational outcomes, and health outcomes. Expertise from many areas can be drawn upon. The ability of elected officials to canvass their constituents, and obtain unfiltered feedback on how various measures are actually impacting people, and what kind of compliance or noncompliance is happening in the real world, is crucial. The existing law also places an exclusive focus on measures to eliminate health risks

such as a contagious disease, but does not require clear and transparent consideration of the costs as well as benefits of various alternatives.

Crises legislation should state plainly that:

1. The government as a whole is responsible for decisions and outcomes. Its duties include listening to the advice of public health officials, as well as experts within and outside of government in other areas.

Just as there is civilian control of the military, there should be civilian control of the public health apparatus during a crisis. Politicians are not medical experts, but they can canvass differing opinions on medical issues from experts both within and outside of government, ask hard questions from their officials, be alert for biases and limitations of the actual relevant knowledge on the part of civil servants, and weigh the whole range of impacts involved with various options, including their effects on health and other dimensions of human well-being;

2. The government must regularly report and disclose the information on which it is acting and the factors that it is considering.

On many important issues, there may only be partial information and predictions may be difficult. But we should ensure that the government is considering both the long-term and short-term impacts of various measures in multiple dimensions of health, as well as in other dimensions, such as educational outcomes and economic prospects. These dimensions tend to be intertwined. Economic adversity and insecurity can be a major cause of poor health and death. Preventative measures can themselves have adverse effects; how many schoolchildren will have serious and irreversible learning setbacks, eventually drop out of school, and have worse prospects for their health, as well as other aspects of well-being?

3. To ensure the well-being of the public, it is

recommended that the adverse effects of public health measures be subject to rigorous assessment.

If lockdowns were a vaccine or a drug, there would be demanding tests of their adverse effects as well as potential benefits. We might now apply precisely the same test for various public health measures (masking, lockdowns, travel restrictions) as we do for a medication or inoculation. However, it is still necessary for policymakers to inform themselves as much as possible about the negatives as well as positives and fairly report their thinking to the public;

4. The ordinary principles of free expression among the public and free scientific debate among experts should continue to apply. Government should be expressly prohibited from attempting to censor debate in any respect during crises.

In an environment of free discussion, there are real risks of people being misguided by erroneous claims. In some cases, misinformation is not the product of good faith errors in gathering or analyzing data and actually is the expression of malice or paranoia. But efforts to suppress freedom of speech and to control information can also have detrimental consequences. In a free and open environment of discussion, diverse perspectives can be explored, and individuals have the opportunity to critically evaluate different viewpoints. While there may be risks of encountering misinformation or misguided ideas, the benefits of allowing free expression outweigh the downsides.

5. Legislation should not direct governments to focus only on minimizing the impact of one immediate threat, such as a viral contagion, but do so in a manner that considers collateral harm from various proposed solutions.

The government making decisions can report on what it knows and does not know; what is clear and what is somewhat speculative.

Sometimes there are trade-offs between different

values in a particular policy dimension, both short-term and long-term effects must be considered. If a lockdown prevents so many bad outcomes immediately, decisionmakers should also consider whether those outcomes are merely being postponed rather than permanently avoided. It should consider the health impacts of various measures over the long-term as well as here and now.

A solid model to build on is the federal *Emergencies Act.* It was created to replace the crude *War Measures Act* and put in place checks and balances during various emergencies. Among its features that should be adopted in provincial legislation are:

- A requirement by the government, when declaring an emergency, to define its nature;
- Affirmation that the *Canadian Charter of Rights and Freedoms* continues to apply;
- Constant oversight by the elected Legislator;
- Clear identification of what measures a government can take in light of the emergency;
- Recognition that the cabinet, not a single bureaucrat or Minister, is responsible for decision making;
- Automatic expiry of emergency declarations, although they can be renewed;
- Requirement for a public inquiry after the use of the *Emergencies Act.*

Provinces should adopt emergencies acts that incorporate the core principles of the federal *Emergencies Act,* integrate the improvements identified by thoughtful critics after its first use (as seen in relation to the truckers' convoy) and add express and strong provisions confirming the following principles:

- Governments shall make reasonable efforts to inform the public about the data and considerations on which it bases its decisions;
- The government must make reasonable efforts

to inform itself, including canvassing the relevant scientific literature and body of experts, in relation to its decisions, and to make that information available to the public;

- The scientific information that the government has considered in making its decision should be defined and presented in a transparent and non-political manner. This includes acknowledging whether facts or theories are in reasonable dispute or where scientific knowledge is uncertain or unavailable;
- The government may engage in informational activities, including campaigns to inform the public, to recommend steps that can be taken by the public to protect and assist themselves and others in dealing with the emergency and explain any mandatory restrictions. The government shall, in doing so, make all reasonable efforts to be factual, rather than exaggerating or understating risks and benefits of various personal and public options;
- The government may respond to misinformation in relation to the crisis by presenting scientific and other information that supports its decision. However, the existence of an emergency does not increase the legal authority of the government or professional bodies in respect to the freedom of conscience, belief, and expression;
- The existence of an emergency declared by a government does not, for legal purposes, justify any departure, in respect of any activity regulated by law, from the existing rules and regulations concerning professional ethics, including those involving scientific integrity;
- Governments must consider alternatives in a crisis that minimize restrictions on freedom, such as making recommendations and providing information, creating incentives, or facilitating what it believes are productive choices rather than imposing legally binding restrictions.

Legislators tend to be cautious about putting considerations into the statute books that might provoke legal challenges. That anxiety can lead to situations in which the exercise of power is left without adequate structure. We need to do a lot of "pre-thinking" of the legal structure for decision-making during crises, because when they arise, we can become emotional, stressed, and overwhelmed by demands, making it difficult to process and decide effectively.

If it is necessary to assuage concerns about the prospect of having decision-making stymied during crises by court challenges and injunctions, or by after-the-fact findings of civil liability, these concerns can be addressed by the same legislation that provides a meaningful structure for decision-making. Adherence to a well-structured process for government decision-making during emergencies will encourage courts to defer to executive decision-makers, rather than to override them during or after a crisis.

Part VII

Rational Environmental Policy-Making

When Dr. Judith Curry left her academic position with the Georgia Institute of Technology, she explained:

> "A deciding factor was that I no longer know what to say to students and postdocs regarding how to navigate the craziness in the field of climate science. Research and other professional activities are professionally rewarded only if they are channeled in certain directions approved by a politicized academic establishment—funding, ease of getting your papers published, getting hired in prestigious positions, appointments to prestigious committees and boards, professional recognition, etc."

Given that climate change is widely considered an existential crisis for humanity, it is not surprising that the debate—or suppression of debate—can follow the same patterns as those observed during the COVID period, or during a military war.

You may ask: What is there for reasonable people to argue about? Is it not "settled science" that unless drastic measures are taken, human-caused activities, particularly the emission of carbon dioxide, will inevitably cause grave and irreparable human harm?

Actually, Steven E. Koonin, a former science advisor to President Obama, argues in a full-length book that much about the science remains unsettled. Many predictions in the past decades—including the extent

to which temperatures will increase—have proven to be overstated in the direction of calamity.

To the extent that we, as a society, engage in a scientifically informed debate over how to proceed, there are many challenges in attempting to make scientific predictions, as well as in devising policies based on them. If we narrowly focus on a particular objective, for example reducing atmospheric emissions of carbon dioxide, we might incur tremendous costs—disproportionate to any benefits—that would especially negatively impact disadvantaged communities. We might, at the same time, inadvertently inflict environmental harm through the very avoidance measures we adopt.

How much environmental harm, as well as benefit, is produced by measures such as manufacturing, maintaining and disposing of windmills, or electric batteries? We should avoid investing resources on efforts that actually have negligible or no positive effects on the environment. These resources might have been redirected to other purposes, such as efforts to eliminate communicable diseases in less developed countries. Investments might be made in projects such as using AI to promote efficient use of energy or planting forests rather than options that might produce unintended environmental harm or disproportionate damage to the economy, including the immiseration of the poorest people in our society and around the world.

