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# Law's Promise, Law's Handicap: Race and Law at the Turn of the Century[1]

## *Law's Promise*

HOW OFTEN HAVE WE HEARD that absent the law and its manifold institutions, we would be at one another's throats? Over time many theorists have argued that law is an essential prerequisite for civilization. Simultaneously, there are just as many theorists who avow the opposite. They argue that law has no place in a good society and that however good a society or community with law is, it cannot be as good as or better than one without law if all of the benefits the law ensures can be had in such a society. I list myself in the ranks of the latter theorists. Positively stated, I believe that "however good a social order that has law as its organizing principle is, it will always be second best to one that is able to secure all that law delivers without employing the instrumentality of law. That is, however much good law embodies or ensures, there is evidence of a widespread unease in most societies with law such that if they can secure the same amount of good without law, their inhabitants would prefer it."[2] Yet, I must acknowledge that there is equally widespread skepticism about the possibility of a world without law. To a large extent, many would consider a world without law as I have described it eminently desirable even as they express serious doubts about its attainability. Meanwhile,

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[1] This paper was originally presented at the Eminent Speakers' Series of the James Robinson Johnston Chair in Black Canadian Studies, in collaboration with Dalhousie Law School and The University of King's College, Halifax, on 23 February 2000.

[2] Olufemi Taiwo, "On the Limits of Law at Century's End," in *Social and Political Philosophy: Proceedings of the XXth World Congress of Philosophy*, vol 11, ed. David M. Rasmussen (Bowling Green, OH: Philosophy Documentation Center, 2001) 1.

those who insist on the necessity for law hardly ever deny that the law has limits and that it cannot do everything that we ask or expect of it. This is the point of convergence between the doubters of and the believers in the possibility of a world without law.

I have examined a version of the problem of the limits of law in another piece.[3] There I looked at the phenomenon of *Truth Commissions* and *Truth and Reconciliation Commissions* in different parts of the world. I argue that the proliferation of Truth Commissions and Truth and Reconciliation Commissions is traceable to a new engagement with the limits of the law in the century that just ended. This model of dealing with national traumas, crimes against humanity and other infamies of the twentieth century, is distinguished from what I call the "Nuremberg model" in which the standpoint and instrumentality of the law was the preferred mode of dealing with the trauma of the Holocaust. On the Truth Commissions model, there is no desire or attempt to deny the severity of the crimes committed or the gravity of their impact. Nevertheless, the countries concerned reject the Nuremberg model with its panoply of trials, convictions, incarcerations, and so on. They embrace instead a full accounting of *all* that took place by those who perpetrated acts of brutality as a precondition for the extension to them of forgiveness by both the society and the victims, direct and remote, of their dastardly acts. As Archbishop Desmond Tutu put it, in the case of South Africa, the country was caught between Nuremberg and amnesia. On one hand, there is the need to resist the retribution that the demands of desert would have warranted on the Nuremberg model. At the same time resisting the impulse to retribution should not eventuate in amnesia. This is because keeping the events involved ever present to our minds and our posterity is essential to ensuring that the ugly history is not repeated nor permitted to repeat itself. The Truth Commission model is designed to resolve this dilemma. It is not my wish to retell the story on this occasion. But the background is necessary to set the tone for this installment of my continuing exploration, within my broad utopian sensibilities, of how a singular or an overweening dependence on law as a principle of social ordering is wont to stint our capacity for building a good society. Since the current discussion turns on the matter of race and law, it is apposite to start with the South African experience.

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[3] Taiwo, 1.

