# Populism and Democratic Decay: Will Canada's Cure be Worse than the Disease?

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*Many political theorists consider populism the principal threat to liberal democracy in the twenty-first century. They argue that the election of demagogues like Donald Trump prefigure a fascist resurgence, which might only be forestalled by an unprecedented reinforcement of the constitutional order — one which would limit the civil rights of anyone who disavows its premises. This paper challenges the assumptions of those who would limit free speech to create a battle-ready democracy. It argues that the lesson of history from the Weimar Republic which we must learn is this: the narrowing of the window of acceptable political discourse is the impetus of political polarization. In the present, we must distinguish between those who would repudiate the tenets of constitutionalism and those who merely spurn the opportunity to align their values with those of the professional-managerial class. The paper demonstrates that reactionary populism should be considered primarily a challenge to the claims of expertise and virtue that are central to the social reproduction and advancement of this class; the rejection of these values is principally the result of political changes that disenfranchised the working class. Further retrenchment of the speech of those who refuse to adopt PMC values will only serve to broaden the inroads for Canadian populism. Despite the danger of this hastening democratic decay, there is an accelerating drive to transform the Canadian legal and constitutional order into a battle-ready democracy, one which has already manifested within the legal profession. The epistemic closure of the legal academy and professions to arguments against that transformation would turn the failure to learn the lessons of history into a self-fulfilling prophecy: those who cannot remember the past accurately are doomed to repeat it.*

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> "Nor does it matter which symbols the enemies of human freedoms choose: freedom is not less endangered if attacked in the name of anti-Fascism or in that of outright Fascism".[1]

# I. Introduction

Democratic decay is a dialectical process; the political forces whose reactions and counter-reactions create threats to the rule of law are always

1 Erich Fromm, *Escape From Freedom* (New York: Holt, Rinehart & Winston, 1961).

in flux. At the time of writing, the currents can be difficult to observe within its roiling turbulence. One risks tempting fate by hazarding any predictions about how future constitutional crises will unfold. In times like these, it is best to begin with a clear assessment of our present circumstances; accordingly, this article will explore the particularities of this contemporary historical moment to demonstrate why it is essential to avoid reliance on misleading historical parallels to past instances of democratic decay.

This will likely be where the divergences between this contribution and others begin. Our analyses will invariably veer further apart as we attempt to chart the future effects of whatever accelerators of decline we take note of, since even a small difference in the initial position in a chaotic system will inevitably lead to pronounced discrepancies in outcomes.

That said, one hopes that this difference of opinion will frame a productive debate about which of the threats to constitutionalism and the rule of law are the most serious. This contribution will assert that it will not be populism that hollows out our democracy. Rather, it is the modification of the constitutional order to protect it from populism — to make it 'battle-ready' — which is far more likely to accelerate democratic decay.

As this article will demonstrate, the heterogeneous political currents now labelled populism are primarily reactive. The unrecognized catalyst is a new form of class struggle in the realm of ideology and ideological state apparatuses, waged between the professional-managerial class (the "PMC", or the "manageriate") and its rivals. Successful populist challenges to this new class's hegemony in the political and cultural spheres has led to increasingly open conflict.

The first tactical objective of this war of position is control over the past, namely to seize authority over the lessons of history about the rise of fascism. Its corollary is the second strategic imperative: the particular class interests of the PMC must be re-branded as universal and integral to democracy and constitutionalism. Next, the constitutional order must be armoured to defend against whatever now qualifies as an existential threat, following the logic of what a democratic order and public sphere dominated by the PMC requires.

If democracy must be made ready for battle, the model for its rearmament is the German *streitbare Demokratie*, which allows for the restriction of the fundamental rights of those whose views are deemed antithetical to the constitutional order. The concept of a battle-ready democracy is particularly attractive to those who confuse populism with fascism owing to their ideological bind spots. Political history — as opposed to ideological just-so stories — provide cautionary examples of its abuses.

Canada's constitutional bulwark against the creation of a militant democracy is not as impregnable as one might imagine. While the *Charter*'s[2] entrenchment of fundamental freedoms would prevent the formal implementation of *streitbare Demokratie*, it is possible to operationalize its tenets in practice within jurisprudence. All this requires is further judicial recognition of the prevention of dignitary harm as a compelling governmental objective and either the weakening of the minimal impairment stage of the *Oakes*[3] test or the continued vitality of a *Doré/Loyola*[4] framework, which is open to the recognition of additional *Charter* values.

The danger of democratic decay that this represents stems from the fact that the concept of dignitary harm can never be neutral, nor will be the assessment of the value of the political speech of those whose freedom of expression will be limited to protect it. While its advocates will typically remain blind to the class-based identification of the types of harms and of the purportedly minimal limitations of rights they justify, those targeted will not accept this with equanimity, at least if history is any guide.

The creation of a battle-ready democracy designed to preclude a populist uprising is the script for a tragedy in the classic sense, as it would be written around a central premise of a self-fulfilling prophecy. As familiarity with the

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2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

4 *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]; *Loyola High School v. Quebec*, 2015 SCC 12 [*Loyola*].

Weimar Republic instructs us, the repression of speech hollows out the political centre and leads to violence, instability, and ultimately to calls for an authoritarian response. Before the war of position between the PMC and the reactionary opposition that its speech restrictions catalyze becomes a war of manoeuvre, we should consider at length whether the cure for the expression of opinions we deem intolerable is inevitably worse than the disease.

## II. From the Past, Through the Present, to the Future

The fourth and final section of this article has the narrowest and most specifically legal focus. It is also the longest by a considerable margin, as it addresses the jurisprudential developments that are required for the creation of a Canadian version of a *streitbare Demokratie* in considerable detail. The three sections that precede it set the stage for that constitutional analysis, by demonstrating that there is considerable impetus in Canada at the time of writing for the creation of a battle-ready democracy of a particular type, and with a specific enemy in mind.

In contrast to the legal analysis that follows, these first sections will draw heavily on history, sociology, and economic theory. Their explication of the contemporary importance of Pierre Bourdieu, Barbara Ehrenreich, and Thomas Piketty's work provide the keys to unlocking the intolerance that is hidden within the PMC's false universality.

The first section deconstructs the terribly *au courant* parallel between the present political crisis in the United States and the final phase of the Weimar Republic. It will also establish the importance of understanding the key role that the tensions between socio-economic classes play in the creation of threats to constitutionalism and the rule of law.

Building upon the parallels drawn in the first section to the earlier crises of the Weimar Republic, the second section will posit the central importance in post-Fordist societies of the role and associated values of a hitherto under-examined class formation: the PMC. It will also discuss its drive to universalize these values as essential to the social position and reproduction of this class,

especially for the members of its most precarious elements: the *lumpenmanageriate*.

These dynamics will explain the appeal of a new form of battle-ready democracy after the populist reversal of 2016. After highlighting the ideological biases inherent to the paradox of intolerance, the third section will outline the dangers of the political exclusion and infringement of the right to free expression of those whose views the hegemonic bloc deems incompatible with the values undergirding the constitutional order. It will also demonstrate that despite these dangers, both the rationale for the battle-ready democracy and the techniques that implement it are being normalized within the institutions that now function as the most important ideological state apparatuses.

The fourth section will, in parallel to its jurisprudential analysis, elucidate how these rationales and techniques for the elimination of dissidence are migrating from the margins to some of the most important centres of power, most notably the legal system. The author's experiences opposing the imposition of a values test by the regulator of Ontario's legal system will be one of the central examples of this drive and its dangerous implications.

The conclusion will recapitulate these arguments in support of its central thesis: if the constitutional order becomes the host for an illiberal, partisan, and unstable form of battle-ready democracy, this parasitism will have consequences. The normalization of repression and centralization of societal power into the state — whether in the past, present, or future — creates a tinderbox.

While we cannot imagine what sparks might set ablaze by a twenty-first century *Reichstagbrand*, it will be clear by the conclusion that a state monopoly for the delineation of respectable opinion is the most direct means of redirecting conflict from the realm of ideas and politics onto the streets. The lesson of history that we must learn is that the transmutation of one class's values into official state values that cannot be criticized is precisely what catalyzes a counter-hegemonic populism — or something worse.

## A. Weimar America? The Use and Abuse of Historical Parallels

Concerns about the rise of populism as a threat to constitutionalism and the rule of law are endemic to the twenty-first century. At its outset, the inclusion of Jörg Haider's Freedom Party of Austria in a governing coalition in Austria in 2000 was considered cause for alarm by many political scientists, as was the sudden prominence of Pim Fortuyn in the Netherlands in 2002.[5] However, these were transient crises: Fortuyn was murdered during the same year of his meteoric rise to fame, and the Freedom Party was defunct by 2005. It appeared that political scientists were as accurate as the economists who correctly predicted ten of the last five recessions. That said, a decade later the warnings of these theorists (like Cas Mudde)[6] came true. In 2016, the broken clock was right on time, as Donald Trump shocked the world by being elected President of the United States of America. A populist was in the Oval Office. The expression of nationalistic sentiments long thought outdated and *déclassé* would now come from behind the Resolute desk. Those who had prophesied that populism would rise within a G7 state and catalyze a new form of totalitarianism — or outright fascism — were vindicated.

The nature and extent of Trump's faults have been the subject of a number of perceptive scholarly treatments, some of which demonstrate nuanced appreciation of the intellectual history of the reactionary tradition in politics and Trump's place within it. One exemplary appraisal (among many others) is Corey Robin's *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump.* [7] Robin's scholarship received widespread dissemination in the publications at the acme of American intellectual life, being excerpted, reviewed,

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5 Wilhelm Heitmeyer & James Steakley, "Tolerance as Risk" (2003) 95:1 Monatshefe 14 at 16.

6 Cas Mudde, *Western Democracies and the New Extreme Right Challenge* (New York: Manchester University Press, 2002).

7 Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump*, 2d ed (Oxford: Oxford University Press, 2017).

and discussed in the *New York Review of Books*, *The Atlantic*, and *n+1*.[8] Unfortunately, it was a much less refined analysis of the Trump presidency (and populism worldwide) that would gain traction within the commentariat.[9]

It is this simplistic analysis that would assume a dominant position over the next four years and appears to have influenced Ontario's legal profession. A broad segment of public intellectuals, in the United States and elsewhere, chiefly located within the vanguard of journalism, political theory, and legal academia, fastened upon the idea that the United States of America is in the same position as Weimar Germany, with Donald Trump in the Adolf Hitler role.[10] As of the summer of 2020, arguments to that end are ubiquitous, not merely in the pages of middlebrow publications but also in the newspapers of record and across many people's social media. This analysis, and the associated call to action, has reached more North Americans than any other alarm of incipient fascism.

At present, the hue and cry about Trump comes from a voice of authority. Bill Moyers may be the closest analogue to Walter Cronkite that there is in these times of proliferating and polarized news sources; his moral authority is unparalleled within mainstream American media at this time. In June of 2020, Moyers described how he saw the light and came to reject his earlier belief that Trump did not present a serious threat to the body politic by re-examining accounts of 1932, particularly Peter Fritzche's *Hitler's First Hundred Days*.[11]

After this Damascene conversion, Moyers rebuked Cass Sunstein's optimistic view: that the checks and balances of the American republic would arrest any slide into authoritarianism. In a sentence printed in bold in the original, Moyers then made the case for s*treitbare Demokratie* (battle-ready democracy): "[i]t may in fact be one of the chief weaknesses of democracy that democracy can lead to

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8 See *e.g.* Corey Robin, "The Triumph of the Shrill", *n+1* 29 (Fall 2017), online: <www.nplusonemag.com/issue-29/politics/triumph-of-the-shill/>.

9 See *e.g.* Carlos Lozada, *What Were We Thinking: A Brief Intellectual History of the Trump Era* (New York: Simon & Schuster, 2020).

10 See *e.g.* Theo Horesh, *The Fascism this Time and the Global Future of Democracy* (New York: Cosmopolis Press, 2020).

11 Peter Fritzche, *Hitler's First Hundred Days* (New York: Basic Books, 2020).

tyranny just as well or perhaps even more than other political systems".[12] The assertion that American democracy is fragile flies in the face of the extensive documentation of the Founding Fathers' efforts to create a republic expressly designed to arrest the Polybian anacyclosis; that was the reason for the checks and balances of the United States Constitution.

There may well be grounds for such a conclusion, but rather than defending his contentious premise, Moyers moves instead to a cascade of analogies between Hitler in 1932 and Trump in 2020, which purportedly demonstrate the truth of the historian Bernard Weisberger's assertion. We are, according to Weisberger, on the verge of an American *Reichstagbrand*: "[a]ll this open talk by Trump of dominance is pretty undisguised fascism. He's inciting chaos to set the stage for the strong man to rescue the nation".[13] Moyers concludes his article by agreeing with Weisberger's alarmism and adding a justification for an immediate response:

> [y]es, Bernie, you are right: the man in the White House has taken all the necessary steps toward achieving the despot's dream of dominance. Can it happen here? It is happening here. Democracy in America has been a series of narrow escapes. We may be running out of luck, and no one is coming to save us. For that, we have only ourselves.[14]

It is fortuitous for the appeal of his argument that the ground had been laid for Weisberger and Moyers by countless other public intellectuals, as the parallels that Moyers draws between 1932 Germany and 2016 America are by no means self-evident. A consideration of the years that led up to 1932 uncovers different parallels — and, accordingly, uncovers quite a different threat to democracy from which "we" must "save … ourselves".