One of the challenges is scientific. Our ability to measure and predict varies in accordance with the specific subject area. At times, science can produce phenomenal precision in all respects. With climate science and predictions there many complicating factors. The climate has many driving forces, with various interactions among them. It is difficult to separate one factor, for example, human carbon dioxide emissions, and determine how it influences climate—especially after all feedback mechanisms are factored in. For instance, a rise in temperature might trigger greater carbon dioxide release from the oceans, leading

to further temperature rises—or not, depending on other factors such as cloud formation.

Some of the factors may involve astronomical events—changes in solar activity, Earth's orbit, and its axial tilt—that can involve cycles taking place over many thousands of years. The place where I lived used to be under ice, and it remerged entirely due to natural warming. The data scientists have to work with is uncertain. Even now, ordinary temperature readings can be distorted by local factors (the urban heat island effect, the placement of a device near a building), it is in many scenitific areas possible to conduct lab experiments or observe natural experiments on a subject that is identical, or close, to one where we wish to make predictions. That is not possible with a system as distinctive and complex as the earth. We can try computer modelling, but current models are severely constrained by the size of the system, the elements of the science, that are still uncertain or unknown, and the limits of computer power compared to the size of the task.

Our thinking can be distorted by many factors, such as overstating how much we can infer using short time frames. A decade or two may seem like a long time to observe and understand a trend, but not when trying to understand the long course of the earth's climate. The recovery from the last Ice Age has been taking place now for over 10,000 years. The "Little Ice Age" lasted 300 years. We can all be too quick to arrive at macro-conclusions from relatively micro-observations; this summer feels hot, so that proves…well, by itself, almost nothing.

The notion that "97 percent of scientists agree on global warming" is out there, but does not appear to be verifiable in any concrete way. A reasonably scientific approach would ask a series of questions. If the issue is carbon dioxide emissions, some of those questions might be:

- What is the Earth's temperature sensitivity to increases in atmospheric carbon dioxide?
- How do we know the current estimate is correct? (Past official UN reports have, by admission of their own later reports, tended to overstate the link.)
- Based on all of the evidence available to the Canadian public and policy makers, what sensitivity should be the basis for policy, what are its margins of uncertainty, and what are the consequences if the best estimate is high, or low?
- How much of a temperature increase will result from a particular increase in carbon or other greenhouse gas emissions? (To arrive at that estimate, we have to consider how increases are amplified or reduced by feedback effects.)
- Does a higher temperature cause more carbon to be released from the oceans, creating a positive feedback effect? Does it cause more growth of vegetation that absorbs carbon dioxide, causing a negative feedback effect?
- What is the state of science on whether increases in temperature cause, or are even correlated with, increased climate disasters, such as the incidences of hurricanes and tornadoes, or with rises in sea levels?
- How much good or bad will that increase do? There is no reason to believe that the Earth's current temperature is optimal. Warmer temperatures might have positive effects in at least some dimensions. More people die every year from extreme cold than from extreme heat.
- What are the benefits and costs of various policy choices? If our country follows a particular policy, what will be the predicted change on global warming? Will other countries follow suit, or potentially diminish or negate the effect of our choices? For example, does limiting fossil fuel production in Canada drive production in other places, where environmental and

human rights standards might be far lower?

- What is the adverse effect on the economy, and in turn, on human thriving, including in dimensions like health and education?
- What are the environmental and other costs of other alternatives? For example, how much damage is done by windmills to the productive use of land such as farming, or the killing of birds, or noise disturbance to people? How much environmental damage is potentially done by the life cycle of the production of lithium batteries?

Seen in an evidence-based, systemic, open-minded way—which includes acknowledging the uncertainties of our data and knowledge—we might devise policies that produce much better results and prevent much more harm than some of our current choices. Policy making should not be paralyzed by the limits of our data and science; often, choices have to be made in conditions of uncertainty. Sound decision making involves considering various scenarios and their probabilities, searching for pathways that minimize the chances of catastrophic outcomes and improve the chances for positive ones. We need to build in mechanisms to objectively monitor unfolding events and adapt our choices in light of them—rather than favouring vindication over course correction.

If the issue is a particular project, environmental law in Canada requires that a rational, evidence-based study take place. There may even be public hearings. The study may include looking at the benefits of the project, the potential adverse effects, and whether those effects can be fully mitigated. For example, if a project damages one fish habitat, can you replace it with another? If some fishers lose part of their livelihood, can they be compensated in money? The *Canadian Environmental Assessment Act* recognizes that economic development and protection of the environment can be mutually reinforcing, and invites policymakers to find ways in

which developments leave no significant net damage to the environment.

These environmental assessments, if properly conducted, can do a lot of good from the point of view of both protecting the environment and economic development. If we had done that in Manitoba in the 1960s and 1970s with hydro development, we would have avoided unanticipated and grave damage to the environment, including devastation to some Indigenous communities and all the ensuing economic and human costs that were not considered.

Let us adopt a conscientious approach with general environmental policymaking itself, rather than only in relation to particular projects. In other words, Canada and the provinces should legislate that before environment laws or regulations are adopted, decisionmakers must first engage in an open, transparent, evidence-based process to rationally consider and report upon the costs and benefits of various options.

Imagine, if before the federal carbon tax is increased, maintained, decreased or eliminated, an independent body could hear expert and lay input, give independent assessment of the expected costs and benefits of different options in all major dimensions—economic, environmental, social—and advise on which options appear to be reasonable. The focus should not be narrowly "how to reduce carbon emissions," but "What mix of policies concerning greenhouse gases produces the best outcomes for the environment, and the thriving of Canadians and the world population generally, including in their economic and social dimensions?"

Experts and members of the public would best have a fair opportunity to participate, respond to each other, and emerge with the belief that their viewpoints have found an open forum where competing views and proposals are listened to with open-minded interest and reported on fairly. Ultimately, the trade-offs involving the environment should be decided by

elected representatives, but all Canadians should be satisfied that there has been a thorough, judicious and public canvassing of the available evidence and options moving forward.

Part VIII

Subsidiarity

Power in a typical Canadian province, like mine (Manitoba), tends to be increasingly centralized in the hands of the provincial government, and within provincial governments in the Premier's office. The role of government has expanded over the years to include responsibilities such as ensuring the delivery of physician and health services, both postsecondary and initial education, non-discrimination, consumer protection, and environmental protection. The left tends to favour centralized decision-making because it believes in a strong role for government in shaping society, and thus holds the view that direct government intervention (whether through control or subsidies) is the best mechanism for achieving this goal.

The right tends to favour centralization for reasons of cost control and austerity. Faced with chronic fiscal problems, the answer all too often is to hire an expensive consultant and be told to "eliminate overlap and duplication." The rhetoric is appealing. But try reframing it as "eliminate choice and competition", which are often means to achieve better outcomes and lower costs. Our political system has not strongly separated the executive and the legislative branch; the executive government tends to control the legislature, and within the executive government, the evolved tradition is that the First Minister's office commands and controls, rather than having collegial decision-making in cabinet or devolving authority to individual ministers. Modern information technologies improve the ability of central authorities to track and direct the activities of both government and individual citizens.

Regarding the federation as a whole, the federal government has tended to assume greater and greater authority at the expense of provincial governments. The principal means of doing so has been the federal "spending power." In an area like healthcare, federal spending is used to ensure compliance with the principles of the *Canada Health Act,* even though physician and hospital care is, in theory, a matter of provincial jurisdiction. With post-secondary education, federal authority in the area of research funding enables federal policymakers to heavily influence the direction of universities.

The centralization of regulation and spending has had profound implications for freedom of thought and expression. In an earlier book, I have argued that Manitoba is a "supplicant society." Practical success in many areas—business, local government, higher education, hydro projects and operations—can depend in large part on responding to the preferences of the provincial government, and, in turn, that of the Premier and his key advisors. You do not want to speak your mind if that means your business is denied a subsidy, or you do not get a government-controlled appointment, or your non-profit doesn't get a grant.

The solution involves a movement towards adopting the subsidiarity principle, which entails leaving or pushing decision making to the most grassroots level that is reasonable and possible. That might mean the individual, or it might mean the family, non-profit organizations, businesses, or other elements of civil society. Within government, it might mean assigning authority or implementation to local government.

