Kathleen Mahoney

2008 *Trudeau Fellow,* University of Calgary

BIOGRAPHY

Kathleen Mahoney has been a professor of law at the University of Calgary since 1991. Having held many international fellowships and lectureships, she has dedicated much of her research, practice, and activism to internationally critical issues in human rights. She has published extensively and appeared as counsel in leading cases in the Supreme Court of Canada. She has also organized and participated in collaborative human rights and judicial education projects in Geneva, Australia, New Zealand, South Africa, Tanzania, Namibia, Spain, Israel, China, Vietnam, the United States, and the United Nations. She was a founder of the Women's Legal Education and Action Fund and a pioneer of the judicial education movement in Canada.

In 2004, Professor Mahoney spearheaded and authored a major research project and report examining the Canadian government's response to the claims of Aboriginal residential school survivors. This led to her appointment as the chief negotiator for the Assembly of First Nations and the subsequent historic settlement agreement with Canada for reparations and a truth and reconciliation process.

Professor Mahoney was elected a Fellow of the Royal Society of Canada and received the Canadian Bar Association Distinguished Service Award in 1997. In 1998, she was made a Fulbright Scholar to pursue her research work at Harvard University and was appointed by the federal Cabinet to chair the board of directors of the International Centre for Human Rights and Democratic Development. In 2000, she won the Bertha Wilson Touchstone Award, and in 2001 she was awarded the Governor General's Medal.

She was nominated a Trudeau Fellow in 2008.

She has law degrees from the University of British Columbia and Cambridge University, and a diploma from the Institute of Comparative Human Rights Law in Strasbourg, France.

ABSTRACT

Pierre Elliott Trudeau once won an election based on the slogan "The Just Society." As a rhetorical device, it neatly illustrated his vision for the nation. Presumably those who were persuaded enough by it to vote for him understood that a Trudeau government would change their lives for the better by bringing them more justice. But what is justice? How does more justice improve people's lives? How is it measured? Is it "just" to improve some lives at the expense of others? Does Canada have a distinct form of justice?

To answer these questions requires a journey through the world of moral philosophy—a journey Harvard professor Michael Sandal says "is a challenge to awaken the restlessness of reason and see where it may lead." Testing and applying the foundational thinking of famous philosophers such as Aristotle, Locke, Kant, Mill, MacKinnon, and others helps us to understand that justice is a moving target. Different moral philosophies and principles result in different conceptions of justice, which in turn affect contemporary matters such as equality and inequality, free speech and hate speech, affirmative action and same-sex marriage. Therefore this philosophical inquiry into justice is not a "pretty toy" or a "petty quibble." It is unavoidable because we live its answers every day. This lecture will attempt to show how moral philosophy provides a baseline from which justice can be better understood and evaluated.

LECTURE

What Is Justice?

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The topic I am addressing is justice. I have asked the question, What is justice? On reflection, perhaps a more accurate title for this presentation would be "How Should We Think About Justice?"[1]

Understanding justice, and figuring out how to think about it, has challenged far more erudite and wise people than me. Believe me, I have had some regrets since I told the Foundation of my choice of topic for this paper.

Nonetheless, it is a question I have pondered and continue to ponder since I entered law school many, many years ago. Perhaps even before that.

Another reason I chose this topic is because the late prime minster, who influenced my life greatly, defined his political vision and ambition for Canada to be that of a "Just Society."

What did he mean by a just society? And can his vision be fulfilled?

1. I would like to thank Concordia University, the Canadian Federation for Humanities and Social Sciences, and especially the Pierre Elliott Trudeau Foundation for hosting the Trudeau Lecture. It was a very special honour for me to be associated with the name of the Rt. Hon. Pierre Elliott Trudeau and the names of all the distinguished Fellows, Scholars, and Mentors in the Trudeau Foundation family.

In pursuit of answers, over the course of my career I have involved myself in the study of law; I have written and presented many scholarly papers and editorials; I have marched in protests and travelled throughout Canada, as well as to many foreign lands; I have taught and practised law; I have organized a number of national and international conferences, asking variants of these same questions.

I have helped to start a movement for the education of judges on social context; I had my own legal issues television show; I have argued cases in the highest courts on the definition of rights and freedoms; I have been an activist for women's rights and I have worked to establish restorative justice and reconciliation between First Nations and Canada.

And yet I still find myself asking the same questions.

This is because what I discovered early on was that while everyone is for justice, the content of justice is highly contested.

Moreover, it is not something that is handed to anyone on a silver platter. Obtaining justice usually requires a fight of one kind or another—in the courts, in political arenas, in back rooms, or even on the streets.

This is because there is resistance between old and new ideas of justice, between those whose life experience tells them they have it and want to keep it, and those who think it is denied them and want to find it.

One's view of justice depends very much on who you are and where you come from. It depends on your philosophical perspective, your gender, class, orientation, religion, ethnicity and race, and physical or mental ability. It depends on the times we are living in and the politics of the day.

It also, and very importantly, depends on the people who get to decide the outcomes of disputes—who they are and where they come from and whether they apply the rules consistently, fairly, and impartially.

Arguments about parliamentary procedure, separation of powers, judicial appointments, and rules of constitutional interpretation may seem boring and esoteric, but they are crucial elements of justice. This is because procedure helps define results—on everything from whether government can tap your phone to whether it can regulate polluters.

Then there is the branch of justice that responds to violations of the rules. Depending on the prevailing wisdom, justice in this context could be retributive, deterrent, rehabilitative, or restorative in nature.