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12 Bill Moyers, "We Hold This Truth to Be Self-Evident: It's Happening Before Our Very Eyes" (5 June 2020), online: *Moyers on Democracy* <www.billmoyers.com/story/we-hold-this-truth-to-be-self-evident-its-happening-before-our-very-eyes/>.

13 *Ibid,* quoting the historian Bernard Weisberger.

14 *Ibid.*

## B. Trump: American *Führer?*

Before Moyers, Timothy Snyder noted in 2017 that "European history has seen major democratic moments", yet "[m]any of the democracies founded at these junctures failed, in circumstances that in some important respects resemble our own".[15] Snyder argues that Germany's slide into fascism was due in part to the conformity of its people during the early phases of transformation, which he dates to 1932, after the election of the "Black-White-Red" coalition that included the Nazi Party in government and led to the appointment of Adolf Hitler as Chancellor.

It is impossible to ignore the later catastrophic consequences of that election. Within a month, Hitler (with President Hindenburg's feckless assent) issued the Reichstag Fire Decree that suspended civil liberties and excluded the Communist Party from the opposition. This allowed the passage of the Enabling Act that transformed the Weimar Republic into a dictatorship. The appointment of Hitler to the Chancellorship undoubtedly warranted decisive opposition: it was Hindenburg's failure to sanction a military coup in 1933 that made the Third Reich inevitable. Accordingly, Snyder argues from history that America is now in great peril, and decisive action is required.

At the time of this writing, many — including a number of law professors — present the current political situation in the United States as having reached a similar juncture to the one Snyder identified. President Trump's threat to invoke the *Insurrection Act of 1807*[16] to send federal troops into multiple American cities to quell unrest, an action that has not been taken since the military occupations of the South during the Reconstruction era, was characterized as a crisis for American democracy.

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15 Timothy Snyder, *On Tyranny: Twenty Lessons from the Twentieth Century* (New York: Random House, 2017) at 10–11.

16 See *An Act Authorizing the Employment of Land and Naval Forces of the United States in Cases of Insurrection*, c 39, 2 Stat. 443 (1807).

Intellectuals' heretofore scrupulous observance of Godwin's Law[17] only served to accentuate its sudden repeal on the eve of the Trump Administration: American lawyer Mike Godwin, the American lawyer after whom the rule of discourse that barred the comparison to Hitler was named, issued a universal licence (via the *Washington Post*) to break that law during Trump's 2016 campaign, specifically to allow the comparison between Hitler and Trump.[18] Among the most ardent of the licensees were a number of law professors, many of whom taught at elite institutions. From Harvard Law School, for instance, Laurence Tribe coyly denied the precision of the analogy, but tweeted that "no prior president even suggests the comparison".[19] Similarly, David Dyzenhaus endorsed Moyers' description of the President of the United States as a "strongman", and chose to lend his considerable prestige to the Trump 2020-Hitler 1932 analogy, building upon it to compare Trump's legal advisers with Carl Schmitt.

Yet a more precise comparison could be drawn between Schmitt and such legal advisers to the President as David Barron and Martin Lederman, Tribe's colleagues at Harvard: they were the authors of a secret memorandum of the Department of Justice's Office of Legal Counsel, which concluded that the President of the United States had the power to authorize the extrajudicial killing

17 This name for the taboo against *reductio ad Hitleram* is attributed to Michael Goodwin, for whom it is eponymously named "Godwin's law of Hitler Analogies (and Corollaries)". See Mike Godwin, "Godwin's Law" (12 January 1995), online: <www.web.archive.org/web/20120829094739/http://w2.eff.org/Net_culture/Folklore/Humor/godwins.law>.

18 See Mike Godwin, "Sure, call Trump a Nazi. Just make sure you know what you're talking about", *The Washington Post* (14 December 2015), online: <www.washingtonpost.com/posteverything/wp/2015/12/14/sure-call-trump-a-nazi-just-make-sure-you-know-what-youre-talking-about/>.

19 Lawrence Tribe (deleted, screenshot on file with author). See also Victor Morton, "Harvard Law professor deletes tweet claiming Trump-Hitler 'physical and behavioral resemblances'", *Washington Times* (14 May 2019), online: <https://www.washingtontimes.com/news/2019/may/14/laurence-tribe-harvard-law-professor-deletes-donal/>.

of an American citizen; and they argued in court that no judge had the authority to review that decision.[20] That twenty-first century *Nacht und Nebel* directive was issued during the Obama Administration.

It is a central argument of this article that there are troubling consequences, both in America and in Canada, to what law professor Jonathan Turley terms the "superheated rhetoric of professors denouncing the Trump administration as a fascist regime" that is "now routine" among "academics"[21] and to widespread acceptance of two of these overheated analogies in particular: that Trump is Hitler; that 2020 is 1932; and that without decisive action, we are on a straight path to an American *Reichstagbrand*. In the United States, for instance, a significant number of prominent political figures (including former Secretary of Defense, Director of the Central Intelligence Agency, and White House Chief of Staff Leon Panetta) suggested in June of 2020 that the sitting Secretary of Defense and the uniformed commanders of the United States Armed Forces should refuse to obey an order from the President to deploy the military in American cities.[22]

More bluntly, a Congressman (who inserted a controversial premise into his compound question when addressing this issue) asked the Chairman of the Joint

20 See David Dyzenhaus, "Lawyer for the Strongman", *Aeon* (12 July 2020), online: <www.aeon.co/amp/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman>.

21 Jonathan Turley, "Chicago Professor Brian Leiter Removed Controversial Post That Appeared to Call for a Military Coup" (9 June 2020), online (blog): *Jonathan Turley* <www.jonathanturley.org/2020/06/09/chicago-professor-brian-leiter-removes-controversial-post-that-appeared-to-call-for-a-military-coup/>.

22 See *e.g.* Tristi Rodriguez, "Former White House Chief Of Staff Says Role of US Military Should Not be Abused by the President", *KRON 4* (4 June 2020), online: <www.kron4.com/news/former-white-house-chief-of-staff-says-role-of-us-military-should-not-be-abused-by-the-president/>.

Chiefs of Staff: "[d]o you intend to obey illegal orders from the President?"[23] From a constitutionalist point of view, this is troubling. The President's role as Commander-in-Chief of the armed forces is constitutionally indisputable, as is his statutory authority to send them into American cities. Removing the president from the role would be sedition, according to the plain text of the *Espionage Act of 1917*.[24] What is more: it would place the military under its own control, which is the essential precondition for a military coup. Some public intellectuals said the 'quiet part loud': one very prominent law professor (with a high profile in both law and philosophy) blogged and tweeted his support for the retired generals who opposed the invocation of the *Insurrection Act*:

> [n]ow he [former Chairman of the Joint Chiefs James Mattis] needs to encourage his military colleagues who share his respect for American democracy and the rule of law to do what he should have done in office: Trump should be deposed and jailed, and VP Pence should conclude his term and stand for election, if he chooses, this fall.[25]

A clearer threat to the rule of law than this can hardly be imagined.

This could only be justified (if indeed one can even accept this sort of pragmatic justification, the logic of which is in itself a threat to constitutionalism)[26] by an even more catastrophic threat. Only the threat of an impending fascist dictatorship might qualify; otherwise, this is simply another example of destroying a country in order to save it. At present, the justification would require accepting the premise that the invocation of the *Insurrection Act*

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23 Helene Cooper, Eric Schmitt & Thomas Gibbons-Neff, "Milley, America's Top General, Walks Into a Political Battle" *The New York Times* (5 June 2020), online: <www.nytimes.com/2020/06/05/us/politics/protests-milley-trump.html>.

24 *Espionage Act,* c 30, 40 Stat 217, §3 (1917).

25 Brian Leiter, "Leiter Law Reports", posted on June 03, 2020 at 5:50 PM in *Authoritarianism and Fascism Alerts* (deleted; screenshot on file with author).

26 See Ryan Alford, "Is an Inviolable Constitution a Suicide Pact? Historical Perspective on Executive Power to Protect the Salus Populi"(2014) 58:2 Saint Louis University Law Journal 355.

would prefigure the suspension of the presidential election, and the crushing of the inevitable rebellions would create a genocidal white nationalist ethnostate. This, of course, is consistent with the lesson of history — or at least the lesson that is pertinent if indeed the parallel to 1932 holds true: if the coup allegedly being planned by Kurt von Schleicher would have been the only possible final throw of the dice to prevent fascism after the Enabling Act, then it would follow that Mattis' inaction would lead to a Trumpian reprise.[27]

That said, it is just as easy to construct a historical parallel to a different — slightly earlier — phase of the same trajectory, which would place Trump not in the starring role, but rather in a supporting role analogous to Alfred Hugenberg's. One might well ask who Hugenberg was: the answer is that he was merely one of many right-wing figures who helped to pave the way for the ultimate victory of the Nazi Party, namely the elections of 1932 and, in 1933, the appointment of Hitler as Chancellor, the Reichstag Fire Decree that outlawed the Communist Party of Germany (the "KPD") and the Enabling Act that established Hitler's dictatorship. The significance of viewing history from this perspective is that, when we look at the role that Hugenberg played, it also becomes apparent that his counterparts on the left were equally culpable.

## C. The Dangers of 'Antifascist' Hyperbole: Antifa and the SPD

Hugenberg does not necessarily present a much better parallel to Donald Trump than many other figures from 1930–1934. The point is that there are a near-infinite number of comparators that might produce more illumination than the one that is invariably drawn instead. As for Hugenberg, he was a media impresario and freewheeling press baron who drifted rightwards after the First World War, moving away from centrism to craft the platform of his German National People's Party (the "DNVP"). Initially, his party called for the restoration of the former grandeur of the German Empire, the re-installation of the Hohenzollern dynasty, the return of German colonial possessions, and state-

27 See *e.g.* Nicholas Rankin, *Churchill's Wizards* (New York: Faber & Faber, 2008) at 1–3.

sponsored antisemitism.[28] The DNVP attained none of its goals before 1930. It had been locked out of the grand coalitions that had previously defined Weimar governments. It was the collapse of the political centre that gave right-wing politicians greater prominence in the 1930–1933 period, during which many important figures on the right, in incremental stages, warmed to the idea of lining up behind the Nazi Party. Ultimately, Hugenberg supported all of the key decisions that resigned him to political oblivion.[29] Accordingly, when one broadens one's historical lens to include the two years that preceded 1932–1933, the central question is no longer why Germans demonstrated what Snyder blithely labels a reflexive deference to authority, but rather why established authority itself collapsed and the key pillars of the Weimar political order fell into the dust.

The answer is that both the right and the left focused their efforts on destroying the centre: the German Communist Party (the "KPD") focused its efforts on destroying the Social Democratic Party, primarily by means of violence.[30] Following the ultra-left turn in the Soviet Union and the Communist International (the "Comintern"), the KPD pilloried the Social Democratic Party (the "SPD") as social fascists: practitioners of a form of fascism so diabolical that it denied its fascist character. After an SPD-dominated government dissolved the paramilitary wing of the KPD, the Communists founded *Antifaschistische Aktion* in 1932, which was dedicated primarily to destroying the SPD before that year's general election. These tactics were the mirror opposite of those adopted by the Harzburg Front of far-right parties, who did their part for political polarization by undermining Heinrich Brüning and

28 See *e.g.* Richard Evans, *The Coming of the Third Reich* (New York: Penguin Press, 2004) at 95.

29 See *e.g.* John Leopold, *Alfred Hugenberg: The Radical Nationalist Campaign Against the Weimar Republic* (New Haven: Yale University Press, 1977).

30 See *e.g.* Eric D Weitz, *Creating German Communism, 1890–1990: From Popular Protests to Socialist State* (New Jersey: Princeton University Press, 1997).

his Centre Party.[31] The KPD's turn to ultra-leftism had disastrous consequences: as Leon Trotsky had predicted, when confronted with a stark choice between the dictatorship of a right-wing leader they despised and the triumph of communists who would seize their wealth, the ruling class would never hesitate to pull the "emergency brake" of revolution: fascism.[32] They had waged half a revolution by disdaining the real threat in favour of easier targets; by doing so, they only dug themselves shallow graves. It was only a precipitous strategic reversal in the Comintern in 1935 that allowed the French Communist Party to support the *Front Populaire* under Léon Blum.[33] His victory prevented France from following the German trajectory into right-wing authoritarianism and ultimately fascism.

It would indeed be disastrous to ignore the Hitler-Trump analogy if this is indeed — as so many would have it — the last moment in which a general uprising might prevent the ushering in of a fascist dictatorship via the *Insurrection Act*, an orgy of racist violence, the suspension of elections, and the creation of a dictatorship. Unfortunately, it remains just as likely now as it was in 1931 that the very belief that this is so might catalyze the same ultimate result, by means of the destruction of the political centre, the normalization of political violence, and the concentration of extralegal power in the hands of those who command the loyalty of the military. This is a danger that is not confined within the borders of the United States, as this article will demonstrate.

Merely asking the question of whether Trump will assume the same role as Hitler in 1933 recalls the joke about the drunk looking for his keys under a lamppost, who when asked if he last saw his keys there, says no: he is looking under the lamppost because that's the only place that isn't in the dark. Similarly, when drawing historical comparisons, we frequently choose to make a historical

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31 See *e.g.* Karina Urbach, *Go-Betweens for Hitler* (Oxford: Oxford University Press, 2015) at 1277–78.