I doubt that the reader needs a reminder of what South Africa represented in the twentieth century's gallery of horrors and of human inhumanity. And we all have reason to celebrate the demise of that heinous system named apartheid. However, South Africa comes up for mention because it, like the United States, Australia, Canada, Zimbabwe and Kenya to a limited extent, was a settler colony in which the white settler-colonialists constructed a system of exclusion in which the allocation of the country's resources was based on one's epidermal inheritance. No doubt, the origins of the system are easily traceable to superior might. But as Jean-Jacques Rousseau long ago pointed out, superior might is not likely to prevail if it fails to turn itself into right. This is where the law comes in. It was with the instrumentality of law that apartheid was woven from whole cloth and enforced for a very long time. Yet, even as the law was used to disenfranchise and disempower native Africans, indeed to legitimize the denial of their humanity, white South Africa constructed a fine Rule of Law regime for its white citizens. Indeed, it was only in the twilight of apartheid when armed African resistance began to impact white lives that more and more white people came to realize that the writ of habeas corpus may indeed be captive to a state built on violence for its own preservation or sheer survival. Until the regime came to that pass, however, few would deny that white South Africa was a state under law where law, not humans, ruled. So, right there, we witnessed the uneasy unity of the contradictory moments of *law as promise* and *law as handicap.* This paradox as it was realized in South Africa was merely a variant of the experience that was inaugurated by the earlier settler colonies of the United States and Canada. This shared genealogy is what makes the reference to South Africa in this discussion particularly apt.

At the end of apartheid, there were no victors, no vanquished. White South Africa was not militarily defeated; Black South Africa did not win a decisive military victory although its moral and political victory is indisputable. The question then was what to do with the operators of a state that had visited untold mayhem on a segment of its population—with those who were complicit in the crime against humanity that apartheid was said to be. Had the Nuremberg model been chosen, South Africa still would have been, as I write, in the throes of ongoing trials, at all levels of South African society, of those who oiled the machinery of apartheid, who killed dreams and maimed lives in the name of the bastard regime. On

the Nuremberg model, the standpoint of justice might have required that F.W. de Clerk be not a revered joint winner of the Nobel Peace Prize but a defendant in only heaven knows how many lawsuits—criminal, civil, constitutional! Recall that under the Truth Commission model, many of the acts that were amnestied included those of murder and other killings, as well as the infliction of torture. So why did South Africa pass on justice and elect instead for truth?[4] In electing for truth over justice, South Africa is telling the rest of us that there may be values that are held dear but which the law cannot foster. I shall come back to this issue presently.

Canada's history contains instances that parallel some of the darkest episodes of South Africa's experience. I am aware that the dominant narrative in Canadian discourse is given over to the continual retelling of the saga of the relationships between its two putative founding nations, the French and the English. I do not want to minimize or in any way fail to acknowledge the sordid history of the experience of French Canadians. In the case of South Africa, in the perennial conflicts, wars on occasion, between British and Boer settlers, what often got short shrift was the remarkable convergence of both groups on the denial, first in power and later by law, of the humanity of Africans. In the Canadian case, the convergence was on the back of the first nations, the original natives of the country.

Recalling this history, Will Kymlicka writes:

> Canada didn't have a policy of segregating blacks,[5] but it did have something which looked similar. As in the United States, the native Indian population was predominantly living on segregated reserves, and was subject to a complex array of legislation which treated Indians and non-Indians differently. While every Indian had the right to live on the land of her band, there were restrictions on

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[4] See Beth S. Lyons, "Between Nuremberg and Amnesia: The Truth and Reconciliation Commission in South Africa," *Monthly Review* 49.4 (September 1997).

[5] This is historically inaccurate. See for evidence, Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: U of Toronto P, 1999) especially 250–52.

> her ability to use the land, or dispose of her estate as she saw fit, and there was a total prohibition on any alienation of the land. The reservation system also placed restrictions on the mobility, residence, and voting rights of non-Indians in the Indian territory; and in the case of voting rights, the restrictions remained even when the non-Indians married into the Indian community. There were, in other words, two kinds of Canadian citizenship, Indians and non-Indians, with different rights and duties, differential access to public services, and different opportunities for participating in the various institutions of Canadian government.[6]

The restrictions just cited go to the heart of what it is to be a human and therefore to be deserving of the respect, privileges and forbearances that are concomitant to being assigned human status in the modern politico-legal system. Having been denied this basic status, the history of violence against native peoples, of disproportionate occurrences of devastating social and other pathologies in their communities, and so on, are but derivative manifestations of a system that excludes them from the most important category of all: humanity.