Recently, reconciliation, transitional justice, truth telling, and forgiveness have become part of the justice lexicon of remedies.[2] As the chief negotiator for the Assembly of First Nations in the historic Indian Residential School Settlement Agreement between First Nations and Canada, which included these elements for the

2. This has become most noticeable in the context of the Indian Residential School Settlement Agreement of September 2007, which is largely based on restorative justice principles, as well as reconciliation and healing. Not only are several billions of dollars of compensatory damages for physical, sexual, and psychological abuse included in the settlement agreement, the court approved settlement includes collective remedies such as the Truth and Reconciliation Commission of Canada, healing funds, compensation for loss of language and culture, commemoration funds, and education credits which do not fit the traditional remedies provided either in the case law or in legislation for personal injuries and human rights violations. See the decision in *Larry Phillip Fontaine et al.* v. *Canada et al.* 2006 YKSC 63 that was brought in nine superior court jurisdictions across Canada. See also *Northwest* v. *Canada* (Attorney General), 2006 ABQB 902; *Quatell* v. *Attorney General of Canada*, 2006 BCSC 1840; *Semple et al.* v. *The Attorney General of Canada et al.*, 2006 MBQB 285; *Kuptana* v. *Attorney General of Canada* (CV 2005/243); *Ammaq et al.* v. *Canada* (Attorney General), 2006 NuCJ24; *Baxter* v. *Attorney General of Canada*, 2006 (CV 192059CP); *Bosum et al.* v. *Canada (Attorney General)* 500-06-000293-056; *Sparvier et al.* v. *Canada Attorney General of Canada*, 2006, 12, 5.

first time in our legal history, I can personally vouch for the fact that such fundamental shifts in understanding what justice requires are extremely difficult to achieve.[3] But for the tremendous leverage of international embarrassment caused by the revelations of widespread systemic abuse and deaths of Indian children during the residential school era, the remedies of a truth commission, compensation for loss of language and culture, healing and commemoration funds, and an education trust likely would never have been considered. The prime minister's apology on the floor of the House of Commons on June 8, 2008, along with the apologies of all the leaders of opposition parties, was perhaps the most dramatic and poignant attempt at restorative justice the country has ever seen.[4]

The latest development in the concept of justice is transitional justice. It is probably closer to religion than other areas of the law in that it takes into account forgiveness, reconciliation and truth telling. Transitional justice is a concept that goes beyond normal legal responses to injustice, in that it requires positive engagement between both, the victim and the offender.

There are many different theories of justice, which drive the thinking of decision-makers—natural law, positivism, utilitarianism, liberation theology, feminist theory, social justice theory and indigenous theory, to name just a few. Because they all have different

3. Most lawyers and judges practising today have little if any familiarity or experience with restorative and transitional justice principles and collective remedies such as truth commissions for victims of mass human rights violations. Consequently the resistance and lack of participation by both plaintiff and defence lawyers, other than those on the AFN team during the Indian Residential School Settlement negotiations, was predictable.

4. The apology was not achieved without a struggle. The AFN used its considerable influence, exerting pressure on the Government to secure a complete apology by publishing a model apology in the *Toronto Star*, as well as securing the support of all the opposition parties in Parliament in advance of the apology on the floor of the House of Commons. See *Toronto Star*, April 22, 2008, "Apology to Native People Must End Denial of Truth."

critiques and perspectives, it is not surprising that there are few areas of agreement. As a result, the concept of justice has been subject to philosophical, theological, and legal debates throughout history.[5] One thing that all justice theories do agree upon is that justice is overwhelmingly important for the proper ordering of people and things within a society.

Theorists usually start from the premise that justice is a social construct—purely a collection of ideas. Some schools of thought maintain that justice stems from God's will, while others believe that justice is transcendental, consisting of rules common to all humanity. Still others distrust reason and theories about justice and believe that any discussion about justice must be grounded in the concrete, lived experience of the oppressed that experience injustice in their everyday lives.[6]

Some new studies tell us that justice is not only inherent in nature, it is a basic need.

In 2008, for example, researchers at the University of California at Los Angeles discovered that the human brain responds to being treated fairly the same way it responds to winning money and eating chocolate. Being treated fairly, researchers say, turns on the brain's reward circuitry.[7] Fairness activates the same region of the brain in

5. For example, see Karen Lebacqz's overview in *Six Theories of Justice Perspectives from Philosophical and Theological Ethics* (Minneapolis: Augsburg Publishing, 1986).

6. See José Porfirio Miranda, *Marx and the Bible: A Critique of the Philosophy of Oppression* (Maryknoll, New York: Orbis, 1974); Gustavo Gutierrez, *The Power of the Poor in History* (Maryknoll, New York: Orbis, 1983). Gutierrez is credited with creating the theory of liberation theology.

7. "Receiving a fair offer activates the same brain circuitry as when we eat craved food, win money or see a beautiful face," said Golnaz Tabibnia, a postdoctoral scholar at the Semel Institute for Neuroscience and Human Behavior at UCLA and lead author of the study, which appears in the April 2008 issue of the journal *Psychological Science*. See UCLA Newsroom, http://newsroom.ucla.edu/portal/ucla/brain-reacts-to-fairness-as-it-49042.aspx.

humans that is activated in mice, rats, and monkeys when presented with food. Conversely, unfair treatment activates a region of the brain previously linked to negative emotions, such as moral disgust.[8]

In addition, animals, like humans, have an innate sense of justice, according to researchers at Emory University in Atlanta. They rewarded two monkeys for a task by giving them pieces of cucumber. It is not their favourite food, but having received it they happily went on doing the task they were given. Then the researchers began giving grapes—a favourite food—to one of the monkeys for doing the same task the other monkey continued to receive cucumber for doing. At that point, the monkey that was only getting cucumber refused to continue the task, went off by himself, and exhibited signs of unhappiness and depression.

The monkey receiving the cucumber would be the equivalent of me finding out that a colleague, who works just as hard as I do, receives a salary twice as high as mine. My emotional reaction would be, according to these studies, as much biological as intellectual.