32 See *e.g.* Leon Trotsky, *The Struggle Against Fascism in Germany* (New York: Pathfinder Press, 1971).

33 See *e.g.* Julian Jackson, *The Popular Front in France: Defending Democracy 1934–38* (Cambridge: Cambridge University Press, 1988).

comparison simply because the subject of that comparison reminds us in some fashion — however trivial — of a prominent figure from history whom we can see from our historical vantage point, and about whom we might have similar feelings. At present, it has become commonplace among the American commentariat to draw the tenuous link between Trump and Hitler on the basis of their shared nationalism, as if the drawing of this analogy were not inevitably predicated on a historically, socially, and class-based appraisal of hackney and jingoistic displays.[34]

What is worse: if the only nationalistic figure present in Germany during the relevant period who is remembered is Hitler, one will grope towards that comparison just as the drunk lurches towards the streetlight: it is the only place where any historical comparison might be found. This article contends that the Trump-Hitler comparison says as much about those who promote it as it does about anything else. Given its prominence as a contemporary social phenomenon, the question it will present to the intellectual historians of the future is what its currency among certain segments of the American population in 2020 tells us about the composition and dynamics of that society. Those interested in deriving class-based explanations for social phenomena might well be among those who find this question particularly fruitful.

To prefigure that inquiry, this article will now turn to the question of why this historical analogy is intuitively convincing to a broad segment of the American public. The first step towards answering it is determining the common denominator that defines those who are inclined to accept it —and those who reject it out of hand. While acknowledging that other factors are also relevant to such an enquiry, this article identifies socioeconomic class as that common denominator.

34 Consider the comparisons between Donald Trump and Hitler drawn after his attempt to stage a bombastic military parade on Memorial Day, 2019. It is difficult to imagine that anyone drew a comparison between Charles de Gaulle and Hitler simply because they both enjoyed watching their troops marching through Paris.

Class differences are not immediately apparent, however, because of the opacity of class relations in post-Fordist America, at least when compared to interwar Germany. It is a foundational premise of this article that a consideration of the hidden factors that drive class conflict in twenty-first century America should start with a consideration of which socioeconomic class has attained new prominence since the Second World War. Such an approach invites one to emulate the Abbé Sieyès' famous rhetorical questions, and his answers: "[w]hat is the [Professional Managerial Class]? Everything. What has it been hitherto in the political order? Nothing. What does it desire to be? To become something".[35]

## III. The PMC: The Class That Dares Not Speak its Name

Any adequate description of the destruction of the Weimar Republic and the rise of fascism proceeds from an examination of the class tensions that drove the ideological conflict that hollowed out the political centre and fuelled the escalating paramilitary violence. The first step is simple, as the KPD was the party of a German working class; and the Nazis' core constituencies were the most fragile sectors of the petty-bourgeoisie. Both of these classes had been devastated by the Great Depression, deflationary monetary policy, and austerity. The violence from both far left and right was a function of these classes' struggle for survival in this economic environment, whether misdirected or otherwise.

The willingness of the German lower-middle class to fight to defend an economic system that was crushing them was the subject of considerable intellectual inquiry in the decades following the Second World War. Building upon Trotsky's analysis, C. Wright Mills labelled the lower-middle class as the "rearguarders" of capitalism, who can be mobilized in a crisis against both the working class and another, more shadowy, class formation: the professional-

35 Abbé Sieyès, Political Pamphlet, "What is the Third Estate" (January 1789).

managerial class, against whom they also have significant animus.[36] Drawing on his insights into the increasing complexity of class relations, Mills went on to outline the impact of technological and managerial innovation on class conflict in *White Collar* (1951).[37] As Mills noted, the petty-bourgeoisie and the precarious manageriate occupy a particularly unstable rung of the socioeconomic ladder owing to their lack of control over their conditions of employment, being neither true professionals nor unionized employees. As Hans Enzenberger notes:

> [the professional-managerial class] can be defined only in negative terms, so its self-understanding is also negative . . . this strange self-hatred acts as a cloak of invisibility. With its help the class as a whole has made itself almost invisible. Solidarity and collective are out of the question for it; it will never attain the self-consciousness of a distinct class.[38]

It is this inability to explain its own nature, combined with the manageriate's insecure hold on their social position, that Barbara Ehrenreich explored to great effect in 1989, in *Fear of Falling*.[39]

Since the fall of communism, the shift to neoliberal economics has only exacerbated the downward pressures on the PMC, especially in the all-important arena of class reproduction: "[u]nlike other classes, each generation had to earn its status through educational credentialing, qualifying employment,

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36 Michael D. Yates & John Foster, "Trump, neo-fascism, and the COVID-19 Pandemic", *Monthly Review* (11 Apr 2020), online: <www.mronline.org/2020/04/11/trump-neo-fascism-and-the-covid-19-pandemic/>.

37 C. Wright Mills, *White Collar: The American Middle Classes* (Oxford: Oxford University Press, 2002).

38 Hans Magnus Enzensberger, "Notes and Commentary on the Irresistibility of the Petty Bourgeousie" (1976) 30 Telos 161.

39 Barbara Ehrenreich, *Fear of Falling: The Inner Life of the Middle Class* (New York: Harper Perennial, 1990).

and professional achievement".[40] Unfortunately for the members of this class, the post-Fordist proliferation of automation, scientific management, and the further routinization achieved by stultifying workflow control systems continues unabated.

This has led to widespread de-skilling of the traditional preserves of manageriate employment, particularly publishing, journalism, health care, and large-firm legal work. In 2020, the professional-managerial class remains a large class formation within post-Fordist relations of production, accounting for approximately a third of the workforce. However, its privileged social and economic status is increasingly precarious, due to the existence of a subclass of *lumpen* (following Marx's usage) members. Accordingly, it is increasingly likely to define itself by virtue of its beliefs and social attitudes, which more than ever delineate the boundary between it and the class that it is deathly afraid of falling down the social ladder into — the working class.

The PMC has been repeatedly decimated by recessions and the largely jobless recoveries that follow them.[41] As a result, there is at present an ever-growing reserve army of professional-managerial labour, consisting of freelancers, adjuncts, and temps, which one might call the *lumpenmanageriate*. Without access to some of the key status markers of that class, the importance of its ideology has been magnified. Being able to employ the argot and jargon of their fully employed brethren continues to mark out even the unemployed members of this reserve army of labour as apart from — and purportedly superior to — the working classes.[42] The PMC, which is increasingly of marginal and tenuous status, now has a radicalized and angry rearguard of its own, defined primarily by a group ideology and the antagonism towards its class

40 Amber A'Lee Frost, "The Characterless Opportunism of the Managerial Class" 2019) 3:4 American Affairs 126.

41 See *e.g.* Stanley Aronowitz, *Just Around the Corner: The Paradox of the Jobless Recovery* (Philadelphia: Temple University Press, 2005).

42 See *e.g.* Charles Derber, William A Schwartz & Yale Magrass, *Power in the Highest Degree: Professionals and the Rise of a New Mandarin Order* (Oxford: Oxford University Press, 1990) at 92–93.

enemies, rather than its role in the productive economy or in the struggle for its own reproduction. Insofar as it cannot recognize either its existence as a class or the contingency of its existence within the relations of production, members of this *lumpenmanageriate* are likely to believe that the social attitudes from which the class derive their sense of superiority are not class-based but universally applicable values, which only deplorable people would fail to profess.[43] However, before exploring how these class dynamics affect the ideological superstructure of American society in ways that contribute to neoliberals' perception that their democracy is in crisis, the analysis must briefly turn from sociological theory to political science — by way of economics.

## A. The Class Basis of Contested Values Within Woke Neoliberalism

In 2020, Thomas Piketty published his second book exploring the dynamics of late modern capitalism. While his first title — *Capital in the Twenty-First Century* — focused on neoliberal acceleration of the concentration of wealth, *Capitalism and Ideology* focuses on the role that ideas play in the maintenance and stabilization of regimes of extreme inequality.[44] Its provocative thesis is that neoliberalism has transformed the political sphere for its own purposes, principally the marginalization of the demands of the working class.

Until the era roughly co-terminal with the fall of communism, the political spectrum of most developed countries ran the gamut from the parties on the right, who represented the interests of those who possess capital, to those on the left who stood up for those who sell their labour power. Within that order, social democratic, socialist, or labour parties connected to the union movement were powerful political actors. However, in the last decade of the twentieth century, centre-left parties began to cater to the economic concerns of neoliberalism and

43 See *e.g.* Michael Lind et al, *The New Class War: Saving Democracy from the Managerial Elite* (New York: Portfolio, 2020).

44 Thomas Piketty, *Capitalism and Ideology* (Cambridge, MA: Harvard University Press, 2020).

the social concerns of the PMC; later, their more radical offshoots began to focus on the preoccupations of the *lumpenmanageriate*.

This transformation of the left-wing parties would over time be perceived by their traditional working-class base, increasingly marginalized by the relentless de-industrialization, offshoring, and union-busting endemic to neoliberalism, as abandonment.

In particular, the incorporation of the concerns of the PMC into the core platforms of the left-wing parties (which Piketty labels the "Brahmin Left") left their former base entirely cold: as they "gradually turned to, and came to reflect the worldview of, the new urbanite, highly mobile, highly skilled 'progressive' elites, [they became] geographically, and ideologically detached from the lower-skilled and less-educated peripheral working classes".[45] The revamped agendas of the parties of the Brahmin Left offer no meaningful opposition to globalism or income inequality, focusing instead on issues such as environmentalism and combating the social ills that obtained the most attention within college campuses and corporate human resources departments: sexism, racism, homophobia, transphobia, and ableism. In short, they became parties of progressive neoliberalism.

This article does not argue against the premise that sexism, racism, and other forms of discrimination are genuine social ills or deny that their causes are complex and varied. It does argue that there are significant economic causes of inequality located in the structures of capitalism that the Brahmin Left has become, by and large, incapable of identifying or acknowledging; accordingly, they have turned their focus on locating evils within the working class, which, as Ehrenreich noted, the manageriate views with contempt and paternalism.[46] In the United States, this came into sharp focus when the failures of progressive neoliberalism in one of America's poorest regions could no longer be denied.

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45 Thomas Fazi, "Overcoming Capitalism without Overcoming Globalism?" (2020) 4:2 American Affairs 145.

46 See Ehrenreich, *supra* note 39.

The desolation of Appalachia is plainly apparent. Opiate and methamphetamine addiction ravage its population; life expectancy has plummeted as unemployment has rocketed. The response of the mouthpieces of the Brahmin Left have not been what one would expect based on its *soi-disant* values of empathy, compassion, and hatred of oppression. Opinion pieces have been published by columnists for the newspapers of record that make the astonishing claim that feeling empathy for the white working class would be immoral;[47] the obverse of this are the feel-good news stories that wax Panglossian when describing government-subsidized efforts to retrain elderly coal miners as computer programmers. These two narrative strands of the Brahmin Left's media response to the human catastrophe visited on Appalachia tracked Ehrenreich's description of the PMC's ambivalent attitudes to the working class: contempt and paternalism. That these are the only available options is a function of fact that the manageriate became the backbone of the left parties after 1980: as Stuart Hall noted, both those parties and the classes that support them were those who had been tasked with "manag[ing] the capitalist crisis" that had destroyed Keynesian capitalism, and with doing so "on behalf of the capitalists".[48] After the working class was abandoned by the Brahmin Left, it was inevitable that various strands of populism filled the void. The leaders of these new populist political parties and movements voiced the traditional response to the "contempt and paternalism" directed towards the working class: hostility.[49]

Ironically, the manageriate's reaction to populism misrecognizes the reasons for this new working-class hostility towards the PMC, its values, and its political leadership, characterizing it instead as hostility towards democracy, as evidence of an appetite for totalitarianism, or even as a fascist backlash. The contemporary

47 See *e.g.* Frank Rich, "No Sympathy for the Hillbilly", *New York Magazine* (20 March 2017), online: <www.nymag.com/intelligencer/2017/03/frank-rich-no-sympathy-for-the-hillbilly.html>.

48 Stuart Hall, "The Great Moving Right Show", *Marxism Today* 23:1 (January 1979) 14 at 18.

49 See Barbara and John Ehrenreich, "The Professional-Managerial Class", *Radical America* 11:2 (March–April 1977) 7.

misdiagnosis of populist reaction as anti-democratic animus is in no small part a function of the professional-managerial class's inability to understand that values are not universal. Rather, its own values are largely a function of an ideology determined by its class position.

In particular, the PMC fails to recognize that the purportedly neutral value of "being educated" conceals yet depends upon the indoctrinating function of neoliberal society's leading Ideological State Apparatus — the educational system — which inculcates judgment about who is worthy and unworthy within society in order to facilitate the maintenance of exploitative relations of production.[50] Owing to this characteristic inability, the PMC came to believe that the values it adopted in order to ward off a fall into the working class were integral to democracy.

As Roger Scruton noted, xenophilia and progressivism (the values of which would later come to define the PMC in the twenty-first century) have no intrinsic connection to democracy, especially to the republican form that the Framers developed to arrest the cycle of revolutions.[51] Republics were designed to provide a durable vessel to contain clashes between factions with incompatible values, including the conflicts between classes.[52] There is nothing inherently antithetical to that system within most strands of populism: the limitation of immigration have nothing intrinsically to do with authoritarianism or fascism. However, the fragility of the PMC's status within twenty-first century relations of production was bound to produce an explosive reaction whenever the values that justify its superiority might encounter pressure from below. This is

50 See *e.g.* Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (London: Verso, 2014) at 244–53.

51 See Roger Scruton, "Oikophobia and Xenophilia", in Teresa Walas, *Stereotypes and Nations* (London: International Cultural Centre, 1995).