In addition to the exclusion of native peoples, there is another category of people whose presence does not register on Canadian political radar screens and whose prostrate condition in Canadian legal and political life is almost unknown to the outside world: Canada's native blacks.[7] David R. Hughes and Evelyn Kallen pointed out in 1973:

> Canadians have long prided themselves on being citizens of a country which has no "race problem."

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[6] Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1991) 142.

[7] It is remarkable that many authors who deal with the problem of racism in Canada do not often treat Black Canadians as a group worthy of attention. Even Kymlicka, who is the most sophisticated and productive of this group of thinkers, inexplicably omits Black Canadians. Only in Backhouse's discussion do they feature as a group. This absence is more remarkable in discussions of the career of the Charter of Rights and Freedoms given that Blacks presumably constitute one of the groups whose condition is to be ameliorated by its remedies.

> The Canadian national self-image has, from the beginning, been that of a tolerant, law-abiding nation dedicated in practice, as in ideology, to democracy and peace .... Violent confrontation between Black and White in the urban inner-cities of the United States, compounded by a seemingly endless Vietnam War, has generated a typically "quiet" Canadian response of self-congratulation. The Canadian man on the street *knows* that "we have no Black problem" .... In other words, Canadians, consciously or unconsciously, attempt to boost their feelings of self-and national identity by contraposing their "peaceful and just society" to that of their "violent and racist" neighbour to the south.[8]

But Canada shares more with the United States than a common continental homeland. Simultaneously, there can be no doubt that the United States is the ultimate context in which the paradox of law—as promise and as handicap—gets its most pristine embodiment. Think of it, the same man, Thomas Jefferson, who wrote that one of the truths that he and others held as self-evident was that all men are created equal, also held slaves. He not only held slaves but he believed that it would take centuries for Africans to attain a sufficient level of development to permit us to predicate of them that they are human. One is struck by how its framers managed to write the "peculiar institution," also known as slavery, into the Constitution of the United States without writing it in the text. More importantly, the Union was constructed on the bedrock of slavery, hidden in the euphemism of the protection of the right to property of property [slave]-holders and the fate of the black inhabitants of the States was sealed thereby.[9] As with the South African and Canadian cases, the United States went on to build for its white inhabitants a society that is the envy of the world, even as it obtained this

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[8] David R. Hughes and Evelyn Kallen, *The Anatomy of Racism* (Montreal: Harvest House, 1973) 213. The sentiments expressed by Hughes and Kallen continue to dominate Canadian discourse, witness the remark in the preceding note.

[9] According to Backhouse, Canada adopted similar processes when it concerned its Black inhabitants. A 1793 Upper Canada statute forbidding the further importation of black slaves into the territory "countenanced a painfully slow process of

prize on the bent and broken backs of its black and Native American inhabitants.

What I have done so far is to establish that there is a pattern of injuries done to individuals and groups of certain sorts of individuals. The pattern has been delineated by race and, in the main, the injurers have been members of the white race and, again in the main, the injured have been members of nonwhite races. In speaking in the way that I have so far done, I may have created the impression that "race" is not a problematic concept or that its pedigree is easy to ascertain. I strongly disavow such claims. In the first place, race is not just a problematic category; it is extremely dubious. Much of the research on the concept has come down on the side of denying any biological basis to race.[10] In the United States and in apartheid South Africa, at least, law, not biology, determined race. Hence, there is an asymmetry between what is required to be white and what is required to be nonwhite or, more specifically, black. One drop of "black blood" makes you black; no amount of "white blood" can make you white as long as you have the one drop. I cite Ian F. Haney Lopez:

> Then, what is white?[11] ... Whiteness is a social construct, a legal artifact, a function of what people believe, a mutable category tied to particular historical moments. Other answers are also possible. 'White' is: an idea; an evolving social group; an unstable identity subject to expansion and contraction; a trope for welcome immigrant groups; a mechanism for excluding those of unfamiliar ori-

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manumission .... The act freed not a single slave. Although the statute did ensure that no additional 'negro' slaves could be brought into the province, it confirmed the *existing property rights of all slave-owners*" (258, emphasis mine). A similar situation was enacted by Britain when the British Parliament approved the Act of Union of 1910 giving independence to South Africa, a document that disenfranchised indigenous Africans.