Society needs checks and balances, and subsidiarity cannot be applied without some moderation and counterbalances. Local governments can be dominated by personalities and small factions, and need some oversight by courts and provincial governments. Businesses sometimes treat their employees oppressively if unchecked by employment and workplace

safety laws. Unions can be taken over by ideological or special interest groups. Parents can, generally, be trusted to act in the best interests of their children, but we still need safeguards against abuse or extreme imprudence; even homeschooling parents should have to comply with curriculum requirements and permit their students to participate in centralized testing.

While acknowledging that subsidiarity is not an absolute or rigid principle, the current need for reform is in the direction of decentralization in many respects. Allow me to provide an example from here in Manitoba. With respect to personal care homes, cost pressure led the provincial government in Manitoba to effectively minimize the role of the non-profit sector and establish central command and control over personal care homes. The practical effect has been to discourage community-based (including faith-based) organizations in contributing volunteer time, fiscal resources, ideas, innovation, and their familiarity with their own community members.

Let me contrast with a quote from a World Health Organization publication that addresses the principle of subsidiary in healthcare:

> **"Principle of subsidiarity"**
>
> Families, groups and associations to which people spontaneously give life enable them to grow at a personal and social level. The dignity of a person cannot be promoted without showing concern for all these expressions of social interaction. This network of relationships strengthens the social fabric and constitutes the basis of a society.
>
> The principle of subsidiarity states that assigning to a higher institution or level of the society what a lower form of social organization can do is unjust. All higher-order organizations in a society should attempt to help, support, promote and develop lower-order organizations in that society.
>
> This allows the intermediate social entities or

bodies mentioned above to properly perform the functions assigned. Their initiative, freedom and responsibility must not be replaced by "invasive" higher authorities. In other words, a higher institution should give over or delegate to the community what the community can accomplish through its own activity. The process through which government recognizes and supports as part of the public system other actors that institutionally do not belong to the state can be defined in various terms. One term that has increasingly been used in the social and political arena to define this process is "subsidiarity".

Every person, family or intermediate group has something original to offer to the community. Subsidiarity is opposed to extreme forms of centralization and bureaucracy often accompanied by enormous increases in spending. Further, it recognizes the public function of private initiative, such as the government supporting a nongovernmental organization providing public services. This principle clearly builds on respect and promotion of the person and the family and on appreciation of the various existing forms of association and intermediate organizations.

Subsidiarity safeguards human rights and the rights of vulnerable and disadvantaged populations and encourages citizens to be more responsible in actively participating in the social reality of their country. At the highest level, the state is called to step in to supply certain functions, such as technical and professional expertise that is not available or cannot be effectively controlled at the community level.

The participation and involvement of individuals and community are important implications of subsidiarity. They are expressed by activities through which citizens, individually or in collaboration with others, contribute to the social

> life of the community to which they belong. Participation in activities that contribute to the common good, based on the awareness that such contribution is possible, is a responsibility and a duty for everybody. It is something that the community can propose to and promote among its members with full respect for their specific cultural and social contexts.
>
> Examples of the principle of subsidiarity include delegating responsibility for support and care to family members, friends and neighbours; recognizing the public utility of private or not-for-profit health care services that contribute to public health; and supporting nongovernmental organizations and faith-based organizations that provide essential health services in remote areas where public services are not accessible.

An example of a decentralized program in Manitoba is the self and family care option, whereby an individual family receives some government funding, but is able to hire and supervise their own caretakers.

Let us take the example of higher education. The province has established a small number of large universities, particularly the University of Manitoba, which has grown to over 30,000 students, and 1,000 faculty members. It is run by a central bureaucracy that tends to micromanage more and more in the names of efficiency, centralized technology standards, public relations, human rights and diversity policies, "branding" for the purposes of fundraising and grantsmanship, and so on. There are fewer and fewer opportunities for smaller units in the university to move creatively in light of their own ideas and knowledge and familiarity with their stakeholders.

In the past, government policy moved towards decentralization. The University of Manitoba used to be considered the only big university in Manitoba, albeit with various sites. Later, the government allowed the universities of Brandon and Winnipeg to emerge as

their own entities. Government used to run community colleges, but realized, to its credit, they would be better operated as autonomous institutions. It is time for a new round of decentralization.

The University of Manitoba could be decentralized by legislation, so that its faculties and schools would be much more autonomous. It could be provided that units and the central bureaucracy could enter into devolution agreements, whereby the centre might provide services for the units, but they are much more in control of policies like hiring, admission and focus. Another possibility would be to partially break up the University of Manitoba; do its Health Science units need to be part of the 'megaversity'? Could some of its professional schools not operate on their own, even if physically sharing a campus space?

There is another level of decentralization that could be even more productive. Government could move away from funding universities and move toward funding students. Then, students themselves could decide—much better than government—what educational experience in which they should invest their time and talent. Governments are historically not good at deciding which occupations are going to be in demand. They continue to prove ineffective in producing educational environments where students are exposed to a variety of viewpoints and encouraged to think for themselves. The quality of student experience does not appear to be improving. Now, in first-year classes, students may be receiving instruction in massive classes with minimal opportunity for contact with the instructor or choice about who is instructing them.

Imagine a government program that combines vouchers and loans, allowing a student to afford approximately four years of post-secondary education, training, or entrepreneurship. The student could choose which university to attend in Manitoba or elsewhere, whether to study online or in person, whether to attend a college focused on occupational training rather than a general

degree, participate in an apprenticeship program, or perhaps, even, join as an equity partner in a business.

Think of how much more adaptive and responsive colleges and universities in Manitoba would be if the environment were one of competing for student engagement, rather than enjoying the position of "the only game in town." Government could further assist by ensuring reasonable recognition of courses taken at other institutions, for the purposes of conferring a degree or diploma from a particular place.

In regard to primary and secondary education, the government of Manitoba misguidedly introduced Bill 64. It was intended to establish province-wide standards and cut costs by eliminating local school boards, streamlining collective bargaining through the provision of a single across-the-province agreement. The centralization went too far. What the province should be aiming for now is province-wide standards of attainment, alongside maximum flexibility in how various institutions reach those standards and exercise their ability to provide additional value at their discretion. Choice for families in choosing their school should be maximized. Safeguards would need to be put in place to ensure that across the system, as a whole, there are fair opportunities and supports for students with special needs or who require remedial education.

A commitment to widely dispersing authority should be one that a leftwing government should be able to embrace within its own ideology. Many should be wary of the inequalities that result from having political and bureaucratic elites enjoying unduly generous remuneration, security of office, and power over others at the expense of the rest of society.

I would suggest that federal and provincial governments enact legislation that might be called the "Act to Promote Subsidiarity in Governance", using a province like Manitoba as an example:

"*Subsidiarity is the principle that to the extent*

reasonably possible, decision making should be in the hands of individuals, families, communities, non-profit organizations, businesses or other elements of civil society, or local government, rather than being centralized in the provincial government;

"The principle of subsidiarity can be promoted in some contexts by provincial government measures to ensure that those involved in decision making or implementation have sufficient resources or legal authority to be effectively empowered to make and carry out their own choices;

"Where provincial government action is required, subsidiarity may be promoted by limiting the provincial government intervention to defining standards or objectives, rather than micromanagement in the form of regulation, subsidies or other means;

"The Statutes and Regulation Act is amended to add "consideration of the subsidiarity principle" to the list of items that must considered in the framing of regulations;

"A Minister designed by the Executive Council must give an annual report to the Legislative Assembly on the extent to which the subsidiarity principle has been applied over the previous twelve-month period with respect to legislation introduced by the government over the period and in the operations of the provincial government."

Part IX

Affirmative Action? Employment Equity? Reverse Discrimination?

The Enlightenment ideal was that every individual was a political equal, with the opportunity to advance in society based on their own merit. No aristocracy, no ethnic caste system, no religious identification should prevail over the rights of the individual, including fundamental freedoms.