52 See *e.g.* Eran Shalev, "Thomas Jefferson's Classical Silence, 1774–1776: Historical Consciousness and Roman History in the Revolutionary South", in Peter S. Onuf & Nicholas P. Cole, *Thomas Jefferson, the Classical World, and Early America* (Charlottesville: University of Virginia Press, 2011).

especially true after the creation of a radicalized element within its ranks. The catalyst came in the form of Donald Trump.

## B. Trumpian Aesthetics as the Antithesis of the PMC's *Habitus*

From Trump's entry onto the political stage, criticism of his showmanship and persona was considerably more prominent than detailed critiques of his policies, at least in the national consciousness. On social media, which is the clearest window into the *id* of the commentariat's psyche, it is rare to find links to policy papers containing detailed refutations of his aggressive anti-China trade policy or the decision not to put "boots on the ground" in Syria. Neoliberals today are far more likely to find the *Twitterati* (or, at least, that segment of it that they find congenial and have chosen to follow) enraged by Trump's aesthetic choices.

The visceral appeal and virality within the media outlets of the Brahmin Left of comments about Trump's aesthetic — viz, his hairstyle and spray tan (along with similar critiques of his lowbrow taste for fast food and preference for eating well-done steaks with ketchup, or his inability to fasten his necktie at the correct length)[53] is undeniable. Trump is caricatured as a buffoon whose appearance and speech are viscerally revolting. While Richard Nixon's countenance was satirized so as to reveal the evil deep within his soul, Trump's aesthetic is lampooned in a manner that merely highlights what many consider his worst quality: vulgarity. This aesthetic dimension of the manageriate's animus is a function of the importance of the power to define good taste to the maintenance and generational transference of class position. After the publication of Pierre Bourdieu's seminal *Distinction: A Social Critique of the Judgment of Taste*,[54] it is impossible to dismiss aesthetic judgments as mere subjective criticism: they are essential to social positioning and reproduction. As Bourdieu noted in that

53 See Alyx Gorman, "You Can Understand How Trump Sees the World by Looking at the Way He Wears His Ties" (22 April 2017), online: *Quartz* <www.qz.com/958764/why-donald-trump-tapes-his-ties-together/>.

54 Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, MA: Harvard University Press, 1984).

volume, in a post-Fordist society, investment capital becomes of secondary importance to the social reproduction of the members of the middle classes. Its primary replacements are social and cultural capital. One's connection to interpersonal networks is essential to success and to the ability to set the next generation on the path to a favourable outcome. Belonging — and by extension, social exclusion of others — is crucial.

Another of Bourdieu's key insights was that cultural capital is embodied not only in social mores, etiquette, and *savoir-faire*, but crucially within *habitus*: attitudes, schemes of perception, and bases for moral judgment, which are formed both consciously and unconsciously.[55] Because *habitus* is acquired unconsciously (at least in part), the claims of each class to superiority over the lower orders comes from the unexamined and therefore unshakable belief that these ways of being are innately superior, and that those who lack them are unworthy of upward mobility or of power. While the *haute-bourgeoisie* might have traditionally employed shibboleths such as the use of U and non-U English (and sneered at fish knives and the inability to eat artichokes in the correct manner),[56] for the PMC, the judgment that a person is simply 'not our kind' turns on different criteria. This is evident from the fact that refined manners and appreciation of high culture are no longer the key product of socialization at universities.

Notably, a set of attitudes that include deference to expertise and cultural broad-mindedness are the signals with which credentialed members of the PMC distinguish themselves from the cretinous lower-middle class booboisie. At the same time, the routinization of the manageriate's occupations means that the academic content of the education they obtained has little relation to the tasks they perform. When work is scarce, members of their personal networks are more likely to be competitors than assets to obtaining employment. Accordingly, the importance of *habitus* increases in direct proportion to the

55 See Pierre Bourdieu, *Outline of a Theory of Action* (Cambridge: Cambridge University Press, 1977).

56 See Nancy Mitford, *Noblesse Oblige* (Oxford: Oxford University Press, 2002).

fragility of one's class position, and is therefore particularly important to for its *lumpen* elements, owing to their precarity.

For the graduate with a humanities degree from a selective liberal arts college working as an intern at a small press, what makes him or her feel deserving of their tenuous footing on the professional ladder has increasingly less to do with what they can do, and more to do with who they are. Virtually anyone can fill out spreadsheets and compose PowerPoint presentations, but it takes a sensitive soul who is constantly mindful of inequality to demonstrate that all-important 'fit' with corporate culture. Accordingly, it is this new *noblesse oblige,* respect for administrative or bureaucratic "expertise", and xenophilia that make one a deserving member of the organizations that hope to make change (and set the tone) in the twenty-first century.[57]

According to Bourdieu's erstwhile student Loïc Wacquant,[58] a key element of the reproduction of the social hierarchy is the imposition of categories of perception onto lower classes who, owing to that symbolic violence, accept that the social order which oppresses them is just. One may clearly see the symbolic violence of such an imposition of narrative in the legacy media's refrain that the devastation of Appalachia was no tragedy, owing to the retrograde social attitudes of its white working class.[59] The epidemic of deaths of despair may be seen as the result of the implicit acquiescence of society's judgment of uselessness and irredeemability.[60] However, the acceptance Wacquant describes is not perfect; the rise of Trump to prominence can be characterized as a symbolic reaction in opposition to the PMC's symbolic violence.

To his base, one of Trump's most attractive characteristics is his shamelessness. He flouts his rejection of all of the cardinal virtues of the

57 See Frost, *supra* note 40.

58 See Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Cambridge: Polity Press, 2008).

59 See Rich, *supra* note 47.

60 See generally J D Vance, *Hillbilly Elegy: A Memoir of Family and Culture in Crisis* (New York: Harper, 2016).

manageriate. His nationalism is brash, and his preference for the homely and parochial is unabashed. Crucially, he ignores the claim to authority of managers and bureaucrats, insisting — rhetorically — that allegiance to traditional values is what entitles his supporters to social esteem. To elaborate on Wacquant's model, Trump engages in symbolic counter-violence on behalf of his key constituency: the classes below the PMC.

This is intolerable to the manageriate, as it is a direct threat to their claims to authority, and thus to their social position and reproduction. Hilary Clinton struck back for the Brahmin Left when she placed half of Trump's supporters into the "basket of deplorables".[61] Unfortunately for Clinton, this was soon cited as a classic example of the blunder of saying the quiet part loudly. The spell of that assessment, which was implicitly shared by so many of its targets, was broken when it was articulated, as now it was associated with a particular speaker — and class position. The re-appropriation of the epithet "deplorables" by Trump's base was a clear sign that the PMC's ability to rely on its *habitus* to maintain its class position was now in doubt. Additionally, political positions that were impossible to advocate when the PMC's power as an arbiter of social acceptability was at its height would now emerge into the nation's political discourse.

That the political positions being asserted with new vehemence called for the Trump administration (as well as for local and state governments) to implement policies that directly affected millions of Americans is not in question here. Yet it may also be stated that these positions represented a class conflict: they were the working-class's open expression of the desire to roll back the agenda for a number of issues the manageriate considered the first fruits of their cultural hegemony.[62] Accordingly, as populist views on a number of positions began to be voiced openly across every Western democracy, the Brahmin Left

61 Hillary Clinton, "Presidential Election Campaign Speech" (9 September 2016).

62 One weather vane issue—among many—was Trump's decision to ban most transgender persons from military service. See US, Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *Military Service by Transgender Individuals* (FR Doc 2017-18544, 2017).

and the manageriate needed to formulate a strategy to maintain their superiority. This included asserting the notion that the tenets of the populist movements that are inimical to the PMC are inimical to democracy itself.

Thus, while Clinton's "basket of deplorables" speech may have prompted a backlash, it also contained the outline of a counter-offensive: in it, Clinton implied that those who possess racist, sexist and homophobic views are "not America".[63] In other words, those espousing "outrageous, offensive [or] inappropriate" attitudes could not be considered members of the American *polis*. Whereas observers like the journalist Rich Lowry argued that the term "deplorable" had been used to label "people who believe reasonable but politically incorrect things (immigration should be restricted, NFL players should stand during the national anthem, All Lives Matter, etc.)",[64] others would follow Clinton's lead to argue that the expression of these views was equivalent to violence, and certain to pave the way to fascism. Ultimately, it would be this adaptation of *streitbare Demokratie* that would prepare the ground for the Brahmin Left's counterattack on the new populism, fought on behalf of its new constituents.

As befits the PMC, this strategy was developed in a semi-conscious manner, and it would not be known by its historical name — or indeed by any designation to date. Not surprisingly, it was also developed outside of the formal channels of politics, within the institutions now dominated by the manageriate — including the legal profession. Within these enclaves, it would quickly demonstrate its utility as a means of silencing the expression of views that purportedly threatened democracy, but which in reality focused on preserving the hegemony of the particular class-based attitudes that protect the manageriate's status and facilitate its social reproduction.

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63 Clinton, *supra* note 61.

64 Rich Lowry, "The Garbage Case for Roy Moore", *Politico* (7 December 2017), online: <www.politico.com/magazine/story/2017/12/06/lowry-roy-moore-garbage-216051>.

## IV. Preparing for Battle with Populism: *Streitbare Demokratie*

It became clear by 2020 that Trump's populism had generated an unprecedented response. In keeping with the manageriate's inability to recognize itself as a class with particular interests, denigration of their values was mischaracterized and relocated into a challenge to the constitutional order; it is this response that characterizes a far more fundamental threat to the rule of law than that presented by populism, as it portends the transformation of the rule of law into a post-liberal shell.

The notion that the rule of law must be battle-hardened in order to be able to protect itself has historically been associated with the political right. The typical right-wing tropes used to justify this position include the assertion that the constitution is not a suicide pact, or that respecting the rights of those who would destroy it would only preserve one law, while all the laws but one would be made meaningless.[65] These arguments are usually advanced by the right to justify states of emergency, although these are increasingly likely to be so indeterminate in length as to be effectively permanent.[66] Yet as the next section *infra* will demonstrate, in the twenty-first century, these arguments' left-wing analogues are now most often deployed to rationalize speech restrictions, which are similarly open-ended. Before describing this practice, however, this section must lay out the theory that justifies it, and which explains the attraction and utility of that theoretical framework. As this section will demonstrate, the concept of the battle-ready democracy has a pedigree that makes it appear to be a theoretically defensible and politically appropriate means of preventing a slide into fascism.

Owing to its origins in post-war Germany and its adoption by the European Court of Human Rights, the concept of *streitbare Demokratie* is increasingly cited with approval as a basis for the restriction of rights wherever populism has

65 Alford, *supra* note 26.

66 See Ryan Alford, *Permanent State of Emergency* (Kingston: McGill-Queen's University Press, 2017).

resurfaced, even in nations that never experienced fascism or a serious threat of democratic decay into totalitarianism. Tragically, the growth and mutation of this concept may prove to be a far greater threat to the rule of law that what it suppresses. Should it narrow the Overton window of political discourse such that this precludes opinions that had been freely expressible until recently, the collapse of the political centre that this precipitates could provide the catalyst for the very forms of totalitarianism that it purports to prevent.

## A. The Theory and Practice of Fortifying Democracy

The broad intuitive appeal of "a democracy capable of defending itself" is well-demonstrated by the inclusion of its rationale in the works of a thinker best known for his advocacy for an open society, defined by permissiveness. Karl Popper's description of the "paradox of tolerance" provided an exception for the intolerance of "intolerant philosophies": "we should claim the *right* to suppress them if necessary even by force".[67] The concept of the battle-ready democracy was first elaborated by Karl Loewenstein in 1937, a mere four years after the Enabling Act was used —legally — to transform Weimar democracy into fascist dictatorship.[68] His argument, which the jurist wrote during his exile in the United States, established a rationale for legal restrictions on the freedom of expression: fascist speech was not designed to convince. Rather, Loewenstein argued, it was merely a technique to arouse emotions, particularly hatred. After the War, the creation of the Federal Republic of Germany allowed for the integration of the principles of the battle-ready democracy into the nation's constitutional order. Kevin Williamson outlined the concept:

> *[s]treitbare Demokratie* is today an important German constitutional principle, an idea deeply embedded into the architecture of German government and law. It provides the theoretical basis for . . . criminalizing the communication of certain kinds of political thought . . . and treating as criminal offences that

67 Karl Popper, *The Open Society and its Enemies: The Spell of Plato* (New Jersey: Princeton University Press, 1971), 235 and n 6.

68 See Karl Loewenstein, "Militant Democracy and Fundamental Rights", (1937) 31:3 American Political Science Review 417.

> [which] would . . . in most parts of the free world, be considered ordinary and unremarkable parts of politics.[69]

These principles are embodied in several sections of the German constitution that grant special powers to the Constitutional Court and the Federal Office for the Protection of the Constitution to authorize and engage in a range of repressive techniques and restrictions of civil liberties, which are predicated on a determination that the targets are engaged in a struggle against the constitutional order, which explicitly bars a transition to totalitarianism, even one achieved by legal means.[70] It is obvious how the experience of the Enabling Act and the rise of fascism motivates and explains such restrictions, but it soon became obvious that these measures were open to abuse — at the very least, to concept creep.