[10] See for discussions, David Theo Goldberg, ed., *Anatomy of Racism* (Minneapolis: U of Minnesota P, 1992); Peter S. Li, ed., *Race and Ethnic Relations in Canada* (Toronto: Oxford UP, 1990).

[11] This was actually a question asked by a District court in a case. See *Ex parte Shahid*, 205 F. 812, 813 (EDSC 1913). Cited from Ian F. Haney Lopez, "White By Law," in *Critical Race Theory: The Cutting Edge*, ed. Richard Delgado (Philadelphia: Temple UP, 1995) 542, 546.

> gin; an artifice of social prejudice. Indeed, whiteness can be one, all, or any combination of these, depending on the local setting in which it is used. On the other hand in light of the prerequisite cases, some answers are no longer acceptable. 'White' is not: a biologically defined group; a static taxonomy, a neutral designation of difference; an objective description of immutable traits; a scientifically defensible division of humankind; an accident of nature unmolded by the hands of people. No it is none of these. In the end, the prerequisite cases leave us with this: 'White' is common knowledge.[12]

What I have just said applies *mutatis mutandis* to the obverse 'blackness.' On a personal note I, for example, did not become 'black' until I moved to the United States in 1990.[13] Pakistanis and Indians and other people of South Asian descent are easily assimilated to 'black' in the sordid politics of racial typing in the United Kingdom.[14] Having said that, the fact that whiteness is a construct does not tantamount to dismissing as nonexistent the privileges that come with being categorized as 'white' and the indignities that pertain to being put in the 'black' box. The privileges are real; the disabilities are undeniable. In her study of the Canadian situation Backhouse avers:

> For all the slipperiness of racial definition in law, it is apparent that dramatic, real-life consequences flowed from racial designations. Falling into the legal category of 'Indian' meant that some participants in ceremonial ritual found themselves behind bars. Falling into the legal category of 'Chinese' meant that some male employers were forbidden to hire the female workers they needed for their businesses. Falling into the category of 'white'

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[12] Lopez, 546–47.

[13] See, for details, Olufemi Taiwo's "This Prison Called My Skin: On Being Black in America" in the special issue of *Annals of Scholarship* 14 (forthcoming 2001) on race and racism.

[14] *Walter Rodney Speaks: The Making of an African Intellectual*, intro. Robert Hill (Trenton: Africa World Press, 1990).

> meant those same female workers were denied occupational choices. A man reputed to be 'Black' who became engaged to a 'white' woman suffered the procession of white-robed men impaling his lawn with fiery crosses. A woman understood to be 'Black' who insisted upon sitting in a theatre where she could properly see the movie courted the possibility of physical ejection from the premises and a stint in jail.[15]

At the present time, in the countries that I have used as my exemplar, few bother to deny the processes that I have described. In the United States, for example, the acknowledgment of past injuries done to African Americans and to native peoples has led in the course of the past forty-six years, beginning with *Brown v. Board of Education* in 1954,[16] to an astonishing variety of efforts designed to repair the injuries. In Canada, in spite of continuing wrangling over Quebec's place in Confederation, the introduction of the Charter of Rights and Freedoms as part of the Act of Patriation of 1982 is meant to open new avenues for remediation of past injustices and the prevention of new ones. Interestingly enough, South Africa again bucks this trend. It is true that the country now possesses a Constitution that is more liberal than most and a Bill of Rights that includes the recognition and protection of homosexual lifestyles. The instrument was not fashioned to redress past problems. South Africans chose to deal with the past with the aid of the Truth and Reconciliation Commission. The current need in the United States and Canada to remedy past injustices has put back on the agenda the promise of law. Let me address the specifics of this promise.

When the "separate but equal" doctrine was repudiated by the United States Supreme Court in 1954, it was done in the name of the self-same principle of equal protection of all by the law that an earlier court in 1896 had decreed was not undermined by "separate but equal" policy.[17] The impact of this ruling on the struggle

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[15] Backhouse, 274.