After the Second World War, many jurisdictions in Canada began to adopt human rights codes. In the aftermath of the atrocities of the war, including the Holocaust, most of these codes concentrated exclusively on anti-discrimination. They were based on the philosophy that group generalizations can be inaccurate and unjust. Instead, individuals should be dealt with on the basis of their own individual characteristics and conduct. As expressed by Martin Luther King, "not be judged by the colour of their skin, but by the content of their character."

In the United States, however, a concept known as "affirmative action" emerged. This approach was founded on the principle that specific groups facing historical disadvantages should be provided with opportunities to counteract inequality within laws and policies that appear to be neutral on the surface. Take for example, a police force where there are no black officers due to some combination of racism within the system, or a tendency for existing police forces to favour friends and

family in hiring. Unless some corrective steps are taken, past discrimination might/would continue indefinitely. The police force would lack legitimacy in the eyes of many, lack cultural knowledge of some key parts of the city, and may miss out on some of its most talented candidates by any measure.

The achievement of actual equality of opportunity requires sensitivity to artificial barriers. Existing systems that appear neutral may, regardless of any invidious intention, present unfair or unnecessary barriers to some. A person with a physical limitation should be able to access a workplace by an elevator if they cannot use a staircase. A height requirement for an army might disproportionately and unnecessary exclude many women, or many men from ethnic groups who tend to be less tall. Creative and energetic efforts may be needed to inform and encourage members of various communities to appreciate that they have opportunities in a particular organization, and would be welcomed by it no less than any others.

"Affirmative action" and "employment equity" programs can be appropriate, even necessary, but they need to be designed and implemented with care in light of other values, such as individual equality and the avoidance of typecasting on the basis of group affiliation.

They should be carried out in a transparent manner, recognizing that the general tenet of individual equality remains as a guiding principle, and that exceptions that favour members of one group or another should be well-defined, well-justified, and limited in scope and time.

We have to be careful about using group characteristics to benefit someone who personally did not suffer from a past wrong, while simultaneously excluding those who never benefited from that wrong either. The use of group affiliation to promote self-serving goals is not an infirmity confined to members of any one group, even if the group has suffered previous disadvantages.

There was a time when women were socially

disadvantaged and officially discriminated against in institutions of higher learning. Nowadays, there are faculties or institutions where most of the students, professors, and administration are women. Some have come from privileged backgrounds. In such contexts—no less than in male-dominated contexts—it is not unheard of or unseen to find discrimination against members of groups such as men, persons with disabilities, Christians, Jews and persons born in Africa.

The idea that affirmative action is never worthy of judicial protection because the majority can defend itself politically is a perspective that warrants careful consideration and examination. Only minorities, it is held, need protection. This idea is simplistic. Affirmative action programs can be designed and continued precisely because they benefit a majority (say, women, or the ensemble of all those who are recognized as belonging to an "equity group at an organization or area"). In other contexts, members of a group that do not form a majority can still be a well-organized minority that effectively advocates for its collective interests. A group can, depending on the context, legitimately be seen as an oppressed minority or a powerful special interest group.

In Canada, the debate over "affirmative action" took a turn when the Abella Report was issued, then calling instead for "employment equity." The vague concept was intended to finesse debates in the United States involving complaints of affirmative action. The nebulous analysis and recommendations permitted key issues to be fudged, such as whether the aim was to remove unfair and unnecessary barriers to equal opportunity, or to mandate a society based on equal outcome for members of different groups.

Equal outcome based on "group" identity might seem like a just objective. Let us consider that proposition more carefully. When Rosalie Abella served on the Supreme Court of Canada, she was one of four persons of Jewish descent or identity out of only nine justices.

If you are choosing on merit, a majority of judges might be just about any identity, for instance women (an overwhelming majority of the current Manitoba Court of Appeal are women); Catholics (in some recent times, the Supreme Court of the United States has had no Protestant members); persons of colour, and so on. If you insist that group identity is a top priority in appointments, there will almost never be another Jewish judge of the Supreme Court of Canada; how often does a minority that constitutes about 1 percent of the population get its turn? In practice, "social justice" ideologies are frequently antisemitic, and stereotype Jews as "privileged" and "oppressors."

Asian Americans are currently exceeding white Americans in many metrics, including admission to top universities and average income. There might be many reasons for that. The very classification of "Asia" is absurdly broad, and the arbitrary nature of such classifications presents an inherent challenge to employing group affiliation rather than individual identity as the basis for our society.

Some Asian Americans may overcome social or institutional discrimination, but have supporting factors such as a special ambition to succeed and prove oneself that may be found in some groups who have suffered exclusion. Culture can be a factor at least as consequential as any state action; members of a particular "equity group" may come from cultural backgrounds that especially prize certain fields of endeavour (medicine) or prize high academic achievement generally. Families matter; children who grow up in stable and two-parent families may have better prospects, statistically, than children raised in some other environments. The condition of families can vary among various groups. The demographic profile of a group can also have an impact; if you are looking at the average income of a group, you need to know how old the average member is. You might also wish to consider how members of the group came to join your population; consider whether

Canada has a "merit-based" immigration system that encourages immigration of individuals with marketable skills. When examining disparities in group outcomes, and considering the state's role in addressing them, we need to be able to think, analyze and debate freely, rather than being confined or censored by rigid ideologies.

The Supreme Court of Canada has largely—in the pursuit of one ideological agenda—turned equality jurisprudence upside down. Section 15(1) of our Charter guarantees the equality of every individual. Section 15(2) permits affirmative action programs in spite of 15(1). As 15(1) is one of only three sections of the entire Charter of Rights that specifically refers to the "individual", the Court might have paid attention to the ultimate importance of individual difference and dignity.

Section 15(2) might be read as a limitation on section 15(1), as it permits affirmative action based on group identity. However, this should be subject to some limitations, ensuring that an affirmative program doesn't depart from the principle of individual equality more than is reasonably necessary to accomplish a legitimate objective. The Supreme Court has instead suggested that section 15(2) shields any and all affirmative action programs, and that section 15(1) is be primarily about securing justice of disadvantaged groups and not about the protection of individuals against the use of group classification and stereotyping, regardless of the original intentions.

The enthusiasts of "employment equity" at the Supreme Court of Canada have been happy to cite the Supreme Court of the United States to support their position. Will the same Supreme Court of Canada simply ignore the parts of American jurisprudence that have cautioned about the risks of using group identity as a basis for justice? In the middle of 2023, in the Students for Fair Admissions case, a majority of the Supreme Court of the United States ruled that it is contrary to the guarantee

of equality in the American constitution for universities to discriminate in admissions on the basis of race. The judgment of Clarence Thomas sets out his vision of the historical realities and contemporary demands of fairness. In my view, it is magisterial. I would simply ask that before anyone in Canada dismisses it, they first read it with an open mind from beginning to end. The concurring judgment of Justice Gorsuch is a *tour de force* in explaining how arbitrary government tends to be when it chooses what constitutes a group and which ones are favoured or burdened.

The Supreme Court of Canada will likely continue for the next few decades to tilt towards critical social justice theory for a number of reasons, including an accumulation of precedents made by the number of judges appointed during the Trudeau era, led by a Prime Minster who tends to be fervent in his rhetorical adoption of critical social justice ideas. More subtly, the "input" at the Supreme Court of Canada tends to be skewed. The legal academic is not representative of the general public, but includes many critical social justice advocates, and hiring is strongly skewed against potential new voices who have more individualistic, libertarian views.

The Supreme Court tends to cite academic articles as important sources in its decision making. The law schools, however, are titled heavily in the direction of hiring those who range from moderately left of centre to the far left. Furthermore, the Supreme Court of Canada often hears a skewed selection of intervenors; in cases expanding the rights of unions, it never seems to have noticed the sheer number of unions appearing before it, as well as the absence of direct representation from any groups that suffer at times from excess union power—such as students (versus faculty unions), unemployed persons, residents of institutions such as prisons, hospitals, and personal care homes. In cases connected with s. 15, the intervenors skew in favour of political and social activist organizations on the critical social

justice side of the spectrum.