While these provisions were first used to disband parties composed of unrepentant Nazis, the Act was soon also invoked to ban the Communist Party of Germany ("KPD"). This was controversial, not least because certain officers of the Federal Office for the Protection of the Constitution involved in investigations had served in the Gestapo during the Third Reich.[71] Even if the decision to ban the Communist Party had not been facilitated by personnel who considered them an inveterate ideological enemy, it is unclear whether anyone in the Bonn Republic could ever view communist political activity objectively, as it owed its existence to the Cold War. The KPD disputed the premises of the Office for the Protection of the Constitution. It argued that the party had distinguished itself during the war against fascism: it had continued its underground struggle against the Third Reich throughout the war, which cost approximately 150,000 German communists their lives. Despite this, vague references to "Marxist-Leninist party struggles" and "the dictatorship of the proletariat" in the party's platform and literature were used to justify the

69 Kevin Williamson, *The Smallest Minority* (Washington: Regnery Gateway, 2019) at 63.

70 See Basic Law for the Federal Republic of Germany, Article 79.

71 See *e.g.* Jefferson Adams, *Historical Dictionary of German Intelligence* (Toronto: Scarecrow Press, 2009) at xxxii.

conclusion that communism was an ideology incompatible with the fundamental liberal order of the Federal Republic, and therefore undeserving of constitutional protection.[72] The decision to suppress the KPD (taken shortly after the Soviet invasion of Hungary) was more a function of Cold War *realpolitik* than a reasoned conclusion about the likelihood of the communists' return to violent methods: across Europe, communist parties were an uncontroversial part of the electoral landscape, which in 1968 (and beyond) had served as a damper on extra-legal political violence. However, the political reality is immaterial to the conceptual framework of the battle-ready democracy. What matters is whether the words and legal actions of a party are deemed to be in service of violent ends or deemed to do violence to democracy itself. Thus, hypothetical violence is used as a justification for actual use of suppression and state violence.

Despite the dangers of this doctrine, the suppression of the KPD set a precedent. The European Court of Human Rights (the ECHR) dismissed the party's application, relying on logic similar to that of the Federal Constitutional Court to conclude that because the party — in theory — would have restricted people's rights had it succeeded, this justified the suppression of the fundamental rights of KPD members — in practice.[73] This implicitly discounted the possibility that the ideology of the KPD was interpreted by its members in a different manner, or that it might change of its own accord in the future, as was the case for other Western European communist parties during the Eurocommunist revision of the 1970s and 1980s. (It should be noted that Giorgio Napolitano, a leading communist modernizer, served as Italy's president for a decade without taking any action to install himself as a proletarian dictator.) The decision to restrict the KPD's speech may have had a paradoxical effect in the decades that followed: after the events of May 1968, the protests in France

72 See BVerfGE [Federal Constitutional Court], 17 August 1956, *KPD-Verbot*, 5, 85, 1414.

73 See Kommunistishce Partei Deutschland v Federal Republic of Germany, Admissibility, App No 250/57, (1955–57) I YB Eur Conv HR 222, 20th July 1957, European Commission on Human Rights (historical) [ECHR].

led to concrete political changes and significant concessions to workers (*e.g.* the Grenelle Accords), in part because the student revolt was subsumed into protests led by trade unions connected to the French Communist Party. Conversely, the German student movement had no analogous and mature ideological ally; instead, numerous students joined radical left-wing splinter groups, some of which engaged in considerable violence, terrorism and, by 1977, assassinations.

The ECHR's decision to uphold a ban on a political party reverberated across Europe, and across the decades of the twentieth century into the twenty-first. At its outset, the ECHR, relying on the *ratio* of its judgment in *Communist Party of Germany v Federal Republic of Germany*, failed to intervene after Turkey banned numerous parties that allegedly challenged the *laïcite* of the Kemalist constitutional order. (It is worth noting that the same rationale was invoked earlier by the leaders of numerous military coups against various Turkish governments.)

In 2003, the very same year that the ECHR upheld the ban on the Turkish Welfare Party, one of that party's leaders — Recep Erdoğan — won a general election under a different party banner. However, the earlier failure to incorporate moderate Islamism into the Turkish constitutional order had already produced considerable political polarization. This increased the chance of a lapse into totalitarianism considerably — a probability that redoubled after a failed coup d'état in 2016, which led to widespread political purges.

Despite these cautionary examples, the appeal of the battle-ready democracy as a response to the perception of a paradox of tolerance continues to appeal to many political observers around the world. But it has not appealed to all, even as it was articulated during the time of greatest peril. Writing contemporaneously with Loewenstein, Erich Fromm argued that political extremism had created a crisis of democracy that confronted every modern state. As noted in this article's epigraph, Fromm rejected *streitbare Demokratie*: "[n]or does it matter which symbols the enemies of human freedoms choose: freedom is not less endangered if attacked in the name of anti-Fascism or in that of

outright Fascism".[74] In Europe, the mobilization of battle-ready democracy against communism and Islamism produced decidedly mixed results. In certain cases it appears that rather than protecting democracy, it created the same dynamics as seen in Germany from 1930–1932, and made the constitutional order considerably more vulnerable to coups and totalitarianism. Owing to this, it is impossible to rule out any negative effects on the rule of law of a heavy-handed application of its techniques to twenty-first century populism. It may be the case that Fromm, and not Loewenstein, will be proven prescient when selective intolerance is deployed by the state — especially if this is done in defence of a noticeably partisan conception of tolerance.

## B. (Post)modern Rationales for Intolerance of Intolerance

The greatest danger of a broad definition of the intolerance that should not be tolerated is that this breadth can disguise the partiality of the definition, or can be camouflage for its selective application for partisan ends.[75] Fortunately, the clear constitutional limits on the restriction of political speech in the United States (and, increasingly, the Westminster democracies) tied the dominant classes and factions to the mast long before the siren song of the battle-ready democracy was first sung. Even so, it is clear that twenty-first century populism has led to some straining against the ropes.

To date, the highest degree of friction has not generated calls to mobilize the state to employ coercive methods to restrict civil rights — that is to say, there have been very few calls for the implementation of legal and constitutional changes that would formally instantiate the basis of a battle-ready democracy (although the first harbingers of this will be described in the next section, *infra*). Instead, what has proliferated to date is pressure on private actors, beginning

74 Fromm, *supra* note 1 at 5.

75 See Williamson, *supra* note 69.

with social media and tech companies, but increasingly corporations in general — to accept the rationale of *streitbare Demokratie* as a basis for "cancellation".[76]

Owing to the close proximity between the PMC, social media, and the tech sector, this dynamic has accelerated, and it has become evident that the definition of intolerant speech that is too dangerous to tolerate is both manifestly overbroad and partisan. Furthermore, it is also becoming clear that this is more likely to drive the development and radicalization of populism than it is to curb it effectively, even as its advocates approach the threshold of governmental action.[77] By 2020, it became evident that the manageriate has turned to "cancel culture" and de-platforming to punish what it cannot tolerate.[78] The acrimonious dispute that arose when J.K. Rowling expressed her views on certain controversial topics associated with transgender rights (including the implications of the recognition of a legal right to self-identify one's sex) may stand as an example.

The comments by the world's best-selling author — long considered a progressive icon — ignited a firestorm. Despite the empathy, tolerance, and reasoned approach to the topic that Rowling espoused, a number of comments instantly labelled her words violence. This conclusion depended on the rationale that any questioning or challenging of the perspective of transgender activists empowers those who seek to take away their rights, and therefore promotes and validates violence against vulnerable transgender people, even — according to some — to the point of precipitating suicides.[79] Within *l'affaire Rowling*, one can observe the roiling confluence of two developments: the hyperbolic

76 See *e.g.* Marjorie Heins, "The Brave New World of Social Media Censorship" (2014) 127 Harvard Law Review Forum 325.

77 See *e.g.* Nadine Strossen, *Hate: Why We Should Resist it with Free Speech, Not Censorship* (Oxford: Oxford University Press, 2018).

78 See generally Michael Bérubé, "The Way We Review Now" (2018) 133:1 Proceedings of the Modern Language Association 132.

79 See Vic Parsons, "Teen News Site Apologizes to JK Rowling for 'Suggesting She's Transphobic' and Urging Readers to Boycott Her Work", *PinkNews* (23 July 2020), online: <www.pinknews.co.uk/2020/07/23/jk-rowling-the-day-apology-transphobia-free-speech-harry-potter-anti-trans/>.

conceptual inflation of the paradox of tolerance and the collapse of the distinction between symbolic violence and actual injury.

First, the 'intolerant' are increasingly defined not by the stated aims of the speaker, or even what can be reasonably imputed to them by virtue of their past speech and conduct. Rather than disputing the speaker's position, their critics castigate them for failing to accept certain premises uncritically. With such critics as these, disagreement is mislabelled as intolerance; a wish to present one's position is equated with the obliteration or erasure of one's aggrieved interlocutor.[80] The second element of this dynamic is a product of a major component of the *habitus* of the *lumpenmanageriate*, named "safetyism" by Greg Lukianoff and Jonathan Haidt.[81] Social psychologists like Haidt identified the elevation of emotional safety to the status of the highest virtue as the unintended consequence of equating threats to self-esteem with actual violence.

The two components of the argument for not tolerating intolerance dovetail perfectly into a seamless rationale for the suppression of Rowling's speech: neither her stated aims nor her reasonable prose have any bearing on the fact that she can be labelled as 'objectively' pro-hate (in the same sense that the SPD was 'objectively pro-fascist' *per* the KPD, following the ultra-left turn) and her words can be unequivocally considered to constitute violence. One might well argue that a spat on social media cannot be considered a harbinger of the incorporation of the principles of the battle-ready democracy and its rationale for restrictions on political speech into the constitutional order. However, such arguments are not limited to Facebook and Twitter.

As the next section will detail, there is an intensifying clamour for something to be done about intolerable speech within the legal profession in Canada. Politicians and regulators are now confronted with powerful incentives, both

80 See Ross Douthat, "10 Theses About Cancel Culture", *New York Times* (14 July 2020), online: <www.startribune.com/10-theses-about-cancel-culture/571761652/>.

81 Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas are Setting Up a Generation for Failure* (New York: Penguin Press, 2018).

negative and positive, to use state power to placate calls from the PMC, which is now the key political constituency of the Brahmin Left.

The essential barrier to the transition from "cancel culture" to the mobilization of official state censorship against those who oppose the PMC's symbolic counter-violence in support of its cultural hegemony is the constitutional protection of the right to free speech. As the next section will demonstrate, this bulwark is not as impregnable as it might seem. Recent events in Canada demonstrate that it is possible to weaken these protections before challenging them directly, principally by smuggling a hyperbolic iteration of the concept of 'harm' into the jurisprudence addressing the reasonable limitation of rights. This is being done in tandem with the insertion of a right not to be offended into the constitution itself, principally by means of the manipulation of the doctrine of *Charter* values, particularly in the case law supporting the position that administrative agencies have a mandate to protect vulnerable groups from what is now considered dignitary harm.

## V. Constitution Ready to Battle Populism — & Free Speech

In twenty-first century North America, one of the most salient ideological divides is between those who accept the epistemology created by the PMC's *habitus* and those who do not: that is what divides the saved from the damned. The latter includes reactionaries, traditionalists, and sections of the working classes, whose political views will be subsumed through marginalization into a heterogeneous populism, which risks being labelled as a modern form of 'social fascism' by its enemies.

The primary element imported from the *lumpenmanageriate's* worldview into (newly intersectional) neoliberalism is the promotion and celebration of diversity, which is so important that it is necessary to being on the right side of history, as it is defined teleologically by the devotees of political messianism.[82]

82 See generally J L Talmon, *The Origins of Totalitarian Democracy*, vol 1 (London: Secker & Warburg, 1952).

Conversely, the wrong side of history is populated by those deemed insufficiently enthusiastic about addressing social wrongs.

This category will include those who merely insist on fighting for their economic interests rather than focusing on addressing gender, racial, or sexuality-defined deficits within the classes that rule them. That is why, as this paper argues, the definition of populism has become so catholic as to be effectively meaningless, except as the catch-all term for the hated enemies of woke neoliberalism. Any political label that covers all reactionaries — from the *Gilets Jaunes* on the left to the *Aliança pelo Brasil* on the right — is necessarily incoherent, and requires the help of a false dichotomy. This serves only to reinforce a worldview that progress is both inevitable and benevolent, and holds that anyone who opposes the process of 'creative' destruction in both the economic and cultural spheres is wrong at best and evil at worst.

One implication of this ideological divide is that the radicalized Brahmin Left has become, as a general rule, phlegmatic about the massive economic dislocations effected by unfettered neoliberal policies. De-industrialization and the dislocation of whole sectors of the economy (whether due to offshoring, technological 'disruption', or the fourth industrial revolution) is viewed as the price of progress. Accordingly, the left is now all too often content to be the handmaid of capitalism, as long as it performs wokeness; modern oligarchs such as Jeff Bezos return the favour by engaging in corporate genuflection (most notably by signalling support for the Black Lives Matter movement).

Blue collar workers and small business owners will remain political vagrants until populist movements rehouse them. As in most countries, their new houses are still under construction (while the decrepit centre-right collapses). For this reason it is unlikely that the most extreme techniques of *streitbare Demokratie* will be deployed in the near future: these parties must be founded before they can be banned for their purported hostility to the constitutional order.