So, given that justice is not only essential for a well-functioning society, but also is apparently hardwired in the brain and inherent in every individual, a just society would seem to require not only that rules be impartially and fairly applied and that decision makers be unbiased and independent, but also that public assets be fairly shared.

After this brief introduction, I think it is obvious this lecture could go in many different directions. It seems that justice cannot be defined by one all-encompassing principle or set of a few principles. Consequently, I will limit my discussion here to justice in the context of democratic capitalism. This is because it generally recognizes equality of individuals' liberties in a broad sense, with different applications and specific adjustments when several liberties conflict or when everybody prefers a different outcome. More specifically, I

8. Ibid.

will focus on that aspect of justice that caused the one monkey to sulk in the corner when he received cucumber and his companion got grapes. In other words, I am going to talk to you about justice in the context of equality and freedom. It is these two values I see as the backbone of any justice system.

More than 2,500 years ago, Aristotle and Plato talked about justice. They concluded that a fundamental requirement for a just society was equality. Put simply, they believed that people who were equal should have equal things. This view is deeply embedded in Western thought and is known as "formal equality."

Aristotle and Plato developed the formal equality principle in the context of a civil society composed of the ruling elites, common men, slaves, and women. Treating equals equally made clear distinctions between the noble and the common, slaves and non-slaves, men and women.

One of the central tenets of their theory was that distinctions between groups were based on merit, often expressed as "to each his due." When it came to deciding what is "due," the Greek philosophers measured merit as capacity to reason and to own property. That the measure was self-serving was obvious, as only elites had access to education and property ownership. Neither women, nor slaves, nor the poor could complain about inequality or discrimination when they were treated differently than privileged men because, according to the normative standard, they were not the same or equal to the privileged men. The standard they were measured against only allowed them to complain if they were treated unequally within their own group.

Somewhat later, liberal theorists such as Thomas Hobbes and John Locke, while not disagreeing with the Aristotelian approach to formal equality, attempted to go behind the social conventions of civil society and uncover universal and unchanging characteristics of human nature. If they could do this, they believed they could

determine the requirements of a just and legitimate society. Hobbes concluded that man, in his natural state, is naturally wicked and vicious, motivated purely by self-interest. Without the constraints of civil society, human beings would live in a constant state of war with each other.[9] While a just society required freedom for individuals to do whatever they wanted to do within reason, it also required a sovereign power to establish laws to protect natural rights such as the rights to life, liberty, and property.

The relationship between the citizens and the state took the form of a social contract, whereby the governed agreed to surrender certain freedoms enjoyed in the natural state in exchange for order and protection. Hobbes said laws are only followed when people fear punishment, so the state must make penalties for breaking the law so onerous that lawbreakers would be deterred.

Protection of individual freedoms meant that individuals would be left alone to do such things as express themselves, to practise their religions, to associate with whomever they wanted without state interference.

This idea, combined with the formal equality principle, ensured that elites would be in the best position to protect and shape the content of their natural rights and freedoms in their own self-interest.

And that is exactly what they did.

So freedom of expression, for example, was shaped to maximize freedom of speech in an imagined marketplace of ideas on the assumption that all members of society had equal access to speak and be heard.

The same was true for freedom of association, religion, and so on. Because of the formal equality principle, women, the poor, slaves, and indigenous groups did not have the same or often any access to these freedoms or the ability to shape them to fit their needs.

9. A.P. Martinich, *The Two Gods of Leviathan: Thomas Hobbes on Religion and Politics* (Cambridge: Cambridge University Press, 1992).

A modern example of this principle in action in Canada is the treatment of Indians under the Indian Act.[10] Until 1952, the Indian Act did not allow Indians to attend university unless they gave up their Indian status, they were not permitted to hire lawyers to protect their land, and they did not get the right to vote until 1961. As a result, Indians, like women and slaves in the time of Plato and Aristotle, had less access to rights and freedoms, such as land rights, freedom of expression, mobility freedom, self-government, or freedom to associate, than the elite, non-Native population did. Because of their race, Indians lacked the necessary "merit" to qualify for the same treatment under the formal equality principle as the white majority enjoyed and so could not complain.

In the 18th century, Jean-Jacques Rousseau took quite a different approach to understanding the requirements of a just society than his predecessors Locke and Hobbes.[11] Like them, he was interested in analyzing the question of morality and the just society from the starting point of the natural man, but he disagreed that life in the state of nature was "solitary, poor, nasty, brutish, and short."[12] Unlike Hobbes, he believed self-interest was not the only principle motivating the natural man. He believed there was an equally important principle, that being compassion or an "innate repugnance to

10. Indian Act ("An Act Respecting Indians") R.S., 1951 c. 1-5. See also Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada,* 1900–1950 (Toronto: The Osgoode Society, 1999), 63.

11. See *Discourse on the Origin and Basis of Inequality Among Men* (*Discours sur l'origine et les fondements de l'inégalité parmi les hommes*), also commonly known as the "Second Discourse," Jean-Jacques Rousseau, http://en.wikipedia.org/w/index.php?oldid=373452035. Jean-Jacques Rousseau wrote the Second Discourse in 1754 in response to a prize competition of the Academy of Dijon answering the question, What is the origin of inequality among men, and is it authorized by natural law?