In creating the constitutional duty of governments to negotiate with public sector unions, the Court seems to have made no note of the fact that so many of the intervenors were public sector unions. The pattern continues in such cases. Those who might suffer at the hands of unduly powerful public sector unions tend to have no distinct representation. The Court seems to have bought into the notion that unions stand up for the vulnerable against big government; but sometimes the government is a necessary force in standing up for even more vulnerable people, like school children whose interests may be at odds with teachers' unions, or prison inmates versus unions of corrections officers, and accused persons versus police unions.

The reform of "employment equity" in Canada can proceed in a way that is moderate, thoughtful, and still retain the positive features in developments in areas such as recognizing "adverse effective" discrimination, and the need to overcome artificial barriers to equal opportunity and the occasional need for taking into account group identity. But the provinces and federal levels should amend the provisions of their human rights legislation that appear to permit any and all "affirmative action programs" to be exempt from the overarching commitment to individual equality. Rather, provisions that permit affirmative action programs could provide the following:

- Affirmative action, employment equity or diversity programs are permitted under this Act if they otherwise are compliant. If any aspect of such a program would ordinarily be contrary to the provisions of this Act that prohibit discrimination on the basis of group characteristics, however, that aspect of the program is only lawful if is defined and applied in a transparent and a justifiable modification of a strict adherence to the principle of equality for all individuals.
- "Transparent" means that the program identifies and defines, in a clear manner, the extent to which

any individual would be favoured or disfavoured on the basis of their actual or perceived inclusion in a group that is identified as a prohibited ground under this Act rather than in light of the person's abilities, record of performance and potential.

- "Justifiable qualification" means the program does not discriminate to any greater extent than is reasonably necessary to overcome past discrimination in that organization.

In assessing what constitutes a justifiable qualification, the following factors must be considered:

- Whether the objectives of the program, such as eliminating artificial barriers to equality of opportunity, can be accomplished by means that do not include discrimination on the basis of group identity;
- Whether, before initiating the program, the organization has conducted a reasonably thorough study of the extent to which it is reasonably necessary, and documented its analysis in this respect;
- Whether the program will be reviewed periodically to assess the extent to which it is accomplishing its objective and remains reasonably necessary. All such programs must have a sunset of no more than five years, after which they can only be renewed, or continued in a modified form, after a reasonably diligent review and assessment support doing so.

The meaningful and effective pursuit of equality of opportunity rarely requires a departure from the principle of treating individuals on the basis of their individual merit, rather than typecasting them on the basis of group identity. Energetic and effective measures to eliminate various forms of discrimination—including disguised or unintended forms—generally do not require the cancellation of the principle of viewing individuals as individuals, not through the lens of group stereotypes.

Legislative moves to reaffirm and reassert respect for the

equality of individuals, including those with all political viewpoints, are a necessary step towards returning to a society that is not only non-discriminatory but genuinely open and free. The excesses of the "equity, diversity and inclusion" movement—including its tendency to typecast on the basis of arbitrarily chosen definitions of group identity, and its censorship of any questioning of its overall ideology—can be addressed in part by the kind of legislative action set out here.

Equality of individual opportunity in areas such as employment is crucial to ensuring that we have a genuine pluralism in the cadres of people who exercise state authority, including the civil service, or have key roles in influencing public opinion, such as educators and journalists. It is also necessary for legislatures to send a signal to our society as a whole that the most censorious and discriminatory strains of "critical social justice" ideology are not the only possible or permitted views, and that we have counterbalancing and moderating commitments, such as to free expression and seeing individuals, first and foremost, as individuals, each one with their own strengths, limits and weaknesses, each one an intrinsically equal part of our society and state.

Part X

A Revived Commitment to Democratic and Legal Process Values

Process values are the essential legacy of progress in virtually all areas of human endeavour. Science includes factual discoveries and explanatory theories that are true, or as close to truth as nature permits and the wiring of the human intellect allows us to appreciate. Science only has proceeded, and can further proceed, when it scrupulously honours process values such as transparently and honestly presenting findings, permitting rigorous review and debate about them, and maintaining an open mind about whether further research requires them to be refined, qualified or abandoned.

It is destructive to science to distort or falsify results, or censor debate, in the name of a higher good. Whether driven by a sincere belief that your theory is actually true or a desire to raise public awareness about potential harm, exaggerating the findings of scientific methods or their level of certainty only undermines the essence of scientific principles. In the long run, the value of science is eroded, and public confidence in the whole methodology is eroded.

When applying state power to an individual, procedural fairness is required. No matter how guilty a person looks, the state cannot punish that individual without a proper hearing. This involves presenting evidence fairly, subjecting that evidence to cross-examination considering contrary evidence, and making decisions

based on case specifics rather than presumptions of fact or ideological influences.

The task of an adjudicator is to fearlessly determine the specific circumstances, and then apply the same abiding legal norms as would be applicable in any other cases. The identity of both the accuser and the accused should be irrelevant.

To Kill a Mockingbird is about Atticus Finch's heroic attempt to defend a man who was falsely accused of assaulting a woman. In that case, the accuser was a white woman and the accused, a black man. In the real-life Tawana Brawley case, a black woman falsely accused a white police officer of sexually assaulting her. Take every kind of false accusation, and you can find representatives of every group and opinion either carrying false testimony or becoming its victim.

The abiding principle should be that witnesses do not deserve to be believed, or not believed, on the basis of their status, titles, rank, wealth, skin colour, ethnic identity, ideology, or gender. Their evidence should be evaluated in a rational and careful manner, in light of factors such as conflicting or confirming evidence from others or from physical evidence and from its own internal consistency. Departures from due process are not excusable in light of righteous objectives.

McCarthyism of the right is wrong. McCarthyism of the left is wrong. The rule of law should apply regardless of whether you believe the law is just, or prudent. In a democracy like ours, law is the result of reasoned process, either legislated by elected representatives, or by independent judges who must hear arguments and who are subject to appeals.

The rule of law means that we are governed by norms that are produced in a generally credible manner, and that can be a stable basis on which an individual can plan their conduct in advance and be shielded from retaliation afterwards. The justice of causes vary, but that does not mean if you agree with a cause it is

acceptable to engage in blockades that disrupt the lives of others, up to and including impeding their access to their jobs or medical care.

There is room in a society for civil disobedience when all else fails in the face of oppression, but, as Martin Luther King said, it should be conducted for the right reasons—of trying to persuade the other side, viewed as fellow human beings, not the irredeemable enemy—and subject to self-restraint such as being peaceful and accepting consequences such as arrest.

Academic freedom should apply equally to all. The university must be a place open to all ideas, regardless of how popular. Hiring, retention and promotion should not be dependent on whether you are a member of the current elect of the righteous. Otherwise, universities cannot be places where the truth can be sought honesty, rigorously and openly, and where students learn to be independent and, critical thinkers and citizens.

Currently, universities are closed systems in which only one ideology, that of critical social justice, is an apparently acceptable—in many respects, approved and mandatory—basis for departing from objective norms of non-discrimination and academic merit. In a free and open university, there will be teachers who are mistaken, who promote political ideas that actually are oppressive. But in the long run, the free and independent academic forum can be the best safeguard that a society has for the preservation of democracy and the progress of science.

The reasons we disregard processes are often the same as why we need them. We can decide quickly and emotionally, but make better decisions when we pause to gather evidence, hear debate, analyze, and consider options. Cognitive psychology has distinguished between "type one" and "type two" thinking; the first is fast and easy, but often wrong; the latter requires the investment of time, energy, and the unpleasantness of realizing that you have been invested in views that are mistaken.

I recall a senior administrator in my law school pronouncing that Robert's Rules of Order might have been suitable for the 19th century, but have no place in the 21st. Robert's Rules of Order are actually based on principles that should endure: everyone in the assembly has an equal vote, everyone has a right to speak before a decision is made, decisions benefit from open debate, discussions should address the merits of issues and not ad hominem, and deliberations should take place in accordance with a stable set of rules and not be bent to the will of those presiding. If you take the time to study and appreciate the underlying principles in Robert's, the details are not hard to understand or apply. If the core principles seem outdated, that is a dishonour to the times we live in, not their own value.