However, the rationale for the integration of the battle-ready democracy into the Canadian constitutional order is being formulated, as diverse groups of reactionaries and traditionalists are now being defined alike as anti-social elements. This process requires weakening the constitutional limitations on the

restriction of political speech found in Section 2(b) of the *Charter*. Motivated by a desire to suppress what they consider dangerous symbolic violence from the deplorables, *lumpenmanageriate* activists in the legal profession are preparing the battle-ready democracy needed for a confrontation with populism.

If they succeed, the Constitution of Canada will be transformed from a shield into a sword — and a key resource for restricting political speech instead of its defender. Canada is already poised to become what the political scientist Eric Kaufmann has noted would be the first post-national state;[83] it remains to be seen if it will need to become a battle-ready democracy and crush populism en route to that goal, and whether its rule of law will survive the journey.

## A. Coercing Lawyers to Promote Values: Rage at Resistance

In 2009, the Law Society of England and Wales adopted a Diversity and Inclusion Charter, which serves as a vision statement for the Society that expresses its commitment to promote greater diversity and inclusion of under-represented groups. The Society encouraged law firms to post a personalized statement addressing the issues the Charter addressed on their own websites, which would serve as a personal adoption and endorsement of its goals and a commitment to addressing these issues.[84] As of 2020, participation remains voluntary.

Inspired in part by these and similar measures, a Report of the Law Society of Upper Canada's Equity and Indigenous Affairs Committee presented to its Board ("Convocation") in 2016 a recommendation that thirteen measures be

83 Eric Kaufmann, *Whiteshift: Populism, Immigration and the Future of White Majorities* (New York: Abrams Press, 2019) at 275–89.

84 "Diversity and Inclusion Charter", online: *Law Society of England and Wales* <www.lawsociety.org.uk/campaigns/diversity-and-inclusion-charter/>.

adopted to address issues related to systemic discrimination.[85] The only measure that proved controversial was the requirement, very similar to that of the Law Society of England and Wales, about a statement of principles. The critical difference was that in Ontario, this would be mandatory.

## 1. The Statement of Principles: First Skirmish of Legal Culture Wars

In 2017, Ontario's legal professionals were informed by email of a new obligation: "[y]ou will need to create and abide by an individual Statement of Principles that acknowledges your obligation to promote equality, diversity and inclusion generally, and in your behaviour towards colleagues, employees, clients and the public".[86] Those who refused to do so were threatened with progressively more serious disciplinary action, although this was waived for the first year of noncompliance, just as serious concerns were raised about the constitutionality of this requirement.

These constitutional infirmities were plainly evident, at least to some; the only case in which the Supreme Court of Canada addressed government-compelled speech (albeit in *obiter*) was damning. In his *National Bank of Canada* concurring opinion, Justice Beetz wrote that compelled speech:

> . . . is totalitarian and as such alien to the tradition of free nations like Canada . . . [where] the *Canadian Charter of Rights and Freedoms* . . . guarantees freedom of thought, belief, opinion, and expression. These freedoms guarantee to every

85 Equity and Aboriginal Issues Committee, "Report to Convocation" (22 September 2016) at 11, online (pdf): *The Law Society of Upper Canada* <www.lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-dec-2016-equity-and-aboriginal-issues-committee.pdf>.

86 Arthur Cockfield, "Why I'm Ignoring the Law Society's Orwellian Dictate", *The Globe and Mail* (17 October 2017), online: <www.theglobeandmail.com/opinion/why-im-ignoring-the-law-societys-orwellian-dictate/article36599997/>.

> person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.[87]

This was only one of the numerous vexing constitutional issues the Statement of Principles presented. It was (and remains) unclear what the duty to "promote" particular values had required, or what it would mean to promote them "generally" in addition to doing so in one's professional dealings. The lawyers retained by the Law Society to address the constitutionality question noted that the vagueness "gave us pause" and "recommend[ed] that the Law Society clear up this ambiguity".[88] It did not. Instead, it communicated to lawyers that the failure to affirm that they would promote these values in general would be grounds for professional discipline.[89]

The opinion letter which concluded that the Statement of Principles was constitutional had conceded that it implicated freedom of conscience, freedom of thought, belief, opinion, expression, freedom of association, the right to liberty and the right to equality.[90] Despite this, and regardless of the "difficulties" the opinion letter identified with the vagueness of the requirement to promote the Law Society's chosen values "generally", it concluded, in its final paragraph, with the truism that "perfection can be the enemy of the good".[91] In other words, the regulator of the legal profession should not let fundamental rights get in the way of pursuing what is most good, namely the elimination of systemic

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87 *National Bank of Canada v. Retail Clerks International Union,* [1984] 1 SCR 269 at 296, Beetz J concurring [*National Bank*].

88 Andrew Pinto, "RE: Opinion on Working Group's Recommendations re Challenges Facing Racialized Licensees" (16 November 2016) (on file with author).

89 See Jacques Gallant, "Part of Law Society's Plan to Address Racism Challenged in Court", *Toronto Star* (7 November 2017), online: <www.thestar.com/news/gta/2017/11/07/part-of-law-societys-plan-to-address-racism-being-challenged-in-court.html>.

90 See Pinto, *supra* note 88 at 357.

91 *Ibid* at 371.

racism. (This, as of 2017, is what passed for constitutional analysis in an opinion letter for Ontario's legal regulator.)

As the next subsection *infra* will demonstrate, this opinion letter implicitly relies upon the manageriate's particular hierarchy of values. It will also detail how the counteroffensive launched against those who contested this worldview followed a process parallel to that observed among neoliberals in the United States after the populist resurgence of 2016.

A constitutional challenge to the Statement of Principles requirement (the "SoP") was soon filed by a law professor; he did so because at that stage no other Ontario lawyer was willing to serve as the test plaintiff.[92] Explaining why he had taken this action, Ryan Alford noted that he made the decision to "become Canada's most notorious law professor" because, while he would "happily take action voluntarily to promote the goals" of "equality, diversity, and inclusion", he was not willing to concede that "as an arm of the State [owing to its statutory powers to discipline its members], the Law Society can[] coerce me or any lawyer to say what my values are".[93] This would generate a dangerous precedent, especially for religious and ideological minorities.[94]

Despite Alford's repeated reiterations in the media that his concerns with the Statement of Principles related to the preservation of state neutrality, the ultimate limits of governmental power over the regulation of the content of speech[95] and the precedent that it would set for compelled speech in other

92 Private correspondence between Ryan Alford and a civil liberties organization, on file with author.

93 Ryan Alford, "An Arm of the State Should Not Be Forcing Lawyers to Declare Their Values", *CBC News* (25 November 2017), online: <www.cbc.ca/news/opinion/law-society-statement-1.4418125>.

94 *Ibid.*

95 Gallant, *supra* note 89.

areas,[96] he was subjected to blistering criticism. Prominent diversity advocates in the legal profession labelled his arguments "disingenuous"[97] and identified the real reason for his objections as "white rage".[98] (It is unclear how this could explain Ann Vespry's earlier objections,[99] or those of Jorge Pineda and Chi Kun Shi's that followed;[100] one particularly notable feature of the media coverage was the erasure of people of colour from the opposition to the Statement of Principles.)

## 2. The Law Society of Ontario as a Site of Symbolic Counterviolence

Owing to the slow movement of the millstones grinding out a resolution to the constitutional challenge, a heterogeneous set of lawyers decided to seek election to Convocation of the Law Society, with the goal of effecting a legislative repeal of the Statement of Principles requirement. While few wagered that this group had any chance of success in the election, every single member of the group succeeded in a landslide: each of these candidates received more votes than any other candidate in the history of the Law Society.[101] The silent majority of

96 See Day 6, "Ontario's Law Society is Tying Itself in Knots Over Diversity and Compelled Speech", *CBC Radio* (6 September 2019), online: <www.cbc.ca/radio/day6/democracy-divided-the-handmaid-s-tale-measuring-hurricanes-diversity-vs-free-speech-and-more-1.5272042/ontario-s-law-society-is-tying-itself-in-knots-over-diversity-and-compelled-speech-1.5272070>.

97 Atrisha Lewis, quoted in Day 6, *ibid*.

98 Anthony Morgan, quoted in Day 6, *ibid*.

99 Joseph Brean, "Ontario Lawyers Must Say They Promote Equality, or Else After Law Society Rejects Exemption for Conscientious Objectors", *National Post* (1 December 2017), online: <www.nationalpost.com/news/canada/ontario-lawyers-must-say-they-promote-equality-or-else>.

100 See Max Binks-Collier, "Bencher Warfare", *CBA/ABC National* (16 October 2019), online: <www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/bencher-warfare>.

101 See "2019 Election Results and Voter Turnout Statistics for Lawyers 1999-2019" (2019), online (pdf): *Law Society of Ontario*

lawyers concerned with imposition of a new regime of compelled speech had spoken.

The response to this electoral vindication of opinions deemed by supporters of the SoP to be outside of the range of the acceptable came very quickly. One prominent former bencher identified the organizers of the group that won the election as "right-wing fundamentalist zealots", while another called them "people who have right-wing religious views". (In support of this evaluation, the author of the article in the *Toronto Sun* in which these former benchers were quoted identified one of the twenty-two electees as an "ordained Roman Catholic permanent deacon" and another as "president of the Catholic Civil Rights League".)[102]

No information on the other twenty was included, although they include an immigrant from Hong Kong, another from Guatemala, a Buddhist, a Jew, a former NDP candidate for Parliament, and a prominent practitioner of Aboriginal law who has litigated for decades on behalf of a number of Band Councils.[103] The reduction of these lawyers' views to no more than "regressive ideology" on the basis of thought-terminating clichés frequently approached the level of absurdity. This became evident when one of the members of the newly elected group of directors ran for the position of Treasurer of the Law Society.

Had she been elected, Chi-Kun Shi would have been the first woman of colour to lead it in its three-century history. Instead, Shi received only the votes of the twenty-two opponents of the Statement of Principles. Every other bencher voted for the sitting Treasurer, a cishet white man who had previously been the managing partner of McCarthy Tétrault. The Treasurer had retained his seat at Convocation by the skin of his teeth, after coming in twentieth of all

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<lawsocietyontario.azureedge.net/media/lso/media/about/voting-results-for-2019-lawyer-bencher-election.pdf>.

102 Michele Mandel, "Law Society of Ontario Taken Over by 'Right Wing Fundamentalist Religious Zealots?'", *Toronto Sun* (3 May 2019), online: <www.torontosun.com/news/local-news/mandel-law-society-of-ontario-taken-over-by-right-wing-fundamentalist-religious-zealots>.

103 See Personal correspondence of Ryan Alford, on file with author.

the lawyers in Toronto running for the Board. He thus received the twentieth and last seat for lawyers from the Toronto region, while Murray Klippenstein, Alford's co-applicant on the constitutional challenge to the Statement of Principles, came in first, receiving approximately three times as many votes as the Treasurer.[104] The absurdity of some of the opposition to Shi demonstrated the consequences of the epistemic closure wrought by the suppression of opposing viewpoints within the precincts of the neoliberal left. One prominent activist, who had earlier attributed Alford's opposition to "white rage", argued that: "electing [Chi-Kun Shi] to lead the lawyer's governing body would undermine our ability to show young people that we are an inclusive and equitable legal profession".[105] In the next year's election for Treasurer, Philip Horgan was criticized both in and by the legal media for having previously represented the Roman Catholic Archdiocese of Vancouver at the Supreme Court of Canada in *Trinity Western University v. Law Society of Upper Canada*.[106] The questions put to him as a candidate by the *Law Times* asked whether this representation indicated Horgan's disagreement with the proposition that "the public interest included . . . preventing harm to LGBTQ law students".[107]

The first hidden premise of that question is that the legal standing of organizations that do not approve of one's identity can itself effect a dignitary harm. Notably, that proposition received a very significant approval from the

104 See "2019 Lawyer Tabulation" (2019) online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/governance/2019-lawyer-tabulation.pdf>.

105 Anthony Morgan, *quoted in* Michele Mandel, "A Showdown Consuming the Law Society of Ontario", *Toronto Sun* (26 June 2019), online: <www.torontosun.com/news/local-news/mandel-a-showdown-consuming-the-law-society-of-ontario>.

106 2018 SCC 33 [*Trinity Western*].

107 Anita Balakrishnan, "Law Society Question and Answer, Philip Horgan", *Law Times* (17 June 2020), online: <www.lawtimesnews.com/resources/professional-regulation/law-society-of-ontario-treasurer-election-question-and-answer-philip-horgan/330621>.

Supreme Court of Canada in its 2018 decision of *Trinity Western*.[108] However, the second hidden premise appears to be that identity-based groups have the right to expect that state bodies operate under a duty to protect them from dignitary harm, as those groups define it.

That said, the *Law Times*' question appears to insinuate that the mere representation of a group that contests a particular conception of human rights could be a legitimate basis for the perception of harm. It further insinuates that such a willingness to cause harm — by representing a client — could disqualify someone from a leadership position within the legal profession. While these premises remain disputable, not least within the Convocation of the Law Society of Ontario, there is only one acceptable position according to the *habitus* of the manageriate, which does not admit neutrality.