12. See Hobbes, *Leviathan*, chap. XIII; reproduced at http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXIII.

see his fellow suffer."[13] He reasoned that because of these two traits combined, humans are by nature essentially peaceful, content, and equal, capable of enjoying a higher form of moral goodness. He also recognized that as history progressed, the corrupting influence of division of labour and the acquisition of property created social classes that in turn created conditions for perpetual inequality.[14] He believed that unbridled material progress was inimical to the just society as it created jealousy, inequality, fear, and suspicion. A just society would therefore require government intervention to secure both freedom and especially equality for all of its citizens. He said the delicate balance between state intervention and the rights of individual citizens could be achieved as long as the exercise of sovereignty reflected the general will, not simply the will of those in power. If the balance was right, laws would be respected for their intrinsic value, even when they conflicted with individual wills. Equality was essential to his conception of the general will.

He saw the social contract espoused by Hobbes as deeply flawed—nothing more than a tool of the rich and powerful to trick the general population into surrendering their liberties and to institute inequality as a fundamental feature of the modern state.[15] But as much as Rousseau was seen as a champion for equality for the oppressed,[16] his vision of equality did not extend to women. He said

13. *Discourse*, vol. ii, 36.

14. When the natural man established property as his own, this was the "beginning of evil," according to Rousseau. The natural man should have "pulled up the stakes" to prevent this evil from spreading. This property established divisions in the natural world. The first was the master–slave relationship. Property also led to the creation of families. The natural man was no longer alone. The subsequent divisions almost all stem from this division of land.

15. Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Canston (Penguin: Penguin Classics, various editions, 1968-2007).

16. Rousseau's insistence on the importance of equality in a just society is often credited for inspiring the French Revolution.

the subjugation of women within the patriarchal family structure was necessary. A women's proper role was in the private, domestic sphere, taking responsibility for the household, childcare, and early education, while governed by her educated and self-governing husband who occupied the public, political sphere.[17]

Nonetheless, Rousseau's equality legacy was significant because he understood that law, justice, and equality were inextricably linked. This meant that no man was above the law—a good thing for a just society. But as long as the formal equality views of Aristotle and Plato remained unquestioned, the normative standards underlying the law would serve the interests, first and foremost, of the elites.

This inspired Anatole France to make his famous comment that: "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[18]

By the end of the 19th century then, a just society was defined by formal equality, protection of individual freedoms from state interference, and equality before the law.[19]

After World War II, and the lessons it taught the world about what formal equality looked like in the hands of an evil and murderous regime, philosophers began to take issue with the formalists and their conception of the just society. The most famous of these was John Rawls, whose vision of equality called for redistributive

17. Jean-Jacques Rousseau, *Émile, or On Education*, trans. with an introduction by Allan Bloom (New York: Basic Books, 1979). Early feminists criticized Rousseau for his views on the role of women. See Mary Wollstonecraft, *A Vindication of the Rights of Women*, ed. Miriam Brody (Penguin Group, 1792).

18. Anatole France, *The Red Lily*, 1894, chapter 7, trans. Winifred Stephens (London: John Lane, 1930), 95.

19. Rousseau's ideas were very influential in providing inspiration for the French Revolution, informing those who demanded radical reforms, such as land redistribution and other measures designed to enhance equality. See Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity* (Oxford University Press, 2002), 274.

justice. In trying to reconcile liberty and equality, he developed a theory of "justice as fairness." He recognized that the formal equality model of treating people the same not only leads to the indefinite perpetuation of inequality; it can also justify the most egregious forms of discrimination. Rawls argued that the inequality of the least fortunate has to be considered in a just society, and it has to be kept to a minimum for justice to be achieved. He saw the solution in substantive, social and economic equality, which requires state involvement, not only to provide for the less fortunate, but also to promote equality as a fundamental value.

To help people think about morality and justice and what a just society needs, Rawls designed a thought-experiment. The idea goes something like this: Imagine that before you are born, you have to decide on what kind of a world you want to be born into. You stand behind a "veil of ignorance" not knowing where you will be born, what race or sex you will be, what kind of family you will be born into, what your sexual orientation will be. You might or might not be intelligent, healthy, strong, rich, poor, or born into a preferred class. He then asks, what kind of society would you create? What sort of rules would it have?[20]

Rawls's experiment forces us to think about the social contract of Locke, Hobbes, and Rousseau from the perspective of all members of society, but especially from the perspective of the least advantaged. Rawls believed that because humans are risk aversive and could find themselves occupying any position in the society once the veil is lifted, the experiment would result in a new social contract that would benefit the least advantaged members of the society. His goal was to develop a social contract that would ensure that wherever one ends up in society, life should be worth living, with enough effective freedom to pursue personal goals. Rawls believed that these

20. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971).

principles of justice should apply to the basic structures of society, including constitutions, the courts, markets, and so on.

Up until the time of the Canadian Charter of Rights and Freedoms in Canada, the predominant understanding of justice and equality was based on the formal equality model. While Rawls's views had some influence in post–World War II public administration and the recognition of basic liberties, court decisions with respect to equality showed a fidelity to the thinking of Aristotle and Plato. Until the late 1980s, treating likes alike, combined with equality before the law, were the twin principles underpinning our system of law and justice.

Depending on who you were and where you came from, this was a good or a bad thing. The normative standard for equal treatment for race equality was white; for sex equality was male; for sexual orientation was heterosexual; for religious equality, Christian; for ethnic equality, Anglo Saxon.

The consequences for women under this system were not very good. For example, pregnant women were fired from their jobs when they got pregnant. Because they were different from men who could not get pregnant, women had no legal basis under the Canadian Bill of Rights upon which they could argue they should be treated the same as men.[21] The same applied to problems with the law of sexual harassment, rape, prostitution, obscenity, and other gender-specific activity, prompting the famous feminist theorist Catharine MacKinnon to remark, "If men don't need it, women don't get it."[22]

21. See *Bliss* v. *Attorney General of Canada*, [1979] I.S.C.R. 183 where it was held that discrimination on the basis of pregnancy was permissible, thus resulting in women being penalized with respect to workplace benefits such as maternity leave and pension benefits. It was not until 1989 in the case of *Brooks* v. *Canada Safeway* (1989), 10 C.H.R.R. D/927 (S.C.C.) that the Supreme Court of Canada overruled their decision in Bliss.