Departures from procedural fairness might seem to save time now, but will waste more time in the long run, as decisions never properly defined or decided in the first place have to be reconsidered in light of ensuing confusion and harm. If fair processes are followed, almost everyone—including those who did not initially agree—are more likely to accept the outcome for now, and not feel either that their views were never considered or that there was no rational basis to what was decided. Democracies only survive when those who are on the wrong end of a decision believe that they have not been cheated or bullied.

We could tend to think that this one cause, this one occasion, is so exigent that we can make an exception to the principles of procedural fairness. Perhaps we would succumb to that tendency less if we studied history more, and realized that all times are difficult, and the immediate time of outright crisis is not the first or the last. I recall an interviewer asking a football player what it was like preparing for the ultimate game. His answer was, "If it is the ultimate game, why are we having another Super Bowl next year?" The study of history might also teach us that what seems inconvertibly righteous at the moment might require tempering later

on, or could have been mistaken, even with the best of intentions.

I do not mean to diminish the importance of the immediate. For those involved—such as an accused in a criminal proceeding—this case might be the ultimate case, a moment that inalterably defines their life. That specific case, however, is more likely to be dealt with justly if we follow the best practice in our procedural traditions.

Over the years, I have made a number of specific proposals to improve process values in our political and legal system. Some of my ideas, I think, actually have had some practical influence. For example, I was one of the strongest critics in the area of constitutional reform, opposing the notion that our supreme law should be crafted by First Ministers' conclaves.

We have moved to the view that the public should be consulted from the outset, and that the end product should require approval in referendums. I was a critic of the tendency of hastily convening public inquiries without proper planning, leading to instances of "mission creep" and the potential abuse of individual rights among those targeted. It is fairly routine now for my suggestion to be followed, involving the appointment of a "preliminary investigator" to advise on the nature and scope of an inquiry.

I have been among those proposing that Manitoba adopt reforms—many of which have now occurred—to better ensure that regulation-making is carried out with the benefit of public consultation, and accompanied by some kind of impact and cost-benefit analyses. This particular segment, however, is intended to serve as a plea that goes beyond specific reform proposals, and speaks to our culture as a whole.

In reality, there are plenty of opportunities and temptations to disregard process values, all the way from biased workplace investigations to the process of international organizations. Legal codes cannot address all issues. Some have to be left to the discretion and

self-discipline of those in positions of power. Educational institutions at all levels would have a valuable role if they lived up to the best in our traditions, encouraging all of us to appreciate process values. Honesty and transparency, involving those affected, genuinely listening, and being open to reconsidering their own views—these are the gateways to advancement in the fields of science, humanities, and the practice of self-governance.

Part XI

A Program for Reform

The program for reform here does not require constitutional reform. Everything proposed can be done by legislative change. But there are many obstacles to legal reform faced by elected leaders. It can include passive aggressive resistance by the permanent civil service (as portrayed in the British comedy "Yes Minister").

Even when there is a cooperative civil service, legislation involves an investment of technical time as well as political attention. A great deal of legislation is not written from scratch, but largely cut-and-pasted from legislation in some other jurisdiction. That is not necessarily a bad thing. It can be efficient and productive to take advantage of conceptual work, stakeholder consultation, and legal drafting done elsewhere—and to have the opportunity to see how law reforms have actually worked in practice. Many ideas that seem like a good idea at the time have had unintended and negative consequences.

In addition to actual legislation in other jurisdictions, there can be models that legislators can draw upon. There can be language in international treaties. Expert bodies, whether composed by government, such as law reform commissions, or non-governmental organizations, can be useful sources. Canada's federal privacy law to a large extent incorporates norms formulated by the Canadian Standards Association.

Think tanks can sometimes formulate not only ideas, but legislative drafts. The existence of such material can assist political reforms in turning good intentions

into actual legislative action. Models can be drawn upon to facilitate consultations and expedite the draft of formal legislation. The discipline of formulating model legislation forces reforms to be thought through with more precision in terms of what they intend to accomplish in policy. Subtle or difficult issues of policy and principle that may not be addressed in merely conceptual thinking can appear and must be addressed when it is time to formulate a proposal in the form of potential legislative language.

I do not propose that governments, 'simply' and uncritically, adopt any particular think tank's proposals, even if it includes the form of detailed legislation. Those in political power should not blindly defer to the recommendations of experts in military, public health, economy, law or public policy. Elected governments need to consult with the public at all stages, and subject specialist advice to rigorous questioning (including consideration of the thoughts and feedback of ordinary citizens).

Additionally, it is crucial to recognize the importance of building as much consensus as possible in this context. I suggest that, at their best, think tanks can contribute to the democratic process in distinctive ways, including thinking outside of the settled or cautious ways of bureaucrats and the prudently meek denizens of academia. Model legislation can be a particularly focused, concrete, and potentially usable way of contributing to policy making.

There is also room for intergovernmental cooperation in achieving the kind of reforms proposed in this series. Advocates of federalism often speak of its potential "laboratories" of democracy. One jurisdiction can formulate and try out ideas that are then assessed by others, and adopted in light of how they actually have worked in practice. With respect to the formulation of policy, however, it may be useful for various jurisdictions to consult with others. I would hope that would take place with some of the ideas proposed in this essay.

There might be half a dozen provinces and territories, and sometimes a like-minded federal government, that might want to pool consultations, ideas, and model legislation to achieve the kind of re-Enlightenment liberal program proposed here.

Some of our most intractable problems do not necessarily require that there be a federal government that agrees with the particular policy reforms of a province, territory, or local authority of Indigenous government. Rather, it can be crucial that the federal government allows space for innovation, rather than constraining it through legislation or the use of its spending power.

I have proposed, elsewhere, an idea for improving our overall medical system. It would be based on the "mutual reinforcement" principle. Our public system is costing more per capita while delivering poorer results than many developed countries. Almost all other developed countries have some form of hybrid public-private overall system for paying for healthcare. The existence of private-pay alternatives might help or hurt the public system. A private-pay sports clinic might damagingly drain talent out of the public system, or it might encourage top-notch people to come to a province or stay, shortening the waiting lists for those using the public system. A focus of healthcare reform in Canada should not be precluding private pay arrangements in Canada, but seeking the proper planning and design so that private pay alternatives potentially benefit—or at least demonstrably do not harm— the publicly funded system.

What if the operative principle were this: the federal government would not interfere with provincial arrangements that aim to provide more private or mixed public-private pay options, as long as they are assessed according to the "mutual reinforcement principle." It would be recognized that patient and provider freedom can benefit from a hybrid system, and that more choice can potentially lead to more innovation and better overall health outcomes. Private pay alternatives

might also take some of the pressure of the public system, including shortening waiting lists for elective procedures. Choice would no longer be limited to patients who can afford to seek care in other countries. Under the "mutual reinforcement" principle, however, private pay arrangements would be evaluated in light of whether in practice they are actually like to make the publicly funded system work better, or at least, not undermine it in any significant way.

Innovations would be subjected to a process of independent evaluation, which would include public input as well as expert advice. The model would be environmental assessments. A major construction project might contribute to both the economy or the environment, but, before proceeding with it, there would be an assessment process to determine whether there are likely adverse environmental effects, and whether and how they can be avoided or mitigated.

As things stand, Canadian politicians tend to be inhibited by political taboos about acknowledging the need for major reforms in our healthcare system. I am suggesting that we should have a political environment in which citizens and their elected representatives are able to speak freely about our challenges, and the ways and means for reforms—at both the technical and political level—and cooperate with each other to make significant and positive changes.

Substantive policies come and go—or at least they should. Sometimes they need to be reformed because they were misguided in the first place, sometimes new realities undermine their effectiveness, and sometimes, we come up with new and better ways of looking at issues and addressing them.

We can accomplish little that is good, and do quite a bit of damage, without a supportive environment for thinking and debating about how things are working in practice, and how they might change.

Part XII

Coda

The arc of history does not always move in the direction of justice. It remains to be seen whether it does even in the very long run. You are not more enlightened because—as I do—you claim to draw on the Enlightenment liberal tradition. You are not necessarily more progressive, however, because you follow political Progressivism. Not all innovations are for the better. The most valuable components in our society are some of the oldest elements in Western civilization.