The fact that the SoP advocates' worldview is a function of the manageriate's *habitus* is demonstrated by their elevation of the elimination of dignitary harms (including micro-aggressions) to the status of a constitutional meta-principle. Despite the obvious constitutional infirmities of the compelled speech requirement, and despite the fact that similar requirements were condemned at the Supreme Court as "totalitarian", similar objections were simply reframed as evidence of racism, or "white rage": no better example of the epistemic closure of the manageriate's worldview could be imagined than the fact that it was now seen in the legal profession, which was previously defined by excellence in rational disputation.

Further evidence of this epistemic closure within segments of the legal profession and its dangers came to light in 2020, with the appearance of erstwhile terminology of the Maoist struggle session and the logic of the call-out and the cancel culture of the North American *lumpenmanageriate* within Canadian legal discourse. An open letter signed by approximately five hundred law students called the Statement of Principles:

> [a] mere first step toward combating racial discrimination within the profession . . . This is not just a moral imperative—it is a professional obligation . . . [that

108 *Trinity Western*, *supra* note 106.

> stems from] the special responsibility to . . . protect the dignity of individuals . . . the LSO must do better. As students, and as lawyers, we will hold accountable those who do not.[109]

There is nothing in this letter that recognizes the existence of good-faith disputes about the limits of the regulatory power of the Law Society, the proper scope of the enforceable duty to respect human dignity, or the constitutional issues that surround the totalitarian use of state power to compel speech. What is evident is the intolerance of an epistemically closed worldview.

The self-reinforcing outrage typical of *lumpenmanageriate* online activism is also apparent here. Note that the letter purports to be outraged at the issuance of a statement written *in support* of Black lawyers, which is "more harmful than helpful without substantive action".[110] This hurt was allegedly occasioned by a Twitter post of the LSO that read:

> [t]oday during Blackout Tuesday, the Law Society supports and stands with our diversity partners and stakeholders to address the barriers faced by Black lawyers and paralegals in the fight to end discrimination.[111]

Given the tenor of this statement (reproduced above in its entirety), there could be no better demonstration of the transmutation of purported offence into harm and the bootstrapping of that alleged injury into something that a regulator is duty bound to prevent than the assertion that the tweet was 'harmful'. The all too typical *mauvaise foi* this displays is only accentuated by the allegation in the letter that the deplorable anti-SoP benchers (who include people of colour and who voted *en masse* for the first woman of colour to run

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109 Open Letter to the Law Society of Ontario, 15 June 2020, on file with author [*Open Letter*].

110 *Ibid.*

111 Law Society of Ontario, "Today during Blackout Tuesday, the Law Society supports and stands with our diversity partners and stakeholders to address the barriers faced by Black lawyers and paralegals in the fight to end discrimination: "https://lso.ca/about-lso/initiatives/edi" (2 June 2020 at 9:58), online: *Twitter* <twitter.com/LawSocietyLSO/status/1267863070547890176>.

for Treasurer in its three-century history) were motivated by "a desire to exclude".[112]

Would that it were only law students who demonstrated their facility in defending their worldview with such tactics. One bencher in favour of the SoP wrote an opinion piece for the Globe and Mail, entitled "[r]epealing Ontario lawyer's statement of principles is not a principled stance", that openly accused the deplorable benchers of racist sentiments,[113] while a retired Justice of the Ontario Court of Appeal opined at a talk given at the Law Society in honour of Pride Month (later printed in the legal media) that those who opposed compelled speech were actually motivated by "principles from a darker [*sic*] place".[114]

Finally, in what was virtually his last official act, the Treasurer wrote an open letter in response to the law students' missive (discussed *supra*). This statement, written under the letterhead of the Law Society of Ontario, displayed the reflexive obeisance expected in a struggle session:

> I accept that the Law Society has lost credibility on the issue of racism. Your critical response to our tweet on Blackout Tuesday is understandable . . . personally, I am saddened and ashamed that the Law Society has lost credibility in speaking out against racism. You help the Law Society to do better by holding us to account. I hope you will continue to speak up.[115]

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112 *Open Letter*, *supra* note 109.

113 Atrisha Lewis, "Repealing Ontatio Laweyer's Statement of Principles is not a Principled Stance", *The Globe and Mail* (12 June 2019), online: <www.theglobeandmail.com/opinion/article-repealing-ontario-lawyers-statement-of-principles-is-not-a-principled/>.

114 Harry LaForme, "Justice LaForme Stresses Importance of Vigilance in Rights", *The Lawyer's Daily* (17 June 2019), online: <www.thelawyersdaily.ca/articles/13239/former-justice-laforme-stresses-importance-of-vigilance-in-rights-protection-at-pride-month-event>.

115 Letter from Malcolm Mercer to Members of the Ontario Law Student and Alumni Community (25 June 2020).

Traditionally, benchers of the Law Society have been considered as a reserve pool of sorts for appointments to the benches of the courts. This is doubly true of treasurers. One former treasurer, a key supporter of the Statement of Principles, now presides on the Superior Court of Justice. The number of judicial appointments (to say nothing of positions such as those on Judicial Appointment Committees) of those who supported a compelled speech requirement of dubious constitutionality (whether from within Convocation, while on the staff of the Law Society, or within its Equity Advisory Group and equity partners [read: advocacy groups]) would likely surprise most observers.

## 3. The PMC's Wedge in the Legal System: *Doré* and Charter Values

A complete enumeration of all the lawyers who reflexively defended compelled speech and minimized its effect on others' fundamental rights would likely give pause to those concerned with the preservation of an independent bar, particularly those who see it as essential to ensuring due process for disfavoured individuals and causes. The number of these appointed to judicial or quasi-judicial positions would likely be similarly troubling to those who are concerned with the preservation of a meaningful right to freedom of political expression for those whose values are in tension with those of the manageriate.

That said, the obvious rejoinder to this pessimistic institutional view would be that the Constitution of Canada remains the same, regardless of who interprets it. Unfortunately, this would be difficult to sustain given the recent jurisprudence interpreting the constitution in a novel manner. There have been three developments in the case law of the Supreme Court of Canada that provide a clear opening to those who would build a battle-ready democracy to limit the expression of the 'populists' who resist the PMC's hierarchy of values becoming the official ideology of the state.

Increasingly, members of the legal profession are joining the professional-managerial class. (More and more lawyers are essentially bureaucrats, and vice versa, as the social reproduction of the manageriate increasingly requires frustrated academics and journalists to become associates in law firms.) Given

the trends observed in the United States, discussed in Parts I and II, *supra*, there is a clear danger that Canada's newly-transformed constitutional order will be prepared for a battle with the ideas and speech of all those whose *habitus* and views are irreconcilable with those of the PMC.

There are three jurisprudential developments that might pave the way for a constitution for a battle-ready democracy. If first deployed against the populist reaction to the manageriate's hegemony, their erection and ultimate permanence could be justified. They are as follows: first, the recognition of offensive speech as a dignitary harm (even where it clearly fails to meet the legal criteria for being designated hate speech, slander, or libel), the prevention of which is a legitimate governmental objective. Second, the creation of an open-ended balancing test that does not require a consideration of whether the restrictions on the offensive speech (especially purportedly offensive political opposition) are minimally invasive. Third, the recognition of a constitutional source (*i.e.* one over and above legislation, including human rights codes) of protection from the dignitary harms occasioned by what was traditionally considered legitimate political opposition.

The first precondition has already been discussed *supra*. The second has been secured by the creation of the *Doré/Loyola* balancing test. The third, namely the recognition of an identity-based concept of dignity as a *Charter* value that must be balanced against the right to free speech within that test, must be elucidated in detail here. The simplest way of doing so is to consider how the constitutional challenge to the Statement of Principles would likely have been decided, had it not been made moot by its repeal at Convocation.

*Alford v. The Law Society of Upper Canada*[116] asserted that the Statement of Principles implicated the Applicant's freedom of speech, infringing the right established by Section 2(b) in a manner that could not be justified as a reasonable limitation. This challenge was brought in the Superior Court of Justice pursuant to the constitutional jurisdiction of that court created by Section 52(2) of the *Constitution Act*, *1982*.

116 2018 ONSC 4269 [*Alford v LSUC*].

The Law Society's very first response to the lawsuit was to move to transfer the Application to Divisional Court. It argued that the Applicant's challenge was improperly brought in Superior Court, as it was merely a disguised challenge to the exercise of a statutory power.[117] The consequence of a transfer of the Application as the Law Society sought would have been the application of far more deferential test applied to whether the limitation of the Applicant's rights could be justified as reasonable.

In Superior Court, the *Oakes* test would have placed the burden on the Law Society to demonstrate that the objective of promoting equality, diversity, and inclusion within its membership was compelling. This would have been straightforward, as it would only have required a demonstration of a rational connection between requiring the creation of a statement to that end and achieving that goal. What would have been considerably more difficult is the showing that it would achieve these goals in a proportional manner. This would have entailed demonstrating that the SoP is minimally impairing of the right to free speech, despite the existence of numerous other means to achieve these goals, including the other twelve measures adopted to that end by the Law Society, none of which were challenged by the Applicant. More pointedly, it would have been difficult in the face of the characterization of compelled speech as "totalitarian" by Beetz J in *National Bank of Canada* to say that the use of this measure was proportional to what it would achieve, particularly as many of its proponents had derided the Statement of Principles as likely to be ineffective, or purely symbolic.[118] Fortunately for the Law Society, The *Doré* test — which applies in Divisional Court when it reviews the exercise of statutory powers — is considerably more deferential to the administrative agency when deciding whether the limitation of one's constitutional rights is justifiable. For this reason,

117 See *Ibid.*

118 See *National Bank, supra* note 87 at 296.

it has been the subject of blistering academic critique, notably from Leonid Sirota[119] and Mark Mancini.[120] As Audrey Macklin noted:

> [t]he Supreme Court's 2012 decision in *Doré* signalled the apparent victory of Team Administrative Law over Team *Charter*: discretionary decisions engaging *Charter* rights . . . would henceforth be decided according to principles of administrative law . . . judges called upon to review exercises of discretion that impaired Charter rights . . . would defer . . . and only set it aside if it was 'unreasonable'.[121]

Accordingly, in *Alford v. LSUC*, the Divisional Court would only have been able to vindicate the right to free speech if it determined that Convocation had been unreasonable when it balanced that right against the objective of promoting equality, diversity, and inclusion within the legal profession. This ignores what Macklin labels the "normative priority" of rights in "a mere balancing of the *Charter* as one factor among others".[122] And this, combined with the fact that reasonableness is a notoriously low standard of review, would likely doom the constitutional challenge to failure, despite the importance of the right to free expression and the totalitarian implications of compelled speech.

As noted by Justices Brown and Côté in their dissent in *Trinity Western*, under *Doré* "*Charter* rights are guaranteed only so far as they are consistent with the objectives of the enabling statute", in this case the *Law Society Act*, in line with its interpretation by the Supreme Court of Canada in *Trinity Western*. This approach to evaluating constitutional challenges virtually mandated a result in *Alford v. LSUC* that would have eviscerated all the rights implicated by the Statement of Principles requirement: rights that, according to the opinion letter

119 See Leonid Sirota, "It's Happening Here Too" (13 June 2019), online (blog): *Double Aspec*t <www.doubleaspect.blog/2019/06/13/its-happening-here-too/>.

120 See Mark Mancini, "The Conceptual Gap between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie Law Journal 793.

121 Audrey Macklin, "Charter Rights and Charter-Lite" (22 February 2018), online (blog): *Double Aspect* <www.doubleaspect.blog/tag/dore/>.

122 *Ibid.*

obtained by the Law Society, included the right not only to free speech but also to freedom of conscience and freedom of religion.

Additionally, as the *Doré/Loyola* framework focuses judicial attention on the objectives enumerated in the administrative agency's enabling statute, it provides a road map for the construction of a battle-ready democracy. All legislatures need to do to limit the fundamental freedoms of those who oppose the new 'official' governmental values (those of the PMC-dominated Brahmin left, whenever they achieve electoral victory) is to enact statutes that enshrine these values.

As Lauwers JA has noted (when writing extrajudicially), "the language that she [Abella J, in *Doré*] used seems to suggest that the statutory objectives have indefeasible priority over *Charter* rights, which would be contrary to the *Oakes* methodology".[123] For those who will continue to seek to express their political opposition to the *habitus* of the manageriate after its worldview has been translated into official state values, this presents a vision of a bleak future. Any remaining optimism is likely to be dimmed even further when one considers how the balancing of the constitutional rights of dissenters is likely to be tilted even further in favour of the administrative agencies by the addition of *Charter* values to their side of the scale.

As seen in the reasons of *Trinity Western*, the identification of a statutory mandate to promote particular values can transform a regulator into a vehicle for social transformation in the image of those who control it. This is made even easier with the addition of the concept of *Charter* values.

*Trinity Western* presented the preliminary question of whether Canadian Law Societies were entitled, when exercising their powers over the licensing process, to consider the harm to identity-based groups that would allegedly ensue from admitting to legal practice the graduates of a faculty that discriminated against members of those groups. In short, the issue is whether the statutory mandate to operate in "the public interest" when licensing new

123 Peter Lauwers, "Reflections on Charter Values: A Call for Judicial Humility" (26 January 2018), online: *Advocates for the Rule of Law* <www.ruleoflaw.ca/reflections-on-charter-values-a-call-for-judicial-humility>.

lawyers would allow them to bar certain lawyers from practice, so as to protect members of certain groups from dignitary harm.