22. Catharine MacKinnon, *Are Women Human? and Other International Dialogues* (Belknap Press of Harvard University Press, 2006).

Indians did very badly under the formal equality system. By law, namely the Indian Act, they were confined to their reserves, denied university education, denied the right to hire lawyers, and denied the right to vote—all justified as being consistent with formal equality because they were different than non-Indians. As long as all Indians were treated the same, the courts said, the laws met the standards justice required of them.

The formal equality theory even operated to advantage Indian men over Indian women. For example, Indian women who married non-Indian men lost their Indian status under the Indian Act, but Indian men who married non-Indian women did not. In the case of Indian men, their non-Indian wives became Indians under the act. When this law was challenged under the Canadian Bill of Rights, which guaranteed equality before the law, the Supreme Court of Canada, using the formal equality theory of Aristotle, decided that as long as all Indian women were treated the same, the Bill of Rights was not violated.[23]

Other minorities, such as homosexuals, were denied shelter, jobs, and the right to marry. Even having intimate relations with their partners could be legitimately criminalized, because their difference from the norm of heterosexual people ensured that formal equality principles were not violated.[24]

These cases teach us about the power of justice theories, as well as the danger of following decontextualized, abstract rules. When judges and other decision makers merely apply rules devoid of context, especially when backed up by the requirement of precedent

23. *Attorney General of Canada* v. *Lavell; Isaac* v. *Bédard*. [1973] S.C.R. 1349.

24. In 1965 the Supreme Court of Canada upheld a ruling that labelled Everett Klippert a "dangerous sexual offender" and sent him to prison for admitting he was gay and that he had sex with other men. *Klippert v. The Queen*, [1967] S.C.R. 822. Six weeks after Klippert's conviction, Prime Minister Trudeau enacted amendments to the Criminal Code, decriminalizing homosexual acts. However, Klippert remained in jail until 1971.

(treating like cases alike) and philosophies such as formal equality, injustices are far easier to perpetrate and justify. Decisions made in the abstract, outside of the messy, concrete reality of life are often too far removed from reality to truly understand what justice requires.

Feminist theorists have demonstrated that the nature of law itself, its reasoning processes and its language, are not unjust solely because they are built on formal equality; they are unjust because they are built on male conceptions of justice and on male forms of analysis.[25] They point out that women were not even permitted to practise law until well into the last century, and that men developed the substantive legal doctrines we use on a day-to-day basis, with male problems in mind, and reflecting male perspectives on the world.

Racial minorities, especially First Nations, argue that the law reflects white, male, Euro-centric worldviews and understandings of events. They say justice eludes them because there is no space for their group-based culture and values to be expressed.[26]

Individual rights regimes, the legacy of Aristotle, Locke, Hobbes and Rousseau, require violations of individual rights to be the foundation of a cause of action, not group rights. This is how Canada was able, for 150 years, to force—with impunity—Native children to attend residential schools created for the purpose of destroying their cultures and languages. This was not only because the Native children were not the same as non-Native children, but also because there was no legally recognized group-based right for loss of language and culture to complain about in the courts.

The Canadian Charter of Rights and Freedoms[27]—Trudeau's answer to some of these problems—came into effect in 1982.[28]

25. Lucinda Finley, "Breaking Women's Silence in Law," *Notre Dame Law Review* (64), 886.

26. See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), 4.

27. Part I of the Constitution Act, 1982, Assented to March 29, 1982.

28. The equality provisions in section 15 of the Charter did not come into effect until 1985.

By giving individuals and groups (linguistic and Aboriginal) fundamental constitutional rights for the first time, Trudeau effectively handed the job of creating a just society over to its citizens while arming them with constitutional tools which could possibly dismantle the master's house.[29]

With the Charter as a backdrop, women, homosexuals, Aboriginal groups, linguistic minorities, and other equality seekers left out of the mainstream for so long began for the first time to shape justice in ways that reflected their reality.

The most significant reform to our understanding of justice was the Supreme Court of Canada's interpretation of the equality provisions in the Charter.

The Charter's equality guarantees are the most comprehensive of any constitution in the world. It guarantees equality four ways: equality before and under the law, and the equal protection and benefit of the law. Most constitutions have just one or, at the most, two guarantees of equality.

The Charter also has an affirmative action provision, which recognizes that different or preferential treatment may be required to correct the past effects of discrimination on disadvantaged groups.

A further clause explicitly affirms sex equality, and a multicultural clause affirms that cultural differences are a part of the Canadian identity. The Aboriginal sections of the Constitution affirm Aboriginal and treaty rights.

In 1985, the federal government, recognizing that the equality guarantees would be quite meaningless unless there was access to the courts for the people they were designed to protect, aided them by creating the Court Challenges Program of Canada to provide basic funding for legal representation in test cases. This access to justice

29. For a contrary, more pessimistic view from a non-essentialist perspective, see Audrey Lourde, "The Master's Tools Will Never Dismantle the Master's House," in *Sister Outsider, The Crossing Press Feminist Series* (1984).

tool enabled equality seekers to put their cases before the courts in their own way, describing the impact of discriminatory laws on their lives.[30] This reform clearly resonated with the views of John Rawls and his vision of the just society.

Just as significant as the Charter equality sections and the Court Challenges program, was the judiciary's response to the equality cases that were brought before the Courts.