Enlightenment thinkers were often bracingly critical of religious dogma; but they also were inspired by ideas all the way back to the bible. There were fiercely outspoken prophets in those days, critics of the establishment, and even King David was chastened by them. The idea that everyone is equally a member of one single human family is not an idea that should ever grow old.

Many of us no longer believe in a Creator, but even if you believe that there is no supernatural supreme being, no creator beyond the material universe, I do wish that we all believed this: there are no other gods. There is no personality, no political leader, no ideology, no priesthood, there is no one, there is nothing, here on this all-too-human earth, that is a god.

We have not emerged from a religious period, but re-entered one. John McWhorter is right to identify "woke anti-racism" as equivalent to a religion, and it is often elitist, antipathetic of empirical evidence, and brutally intolerant. It frequently agrees with one thing almost all the traditional Western religions—including modern forms, such as fascism and Marxism—have been able

to reach consensus on, which is hostility towards the Jewish people and our tradition. Maybe one of the things that is discomfiting about the Jewish people is not actually what we believe, but our civilizational commitment to questioning, debate and doubt.

The proposals in this series, at least as I conceived them, do not require you to sign up for any political party, to identify yourself as left or right, or to belong to any particular religion or ideology. This series is intended to provide a practical program to check some of the excesses of our time that stand in the way of open debate: in the humanities, in the arts, and in the sciences. If implemented, it would promote an environment in which people could live authentic lives, which critically involves thinking for yourself and saying what you have to say.

I wish all of you the freedom to think your own thoughts. And then, as and when you choose, the freedom to say them right out loud.

Appendix

Appendix to Bryan Schwartz' work on how legislative action is needed to improve the state of freedom of expression and deliberative rationality in our society. This project may be considered a sequel to his influential book "Revitalizing Manitoba".

Some more detailed examples of how the ideas in this book could be transformed into actual legislation

I will give some suggestions in relation to general protection for freedom of speech and belief in our society generally, using Manitoba as an example.

Proposals for Legislative Action in Manitoba to Protect Freedom of Speech, Conscience and Religion while Effectively Preventing Discrimination on the Basis of Political Belief and Activity

There are many challenges in our society that impede the ability of people to live in freedom, including the right of individuals to speak their minds and engage in political activity.

There is a strong desire among many members of the public to see a restored respect in Canada for the ability of people to speak their minds and exercise other fundamental freedoms. During the COVID period, freedom was restricted in many ways, and in some jurisdictions, that included the ability of both members of the public and experts, including medical experts, to express their views.

Even in forums traditionally associated with free expression, like universities, many people feel they are

unable to speak freely and honestly about important issues.

The *Canadian Charter of Rights and Freedoms* only applies to restrictions by governments, and not by private sector actors. It will not protect you, for example, from being fired by a private employer because you express a view in your own time and on your own forum (like a social media post) that the employer or some of its customers do not agree with.

The *Manitoba Human Rights Code,* however, applies to actions in both the public and private sectors. It takes precedence over all ordinary laws.

It is much easier for an individual to bring a complaint under a human rights code than under the *Canadian Charter of Rights and Freedom.* Under human rights codes, individuals have the right to access human rights commissions and tribunals, rather than having to go to court. With the Canadian *Charter of Rights and Freedoms,* by contrast, a complainant generally has to bring a court case, with all the attendant delay, publicity, and expense.

The current *Human Rights Code* in Manitoba only deals with antidiscrimination, not with freedoms, including freedom of speech. The *Code* should indeed continue to deal with discrimination in a robust manner. But freedom of speech and other fundamental freedoms are a part of any contemporary definition of human rights as well. These freedoms are acknowledged in the *Universal Declaration of Human Rights* and in the *Canadian Charter of Rights and Freedoms.* It made sense after the Second World War and in the context of the American civil rights movement for legislatures across Canada to place a strong legislative emphasis on discrimination. In contemporary times, however, freedom of expression is under profound pressure, and legislatures should ensure that it is protected as well in their basic human rights legislation. Quebec has done so. Alberta has a bill of rights that includes freedom of speech, but it is not woven into the *Alberta Human*

Rights Act. The *Saskatchewan Human Rights Code* is the model that Manitoba should follow here.

The Saskatchewan model of having fundamental freedoms incorporated into its human rights code, with all of the accompanying enforcement provisions, has been on the books for decades. These fundamental freedoms—a "bill of rights"—have been contained in a part of *The Saskatchewan Human Rights Code* since 1979. No discernable harm has resulted from this inclusion. This fact should reassure legislators in the face of any scare scenarios raised against Manitoba taking the same step.

Manitoba Legislation could adopt *The Saskatchewan Human Rights Code,* although a few adaptations might be useful.

I would propose the following insertion into *The Manitoba Human Rights Code,* which would copy most of the parallel provisions in the Saskatchewan human rights law.

Proposed Part II.1 of the *Manitoba Human Rights Code*

The Manitoba Human Rights Code

Fundamental Freedoms

Right to freedom of conscience

20.1(1) Every person and every class of persons has the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

Right to Free Expression

20.1(2) Every person and every class of persons has the right to freedom of expression through all means of communication, including the arts, speech, the press or radio, television, or any other broadcasting

Right to Freedom of Assembly

20.1(3) Every person and every class of persons has the right to peaceable assembly with others.

Freedom from Arbitrary Imprisonment

20.1.(4) Every person and every class of persons has the right to freedom from arbitrary arrest or detention.

Right to Free Elections

20.1(5) Every qualified voter resident in Manitoba has the right: (a) to exercise freely his or her franchise in all elections; and (b) to require that no Legislative Assembly continue for a period of more than 5 years.

Scope of Application

20.1(6) These rights in this Part must be respected throughout Manitoba Society, not only in the operation of government.

Limitations

20.1(7) The rights in this part are subject only to such limits, including any limits under other provisions of this Act, to the extent that they are demonstrably justified in a free and democratic society.

(8) On judicial review, the standard of review for determining whether a limit is justified under s. 20(1)(7) is correctness with respect to matters of law, fact and mixed law and fact.

(9) Where a union declines to proceed with a complaint under this part on behalf of an individual, the human rights commission may, in its discretion, consider the complaint.

Section 21.1(6) would be incorporated into the *Manitoba Bill of Rights,* in comparison to the Saskatchewan model, to make it clear that the intent is to protect people from infringements of basic freedoms in the private as well as public sector.

Section 21.1(7) would be added to confirm that fundamental freedoms are subject to limits that are demonstrably justified.

Section 21.1((8) would be added to make it clear that on reviewing the decisions of an administrative tribunal, the reviewing court does not "defer" to the "expertise" of the administrative body that rendered the initial decision. In the Jordan Peterson case, the issue was whether a famous public commentator could be forced to attend a social media training program in light of some of his controversial posts. The reviewing court found, in light of earlier Supreme Court of Canada decisions, that it merely had to determine whether the college had applied the Charter of Rights "reasonably", not necessarily correctly.

However, it is generally the role of the legislatures to establish the final standards for judicial review, and they should act in this area. Professional regulators have no special expertise in appreciating the importance of fundamental freedoms or in making findings of fact in a legal context. They may, in fact, be biased in other directions, such as protecting the status of their profession, shielding it from critiques of its methodologies or effectiveness, protecting its economic interests, or silencing iconoclasts who are upsetting their leaders by criticizing them. In many professions, admissions to higher education or selection for training positions are skewed by critical social justice ideology; such professions are especially ill-equipped to protect freedom of expression in a general sense and, in particular, criticism of that ideology.

Section 21.1(9) would be added to provide that where a union declines to support fundamental freedoms claim by an employee in the workplace context, the employee has the option of bringing their complaint to an independent commission. At present, if the union refuses, the employee may have no legal or practical options to seek justice. In the Horrocks case, the Supreme Court of Canada recognized that this "no

remedy" outcome could occur based on its interpretation of the current legislation. The Legislative Assembly should act to correct this denial of access to justice.