To resolve this issue, the majority turned to a versatile concept: *Charter* values. That majority (plus McLachlin CJ & Rowe J) interpreted the requirement that the Law Societies operate "in the public interest" so as to allow it to take into account how "inequitable barriers on entry to the school" (which receives no public funding) will cause "potential [dignitary] harm to the LGBTQ community". [124] This is because the majority concluded that administrative bodies have a mandate when operating in the public interest to take heed of "fundamental shared values, such as equality, when making decisions within their sphere of authority — and may look to instruments such as the *Charter* or human rights legislation as a source of these values".[125] As these reasons make clear, the problem with *Charter* values is that they are not enumerated or to be found the *Charter*, or in any other part of the Constitution: "There is no doctrinal definition of what a *Charter* value is".[126] Rather, the simplest definition that can be derived from judicial use of the concept is that they are simply the means by which additional rights can be shoehorned into the Constitution, which runs directly counter to the decision of its framers to entrench only certain rights and not others.[127]

The ambiguous role that *Charter* values play in adjudication is compounded by the fact that they are so vague as to resemble empty vessels for one's own views, or indeed one's *habitus*. As Lauwers and Miller JJA reasoned in *Gehl v Canada*:

> *Charter* values lend themselves to subjective application . . . because of the irredeemably subjective — and value laden —nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem

124 *Trinity Western*, *supra* note 106 at para 39.

125 *Ibid* at para 46.

126 Lauwers, *supra* note 123

127 See *Ibid.*

> of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter rights*.[128]

The subjective and ideologically-laden nature of value terms is becoming increasingly clear owing to the rise of the manageriate, whose *habitus* entails particular and even peculiar definitions of some of these concepts, including 'harm' and 'equality', both of which appeared to obtain significant traction in the decision of the majority in *Trinity Western*.

Owing to the ongoing conflict between the manageriate and the populist reaction, which has spread to the Canadian legal profession, it is no longer possible to dispute Lauwers' observation that "the meaning of these concepts — and even their judicial application — is both contestable and contested";[129] what remains to be seen is whether the ideological colonization of the legal profession by radicalized segments of the manageriate continues apace, and whether this could produce epistemic closure around these topics.

The first step towards that closure would have occurred if the Statement of Principles had been upheld on the same basis as the decision for the majority in *Trinity Western*. As noted above, because of the Law Society's success in arguing that the constitutional challenge to the infringement of free speech rights was a dispute about the LSO's statutory powers in disguise, the *Doré/Loyola* framework would have applied. The LSO could then have cited *Trinity Western* for the proposition that the power to regulate the legal profession in the public interest included a duty to promote equality within the legal profession, defined — in keeping with the manageriate's preferences — not as formal, but as *substantive* equality. Again, citing *Trinity Western*, it could argue that the public interest requires the legal profession to protect racialized members or members of other identity-based groups from dignitary harm.

Finally, it would likely conclude that it had been reasonable for Convocation to determine that the only way to allow members of these vulnerable groups to feel safe within the legal profession was to curtail the free speech rights of every

128 *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at para 97.

129 Lauwers, *supra* note 123.

member of the profession (including racialized lawyers themselves), by requiring them to assert that they did not merely accept the importance of equality, diversity and inclusion, but that they would "do the work" necessary to create substantive equality by pledging — under threat of expulsion — to promote these goals, both in their professional lives and generally, however that perplexingly vague imperative might be construed in the future.

At that point, the only question that would remain for the court to answer is whether the Law Society had balanced the free speech rights of its members against these paramount goals, which are now deemed to be mandated by the *Charter* (*ex silentio*) in a reasonable (that is, not necessarily in a correct, but merely defensible) manner. It is extremely unlikely that a Supreme Court of Canada (with substantially the same composition as the one that decided *Trinity Western*) would conclude that the LSO had not cleared the very low bar of reasonableness (at least before the redefinition of the reasonable standard in *Canada v Vavilov*).[130]

## 4. Epistemic Closure of the Legal System: A Harbinger of Violence?

This catastrophic defeat for the right to freedom of political expression was only forestalled by the collective action of Ontario's lawyers. It is notable that fewer than three percent of those called upon on pain of discipline to assert that they had made the required statement were willing to openly assert that they would not; but then under the cover of anonymity, the silent majority rose up to voice a stunning rebuke to the ideological reorientation of their regulator.

Despite this historic defeat of the manageriate's ideological agenda within a particularly strategic node of social reproduction, the struggle over the meaning of the highly contested value terms of justice and equality within the Canadian legal profession — and society — has only just begun. As the letter signed by over 500 of Ontario's law students indicated, the Statement of Principles was (and is) considered "only the first step" to the transformation of the legal

130 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

profession, which is characterized by an increasing number of activists as an engine of injustice.

One might argue that it is remarkable that the open expression of goals that recall the Cultural Revolution's aim of destroying the "Four Olds" received such a ringing endorsement from the outgoing Treasurer of the LSO, or that he would express his "personal . . . shame" that he had not been able to push this agenda further during his time in office, were it not the case that PMC *habitus* has been confronted with what might well be termed a populist reaction.

The steps that would have followed (and which may yet follow) upon a purge of those who would not agree to 'promote' the class-based values of the manageriate within the legal profession are now apparent. It was made clear in the last two elections for the position of Treasurer that certain beliefs, which were acceptable until the proverbial day before yesterday, can now disqualify one from a leadership position in the legal profession. These apparently include the belief that even the deplorable are entitled to legal representation. The obvious next step is the cancellation of those lawyers who continue to choose to represent those accused of hate crimes or human rights violations; in this case, the penalty may not merely be expulsion from the public sphere, but from the legal profession.

From there, it is only one step further to a legal profession that refuses representation to anyone whom the state accuses of transgressing official values, which it will read into the constitutional text as it sees fit. As Sirota noted:

> [o]ne cannot help but think of the more unsavoury totalitarian regimes, where "bourgeois legality" was made to give way to "revolutionary class consciousness" or similar enormities . . . [but] [a]s the [*Trinity Western*] dissent rightly points out, on the majority's view law societies have a roving commission to weed out injustice.[131]

131 Leonid Sirota, "The Supreme Court v the Rule of Law", (18 June 2018), online (blog): *Double Aspect* <www.doubleaspect.blog/2018/06/18/the-supreme-court-v-the-rule-of-law/>.

Anyone who understands the implications of the transformation of the concept of justice into the remediation of everything the *manageriate* conceives of as oppression will understand how dangerous an ideologically-colonized legal profession might prove itself to be. The enumeration of a set of values that lawyers should promote generally within society and the identification of those who oppose particular conceptions of those values as deserving of expulsion would have been a serious escalation of the symbolic violence that the PMC has deployed in support of the counteroffensive against what it considers populism, or worse.

The legal profession serves as a repository within society for the wisdom of preserving a place for nonviolent political disputation; it is also the primary voice speaking in favour of the value of complex systems of neutral adjudication and due process — as opposed to partisan justice. Should this voice be silenced, a precedent would be created for imposing official sanctions on those who do not have values that align with the PMC's class-based aspirations. It would prevent others from opposing such persecution in the legal system.

The elimination of legal avenues for disputes about the scope of political rights is as dangerous a formula for the catalyzation and radicalization of populism as can be conceived by the mind of man. Those who have already been excluded from public life (or even gainful employment) by the effects of neoliberal globalization are unlikely to respond to being labelled and sanctioned as the official enemies of state values with equanimity. Rather, they would be very likely to understand the class-based impetus for their persecution, and to expose the hollowness of their class opponents' claims to authority.

Those exiled from political participation would quickly grasp the truth that the rhetorical function of substantive equality "is just a stalking horse for the particular form of treatment the advocating party wants to claim as worthy of equality protection",[132] in particular, the exclusive right to political speech. The new form of battle-ready democracy this requires would create its own justification after the fact, by radicalizing its enemies. This would lead to a state

132 Lauwers, *supra* note 123.

of affairs in which any constitutional order — even Canada's constitutional order — might plausibly be compared to the Weimar Republic, as the political centre collapses and violence replaces speech.

## VI. Conclusion

Restricting the ability of broad segments of the populace to advocate for themselves and in accordance with their own values and interests inevitably leads to a populist reaction; this remains as true in Canada in the present as it was elsewhere in the past. At present, anyone not in perfect alignment with the manageriate's class-based hierarchy of values stands to be silenced and sidelined from mainstream political activity. What is worse, they can now be exiled outside of what is rapidly becoming the official moral order of society — and labelled an enemy of all that is right and proper. Yet history strongly suggests that the populist backlash to this unprecedented ideological repression may lead to violence in the future.

To address the analogies presented in the article's title, the primary threat to constitutionalism and the rule of law, in Canada as elsewhere, comes not from populism — Trumpian or otherwise — but from responses to its successes. At present, the smouldering flames of class conflict have spread throughout this society's ideological superstructure, including the apparatuses that comprise our legal system, beginning with legal education and the regulators. This prefigures a broader transformation of the legal system designed to suppress populist resistance: the creation of a battle-ready democracy.

As this article has demonstrated, the decision to restrict fundamental rights to protect the constitutional order will inevitably entail speech restrictions that are demonstrably partisan. The lesson that history provides is that this is a prelude to an escalation of class conflict into political violence, which then provides an additional rationale for an authoritarian crackdown on free speech. Having failed to learn that lesson, Canada may soon be entering a vicious circle of repression. We may soon risk destroying the rule of law in an attempt to save it; or rather, in attempting to save a vision of the Constitution imbued with the values and hierarchies of the prevailing hegemonic bloc, the constitutional order

that served to contain disputes about values within political and legal bounds may burst asunder.

Only better understanding of the forces that drive the calls for repression can bring us back from the brink. This begins with an understanding of the class-based nature of the conflict that appears in the guise of a culture war. Both sides of this struggle are defined by their position within post-Fordist relations of production. In the twenty-first century, the single greatest political threat to the professional-managerial class has been the increased unwillingness of its greatest rival — the working class — to accept the naturalness of its subordination, especially as this is reproduced within the realm of culture.

This resistance first became visible as symbolic counter-violence, which spread rapidly over the new social media platforms and culminated in the election of politicians — most notably Donald Trump, but others too, as ideologically diverse as Beppe Grillo and Jair Bolsonero — who ridiculed the manageriate's purported moral authority. It was this public and majoritarian rejection of the PMC's class-based values that catalyzed in the PMC a desire to regulate speech that it deemed offensive: a desire to eliminate dissent instantiated by promoting the equivalence between taking offence and having suffered real and irreparable harm.

Remarkable successes within the broader public sphere in the United States and elsewhere and the widespread uncritical acceptance of the view that present circumstances in the United States parallel the last days of the Weimar Republic prepared the ground in Canada for an assault on the most important citadel of open and reasoned debate: the legal profession. The constitutional bastions of free speech — in Canada, the fundamental right entrenched by Section 2(b) of the *Charter* — is now being undermined in a manner that might precipitate the total collapse of Canadians' only durable protection from the promotion of official state values and the regulation of speech in accordance with its dictates.

The rejection of this justification for driving dissidents out of the public square in addition to the public sphere cannot be considered a foregone conclusion. What is most troubling is that the decision of the majority in *Trinity Western* created a road map for the justification of these measures, one that relies

upon the infinitely malleable — yet increasingly partisan — application of *Charter* values such as equality and justice.

The consequences of the epistemic closure that subjects these values into thought-stopping clichés are far reaching in scope and terrifying in effect. It is also quite predictable that this will catalyze a more radical populist response. If these dynamics continue unabated, the broken calendar will be right once again: the invocation of 1933 as a rationale for intolerance of intolerance will summon its horrors.

At the time of this article's submission, President Trump has not conceded defeat, despite the projections that Joe Biden would win 306 electoral votes (where 270 are required, at a time when 99% of the ballots have been counted). Trump authorized the release of funds for Biden's transition to the presidency; if he concedes before December 13, 2020, he would do so sooner than Al Gore did in 2000.

In the unlikely event that Trump achieves victory by means of his lawsuits addressing states' certification of their results, this would follow the precedent set by George W. Bush (who was recently rehabilitated by the Brahmin Left owing to his rejection of populism). Were Trump's lawsuits to succeed only in delaying the certification of electoral votes and then achieve victory in a contingent election in Congress, he would achieve success in the same manner as John Quincy Adams (and in accordance with the terms of the Twelfth Amendment to the United States Constitution).

If, as is most likely, Trump loses the election, refuses to concede, and continues to campaign for the next four years while alleging that he was cheated by means of corruption, he would instead be following the example of Andrew Jackson. It should be noted that a comparison between Jackson and Trump is considerably more apt to any comparator drawn from the era of the Weimar Republic.

Whichever result comes to pass, the total failure of all the predictions that Donald Trump would fight for the Oval Office by mobilizing the military or paramilitary militias should put the allegation that he was a potential American *Führer* to rest once and for all. Unfortunately, a retraction of that charge from a

commentariat that cannot distinguish between fascism and disrespect for the PMC's values may be too much to expect.

That said, one hopes that it is not too late for Canadians to learn the right lesson from the lessons of history, both recent and further removed: a Constitution that is made battle-ready because of the inability of the ruling classes to tolerate populism will only accelerate democratic decay. Those who lose their liberties in the name of anti-fascism are among the least likely to adopt a state-sanctioned respect for democracy. Removal of even the right to disagree runs the risk of creating an unparalleled legitimation crisis, one with explosive pressures far beyond the ranges that can be dissipated through the safety-valve of reactionary populism.