The late chief justice of Canada Brian Dickson considered the interpretation of the Charter to be a revolutionary role for the judiciary.[31] He said judges needed take a new approach, contrary to tradition and contrary to the principles of formal equality. He urged his judicial colleagues to practise "compassionate justice," declaring compassion to be "part of the nature of law itself" and that judicial decision making should not simply be an application of abstract rules. He said,

> I view law as the means by which we order social relations to create social conditions for human cooperation and the attainment of justice. By compassion, I mean a feeling of empathy, or sympathy for

30. A Parliamentary Committee on Equality Rights, chaired by Patrick Boyer, held hearings across Canada and recommended in its report *Equality for All* that "funds…be provided to assist those involved in equality litigation." In the report the committee stated, "The imbalance in financial, technical and human resources between the opposing parties constitutes a serious impediment to those who might wish to claim the benefit of section 15, thus reducing the effectiveness of resorting to the courts as a means of obtaining redress."

The federal government responded quickly to the recommendations and observations of the committee. The program's mandate was expanded to include challenges to federal laws, policies, or practices based on sections 15 (equality), 27 (multiculturalism), or 28 (sex equality) of the Charter. Also, the federal government entered into a five-year contribution agreement with the Canadian Council on Social Development so that the program could be administered independently.

31. The Hon. Claire L'Heureux-Dubé, "Making a Difference: The Pursuit of a Compassionate Justice," in *Conversations on Equality* (1999) 26 Manitoba LJ 273 AT, 283-295; 298.

> the hardships experienced by others—a feeling which extends to a sense of responsibility and concern to alleviate hardship at least in some measure…It is my belief and contention that for the law to be just, it must reflect compassion. For a judge to reach decisions that comport with justice and fairness, he or she must be guided by an ever-present awareness and concern for the plight of others and the human condition.[32]

He then went on to say, "Compassion is not some extra-legal factor magnanimously acknowledged by a benevolent decision-maker. Rather compassion is part and parcel of the nature and content of what we call 'law.'"

This hugely significant statement, reflecting the wisdom of both Rousseau and Rawls, shifted the ground beneath years of judicial thinking that had stressed the benefits of positivism and the abstract application of rules.

By 1989 the Supreme Court of Canada had its first opportunity to interpret equality under the Charter.[33] In the BC Court of Appeal, it was decided that Charter equality would be understood as sameness of treatment for those who were the same, or, in other words, the Aristotelian formal equality model would inform judicial thinking under Charter equality guarantees.

The decision was appealed and after hearing from an array of interveners representing disadvantaged minorities and women, the Supreme Court overturned the decision of the BC Court of Appeal, saying that formal equality or same treatment may be appropriate in some cases, but would not be sufficient to achieve equality in the manner the Charter intended.

The Court instead opted for substantive equality—an approach which required judges to look into the social context of claimants' lives and investigate whether or not the challenged law or practice

32. Ibid., 288, quoting from a 1986 convocation address at the University of Toronto Faculty of Law.

33. *Law Society of British Columbia* v. *Andrews* [1989] 1 S.C.R. 143.

worsened their disadvantage, regardless of whether they were treated the same as the dominant group or not.

The Morgentaler decision shows how the Court's new compassionate justice and commitment to context decision making played out.[34] In that case, the law regulating abortion was challenged and found to be fundamentally unjust because it failed to take women's humanity into account in its requirement for a panel of doctors to decide whether a woman could have an abortion or not. In striking down the law, the Court saw what the lawmakers did not—that the right to reproduce or not to reproduce was "properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being."[35] It said that women could not be treated as a means to an end, passive objects of decisions made by others, and maintain their human dignity.

Many other decisions in the first 20 years of Charter jurisprudence significantly changed the ways we thought about justice. Using context-based substantive equality and compassionate justice, the Court made decisions favourable to women seeking refugee status on the basis of gender persecution; it found sexual harassment and pregnancy were forms of sex discrimination; it upheld legislation protective of women from degrading and violent pornography, and upheld legislation protective of homosexuals and religious, ethnic and racial minorities from the promotion of hatred.[36] Same-sex equality rights were read into provincial human rights legislation; rights of the disabled were affirmed when seeking public services; refugees were given Charter protection. The cultures and dignity of First Nations peoples were affirmed when oral history evidence was

34. *R* v. *Morgentaler* [1988] 1 S.C.R., 30.

35. Ibid.

36. For an overview and critique, see Diana Majury, "The *Charter,* Equality Rights, and Women: Equivocation and Celebration," *Osgoode Hall Law Journal* 40, nos. 3 and 4, 298.

legitimated in trial proceedings and the duty to consult was imposed as a legal obligation before development could take place on Indian lands.

These and many other decisions applicable to women and disadvantaged minorities, made possible by the Court Challenges Program, revolutionized Canadian equality law and standards of justice both under the Charter and in cases raising Charter values, such as human rights cases, refugee cases, and family law cases.[37]

I use the word "revolutionized" because the decisions explicitly acknowledged history and the multiplicity of experiences the plaintiffs seeking Charter relief represented, and sought to correct past injustices. This had never been done before.

Talking openly in their decisions about the interaction between historical events, legal change, political change, power, and domination, the jurisprudence clearly demonstrates that diversity had influenced the process of judicial deliberation and helped to develop new perceptions of impartiality.

Difference being used in a manner committed to achieving equality and fairness rather than inequality was most definitely revolutionary. It indicated a new awarness of an openess to broader conceptions of justice and equity.

I have always found it curious that law's metaphor for neutral and impartial justice is blindness—a figure with a blindfold on holding the scales of justice. It is curious because, when you consider the meaning of blindness in other contexts, it is not equated with objectivity, impartiality and a universal view. On the contrary, it is understood as an inability to have full comprehension of a problem which can lead to errors of judgment and misunderstanding.

37. For a detailed overview, see Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, Publications List, Library of Parliament, http://www2.parl.gc.ca/content/lop/researchpublications/bp402-e.htm.