The courts in Saskatchewan have accepted that there are implied limitations on the rights in the basic freedoms part of the Saskatchewan human rights legislation. It might be better, however, for the Manitoba *Human Rights Code* to acknowledge the existence of such "reasonable limits". Doing so would avoid that alarmist claim that inserting fundamental freedoms into the Manitoba *Human Rights Code* would lead to unreasonable consequences, such as suddenly giving unlimited scope to all forms of defamation or removing any and all limitations on verbal abuse in the workplace.

By borrowing the Saskatchewan language, Manitoba would be able to say that it has a tried-and-tested concept, rather than introducing anything that is radical or unprecedented in human rights codes.

The draft here does omit one part of the Saskatchewan *Code,* which is the right of free association in any form. There are several reasons for the proposed omission.

One reason is to avoid disputes about whether the intent of the proposed fundamental freedoms part of the Manitoba *Human Rights Code* is to expand or contract the system of collective bargaining law in Manitoba. The Supreme Court of Canada has used "freedom of association" under the *Charter* to recognize—or some critics, like Justice Rothstein in dissent would say, create—various duties on the part of government to engage in collective bargaining. The proposed draft offered here does not invite the continuation and expansion of that particular controversy.

By not mentioning freedom of association, the proposed Manitoba provisions on fundamental freedoms would also avoid giving rise to the concern that its intent is to interfere with the general statutory regime in Manitoba for collective bargaining.

There may be strong views about the freedom of

employees not to be forced to belong to unions. The Supreme Court of the United States in recent years has moved strongly in favour of individual choice in this arena concerning public sector unions. But any such debate should take place on its own terms as a distinct set of issues and should not become a potential complication to recognizing the essential freedoms that would be protected by the proposed fundamental freedoms part of the Manitoba *Human Rights Code,* including freedom of speech, conscience, assembly, and religion.

The omission of "freedom of association" would also help to avoid any legitimate concern that the fundamental freedoms part of the Manitoba *Human Rights Code* would permit commercial actors to discriminate in areas such as employment or providing services.

The tension between individual freedoms and anti-discrimination laws can be challenging. Reasonable people can have different views on how to resolve that tension in different cases. The 5-4 split of the Supreme Court of Canada in the *Ward* case illustrates how complicated the debate can be and how divided opinion can be. In cases like *Whatcott*—which arose in Saskatchewan—the Supreme Court of Canada has found that the *Charter* permits limitations on what amounts to hate speech, focusing on speech aimed at provoking detestation of individuals or groups, rather than merely speech that is mistaken or offensive. The draft here, as formulated, would almost certainly permit the same outcome as in the *Whatcott* decision.

Section 27.1(8) would be added to make it clear that in reviewing the actions of government bodies, including professional regulators, a court of law in reviewing the decision must not use the "deferential" standard—is the decision "reasonable"—but the correctness standard.

In the Peterson case, the Ontario Divisional Court relied on Supreme Court of Canada precedents, including Doré, to hold that a professional body is entitled to "deference" when upholding the decision of a psychologists association to require a famous and embattled advocate

of free speech to undergo a training session with respect to his use of social media. The fact that a body is expert on psychological science, however, does not make it an expert on matters such as the meaning of free speech, how to apply it to a particular set of facts, or how to fairly and accurately make findings of fact. On the contrary, professional bodies and governments may not only lack expertise on these areas, but also be biased against free expression. They may not like criticism—especially from their own members—about themselves. Some professional associations are primarily governed by advocates of critical social justice, and ideologically favour their version of equality over free speech and thought.

Section 27.1(9) is added to address situations where an individual is represented by a union, and the latter chooses not to proceed with a complaint against the employer involving fundamental freedoms. The Supreme Court of Canada, in the interests of streamlining the overall system, has held in the Horrocks case that if the union chooses not to proceed, the individual might (depending on how the applicable labour law and human rights codes are worded) have no forum in which to press their complaint about fundamental freedoms.

The dissenting opinion in Horrocks more sensibly held that an individual should have the option of taking their case to a human rights commission if the union chooses not to proceed. A union may have a variety of practical or ideological reasons for not wanting to proceed. It can be wholly impractical to expect that an individual, using their own resources, can establish that a union has breached its duty of good faith representation by refusing to proceed.

Legislative Action to Ensure that Freedom of Political Belief, Political Association or Political Activity is protected

I will begin with the example of Manitoba.

The Manitoba *Human Rights Code* expressly does prohibit discrimination on the basis of (k) "political belief, political association or political activity".

Unfortunately, the Human Rights Commission has issued a "guideline" to interpret this provision that seriously narrows its scope and effectiveness: http://www.manitobahumanrights.ca/education/pdf/board-of-commisioner-policies/i-5.pdf.

The Board's policy provides in respect of political belief that:

> "Specifically, it is not the same as a broad right to freedom of expression to be guaranteed to openly debate any issue that affects the public well-being. See, for example: Potter v. College of Physicians and Surgeons of British Columbia (1998), 31 CHRR D/6311 at para. 11). Rather, a "political belief" as protected by the objectives underlying The Code must involve some form of focused discourse about convictions that relate to the political organization, political functioning or political nature or goals of society. See, for example: Morel v. Saint-Sylvestre (Paroisse) (1987), D.L.Q. 391 at p. 392 (Court of Appeal). "Political belief" does not, therefore, include beliefs about, for example, discrete social, environmental, business, human resources, medical or other such issues that bear no connection to the political organization, function or nature of society."

The Board provides similarly narrowing direction on the other branches of s. 9(2)(k). There is nothing in the language of s. 9(2)(k) that requires such a narrow restrictive interpretation.

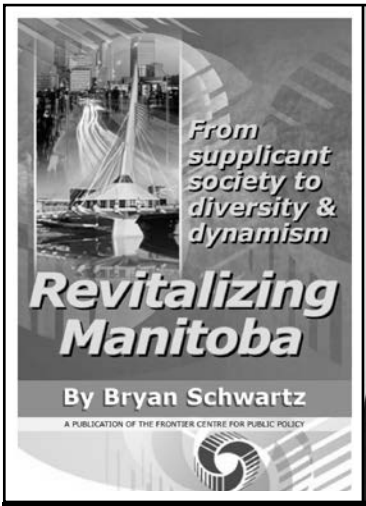
The Legislative Assembly should amend s. 9(2)(k) of The Manitoba *Human Rights Code* to provide that:

> "Political belief, political association, and political activity, **whether of a general nature or in relation to specific issues.**"

This revised provision would ensure that an individual is protected even if that individual gets involved in a particular controversy—on any side—involving controversial matters such as whether lockdowns or masking should be mandatory or a matter of personal choice, curriculum or programming for their children at a school, the merits of a controversial political figure or party and so on.

The proposed revision would not mean that there is protection for any and all associations and activities. All the qualification language that applies generally to "political discrimination" would continue to apply. In respect of discrimination on the basis of political belief, activity or expression, an employer can continue to apply reasonable and bona fide job requirements. An employer can restrict an employee from engaging in outside political activity during the time they are being paid to do their assigned work; but the employer will not be able to discipline an employee who disagrees with the employer on a particular political issue during their own private time.

Other provinces and Canada can and should, it is proposed, adopt amendments to their human rights to include protection for political belief, association and activity. Currently, many jurisdictions, including the federal level of government, do not even include political belief, association or activity in their human rights codes.



ALSO BY BRYAN SCHWARTZ

REVITALIZING MANITOBA

From supplicant society to diversity & dynamism

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Bryan Schwartz, author, editor and contributor to thirty-four books and over three hundred publications presents his latest book, which represents his own independent views, as a sequel to *Revitalizing Manitoba,* which was also published in 2011 by the Frontier Centre. In 'Re-Enlightening Canada' he writes of how we now live in a time where debate, questions, and real answers are no longer seen as being normal. This questioning and answering has been replaced by a progressive and so-called "woke" agenda that claims that science is largely settled without discussion, identity politics are integral to all public policy, and that a socially progressive agenda cannot be debated, no matter how radical it gets. Bryan Schwartz provides common-sense answers to these questions to determine what governments can do to ensure that Canadians do not forever lose the ability of asking questions without recrimination.

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