The ancient parable of the six blind men asked to describe the elephant comes to mind. The blind man who feels a leg says the elephant is like a pillar; the one who feels the tail says the elephant is like a rope; the one who feels the trunk says the elephant is like a tree branch; the one who feels the ear says the elephant is like a hand fan; the one who feels the belly says the elephant is like a wall; and the one who feels the tusk says the elephant is like a solid pipe. None of the blind men can imagine the whole elephant.

I would argue that compassionate justice and substantive equality effectively remove Lady Justice's blindfold so she can see the nature of problems in all their peculiarities, just like she would see the whole elephant.

This certainly proved to be the case with the Charter jurisprudence of the first 20 years, from 1982 to 2002. It looked like Trudeau's vision of a just society in line with the ideas of Rousseau and Rawls was beginning to take hold.

In 2006, however, all of that began to change. The more compassionate and inclusive approach to governance exhibited in the 80's and 90's began to be replaced by formal equality and the white, male normative standard—the norm from which all other views are measured and found deviant if they do not conform.[38] This turning back of the clock on all or most of the progress towards substantive equality achieved under the early years of Charter decisions and influence touched everything from funding decisions of human rights and equality organisations to the appointment of judges. "Charterskeptics" began advising political leaders, and some were elected to public office. An example was Ian Brodie, Prime Minister Harper's choice for chief of staff. He had made his anti-equality

38. F.L. (Ted) Morton and Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," *Canadian Journal of Political Science* 34, no. 1 (March 2001), 55-84; F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

views crystal clear in his 2002 book in which he, for example, criticized both the Supreme Court and the Court Challenges Program for favouring feminist and gay-rights groups. Echoing his mentors, Morton and Knopff,[39] Brodie castigates the high court for making political decisions under the pretext of interpreting constitutional law and specifically targeted the Court Challenges Program as being antithetical to formal equality principles.[40] It is no coincidence that one of the first acts of the Harper government was to scuttle the Court Challenges Program.[41] This was so even though the UN heralded the Court Challenges Program as a best practice in human rights for the world to emulate, because of the access to justice it provided to marginalized citizens.[42] Closing it down meant the government, in one fell swoop, stopped most if not all equality cases from even getting to the courthouse door.[43]

At the same time, the concept of substantive equality and compassionate justice was under constant attack from the government and its supporters for conferring "special rights" on some but not on others. The message clearly transmitted was that formal equality or treating everyone the same is the preferred approach.

Unprecedented attacks from conservative politicians, academics, and media continue against what they term as "activist judges" who find discriminatory laws unconstitutional while practising

39. Ian Brodie, *Friends of the Court: The Privileging of Interest-Group Litigants in Canada* (Albany: State University of New York Press, 2002).

40. See note 45.

41. Eighteen months later the linguistic rights part of the mandate of the Court Challenges Program was restored.

42. The UN Committee on Economic, Social and Cultural Rights recommended that the Court Challenges Program be expanded to fund test case litigation against provincial laws and policies that violate constitutional equality rights. See: www.fafia-afai.org/en or www.ccppcj.ca.

43. Charlie Smith, "Women Kick Harper's Ass," Straight.com, http://www.straight.com/article-59499/women-kick-harpers-ass (December 14, 2006).

compassionate justice. Their judgments have been ridiculed and some have been personally vilified.[44] Some commentators argue that the government's objective is to appoint judges who are anti-Charter in orientation to meet its objective of achieving a more limited view of equality.[45]

Indigenous demands have been marginalized, even while many First Nation's are in crisis, with more children in state care than ever before, and youth suicide rates as high or higher than any place in the world; there is a lack of schools, clean water, and health care facilities on most reserves in the country.[46] The government's opposition to the UN Declaration on the Rights of Indigenous People is consistent with the special rights rhetoric even though for 25 years prior to the Conservatives' taking power, Canada had supported and worked on drafting the Indigenous Declaration.[47]

44. See, for example, F.L. (Ted) Morton, "Can Judicial Supremacy Be Stopped?" *Policy Options* (November 2003), 25; Morton and Knopff, *The Charter Revolution*; F.L. (Ted) Morton, "Damn the Law Profs!" *Globe and Mail*, January 27, 2005; Rory Leishman, *Against Judicial Activism: The Decline of Freedom and Democracy in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2005); Rainer Knopff and F.L. (Ted) Morton, *Charter Politics* (Scarborough, Ontario: Nelson Canada, 1992); Robert Hawkins and Robert Martin, "Democracy, Judging and Bertha Wilson," *McGill Law Journal* (1995); Robert Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003).

45. Cristin Schmitz, "Conservatives aim to replace judicial 'Charterphiles' with 'Charterphobes'," *Lawyer's Weekly* 25 (February 2007), 36, http://lawyersweekly.ca/printarticle.php. She argues that because the prime minister and other Harper government officials have been opposed to how the Supreme Court has operated, especially in its broad and liberal interpretations of equality, they are keen to reign in the Court. They are also eager to shift the balance of the Court to reflect the current government's more right-wing ideology.

46. See Borrows, *Recovering Canada.*

47. See Tom Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queen's University Press, 2000).

Bureaucrats working for the federal government say that in certain government departments the word "gender" cannot be spoken; NGOs and other agencies that have the word "equality" in their mandates have been denied government funding; 12 of 16 Status of Women offices across the country have been eliminated, as well as their research funds; and Rights and Democracy, an arm's-length international human rights organization, which I used to chair, has been subjected to an apparent ideological takeover by government appointees determined to change the direction of what they perceive to be a "left-leaning" organization.

One of the most vociferous campaigns against equality is the attack against human rights legislation and human rights commissions.[48]

Human rights legislation and commissions do in the private sector what the Charter is meant to do the public sector. When established in the 1950s, they were designed to eliminate discrimination in services, housing, and employment, such as that suffered by Mr. Christie when he was refused service at the Montreal Forum merely because he was black.[49]

48. Ezra Levant, *Shakedown: How Our Government Is Undermining Democracy in the Name of Human Rights* (Toronto: McClelland & Stewart, 2009). Levant is a fierce critic of the Alberta Human Rights Commission, particularly concerning a preacher who was fined $7,000 and banned from publicly "disparaging…gays and homosexuals" in May 2008. This case concerned a letter published by the local newspaper in 2002 in which the preacher attacked the "homosexual agenda" as "wicked." In June 2008, Levant republished the letter on his blog. When the Alberta Human Rights Commission dismissed the resulting complaint in November 2008, Levant accused it of religious discrimination, asserting that "100% of the Commission's targets have been white, Christian or conservative" and that "It's legal for a Jew like me to publish the letter. It's illegal for a Christian like the preacher to publish it."

See also Ian Brodie, *Friends of the Court*; Ian Brodie, "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program," *Canadian Journal of Political Science* 34, no. 2 (June 2002), 357-376.

49. *Christie* v. *York* (1939) [1940] S.C.R. 139.

Human Rights Commissions, both federal and provincial, are all about giving everyone access to justice to fight for their chance to enjoy the good life without having to be stymied by discriminatory barriers based on immutable characteristics such as race, age, sex, religion, sexual orientation, and other personal attributes.

Just recently, the federal government closed federal Human Rights Commission offices in three cities where more than 70 percent of their cases originate, namely, Toronto, Halifax, and Vancouver.

Even more disturbing is the fact that lawyers and other human rights defenders are under attack for defending or assisting those who seek their help to fight for their rights. There is no doubt we live in a different world today than Trudeau experienced in his lifetime.

Since 9/11 there has been a preoccupation with security requiring some rights to be rebalanced. Whether the right balance has been found is the topic for another paper.

However, this does not and cannot explain why disadvantaged minorities, First Nations, and women are being targeted for regressive policies that take away what they have gained in their struggle for justice. Why has the quest for equality, self-determination, and access to justice been attacked?

Why would a government want to subtract from the sum of justice in the world by imposing anti-equality policies on its weakest, and on citizens who are most in need? What is the ideology that informs these strategies?

Trudeau warned that ideology is often the enemy of justice[50] and freedom, as did Isaiah Berlin, who said, "I can only say that those who rest on such comfortable beds of dogma are victims of forms of self-induced myopia, blinkers that may make for contentment, but not for understanding of what it is to be human."[51]

50. See "On the Eve of the Third Millennium," in Pierre Elliott Trudeau, *Against the Current* (Toronto: McClelland and Stewart Inc., 1996), 325-340.

51. Isaiah Berlin, *The Crooked Timber of Humanity* (London: John Murray Publishers, 1990), 14.

Trudeau knew, as did Locke, Mill, Rousseau, and Rawls, that "human created" utopias are not achievable. He said, "Because we are mortal and imperfect, [the Just Society] is a task we will never finish."[52]

On the other hand, he was optimistic enough to see that the search for justice can never be abandoned. He said, "On the never-ending road to perfect justice we will…succeed in creating the most humane and compassionate society possible."[53] It is clear that he saw the challenge was in achieving equality. He asked, "Where is justice in a country in which an individual has the freedom to be totally fulfilled, but where inequality denies him the means?"[54] At the unveiling of the Louis Riel Monument in Regina he stated, "We must never forget that, in the long run, a democracy is judged by the way the majority treats the minority. Louis Reel's battle is not yet won."[55]

I believe we have arrived at a very important crossroads in our history and our identity as a country. Before we go any farther down the road we are on, regardless of political affiliation or ideology, I believe we must reinvigorate the public conversation about what is required to live in a just society.

What is important to understand, and what I think our current government loses sight of, is that human dignity is not an ideology. It is a basic human need, along with identity, recognition, and justice. These are non-negotiable elements for human development in a just society. Since individual self-worth is tied to the collective identifications people have, denial of those identifications through

52. Pierre Elliott Trudeau, *Conversation with Canadians* (Toronto: University of Toronto Press, 1972), 42.

53. Ibid.

54. Pierre Elliott Trudeau, "The Values of a Just Society," in *Towards a Just Society: The Trudeau Years*, eds. Thomas Axworthy and Pierre Elliott Trudeau (Penguin Group, 1990), 358.

55. Pierre Elliott Trudeau, "Democracy and Minorities," in Trudeau, *Against the Current*, 297.

discrimination, repression, or worse is a root cause of conflict. Surely that is a direction no one would advocate taking us in.

Trudeau warned us that "Only if statecraft and public law are diligent in the constant reshaping of social contracts appropriate to the rapidly changing times will our crowded world feel secure from the terrible vision of Yeats."[56] He quoted Yeats as follows:

> The Second Coming! Hardly are those words out
> When a vast image our of *Spiritus Mundi*
> Troubles my sight: somewhere in the sands of the desert
> A shape with lion body and the head of a man
> A gaze blank and pitiless as the sun,
> Is moving its slow thighs, while all about it
> Reel shadows of indignant desert birds.
> The darkness drops again; but now I know
> That twenty centuries of stony sleep
> Were vexed to nightmare by rocking cradle,
> And what rough beast, its hour come round at last,
> Slouches towards Bethlehem to be born?[57]

56. Ibid., "On the Eve of the Third Millenium", 339.

57. See William Butler Yeats, "The Second Coming"; reprinted in several collections including *The Norton Anthology of Modernest Poetry*, Peter Childs, *Modernism* (London: Routledge, 2007), 39 for the full text.