[16] *Brown v. Board of Education* 347 US 483 (1954).

[17] *Plessy v. Ferguson* 163 US 537 (1896). This was in spite of the spirited and, it turned out, prophetic dissent of Justice Harlan insisting that the American Constitution is "colour-blind."

for equal rights in the United States cannot be overstressed. For instance, it emboldened Blacks in their belief that the law could work for them, too. It led to some serious sociopolitical upheavals in the society. This was especially so in the South where the Supreme Court and, for the most part, the Court of Appeal, the Fifth Circuit in Atlanta, sometimes set goals that school districts were mandated to meet on the road to making racial discrimination a thing of the past.[18] Indeed the social changes inspired by the ruling provoked such elemental hostility and violent reaction from Southerners that they mobilized stoutly against the mandates. This merely led to more wide-ranging political action on the part of African Americans and others in sympathy with their predicament and yet others insisted that the United States must live up to the promise of law embodied in its founding instruments and institutional practices. The insistence that the promise of law be redeemed for them, too, undergirded for the most part the struggle for equality of African Americans.

Hence, when in later years the movement for Civil Rights began to spread across the United States, African Americans were not asking for a new constitutional convention nor were they saying that the Constitution required alteration. Quite the contrary: they demanded that the Constitution be respected, and that those who run the United States should obey the law. This phenomenon was not limited to African Americans. The same ebullient optimism about the law has driven the most effective segments of the Women's Movement and of the Gay Rights Movement. Lately the promulgation of the Americans with Disabilities Act in 1990 has expanded, with the instrumentality of law, the areas available to disabled people for self-realization. It is not an exaggeration to say that such is the situation now in the United States that almost every dispute is displaced onto law, and there is an overarching desire to manufacture new rights and to turn every dispute into a dispute about law.

In their different ways, all the preceding examples are instances of the promise of law and its allure as a principle of social ordering, a guarantor of social harmony and an instrument for fit-

[18] For a discussion of the sterling contributions of this particular court to the process of desegregation in the United States, see Jack Bass, *Unlikely Heroes* (New York: Touchstone, 1982).

ting our actions for the goal of a good society. Thanks to this overwhelming faith in the power of law to handle almost any problem, ordinary schoolyard altercations are now potential lawsuits and everybody wants a day in one court or the other. Of course, many believe that the overarching litigiousness of United States society is traceable to litigant greed and attorney overreaching. But there is little doubt that some of the litigiousness must be traced to a deep faith in the promise of law engendered by a history of law stepping into where politicians fear to tread. That was the case with abortion in the United States. The entire jurisprudence of First Amendment adjudication is an even more fecund example.

Simultaneously, in Canada, too, the introduction of the Charter of Rights and Freedoms in 1982 has meant a larger role for the Supreme Court of Canada as the ultimate arbiter of what is fit and proper.[19] Nor should it be forgotten that long before the proliferation of disputes based on the Charter, some serious social and political issues had been displaced onto law.[20] The most significant instance through the eighties was the decision of the Supreme Court of Canada in 1987[21] concerning the unconstitutionality of laws regarding abortion. The Courts have become the principal arbiters in the matter of Native rights and what they entail for Native self-government and the rights of individuals who live under Native administrations. They are to adjudicate the issue of reparations for damages done to Native Canadian life over time by Canadian government policies. They are to pronounce on the issue of remediation for injuries done to women over time, and so on.[22] But with the introduction into the Canadian polity of the Charter Canada has committed to the promise of law as an instrument for resolving some of the thorny problems that were expected to arise with the

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[19] Patrick Monahan has studied this in some detail. See his *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) 30.

[20] By this I do not restrict myself to litigation alone. I mean the process by which issues that call for wider participation of the sort that is emblematic of politics and culture are displaced onto the less inclusive and less popular sphere of law.

[21] See *Morgentaler v. Regina* 1 SCR 30 (1988).

[22] For discussions of some of these themes see the essays in David Schneiderman and Kate Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: U of Toronto P, 1997).

patriation of the Constitution in 1982. The Charter was introduced, in part, in anticipation of problems that were likely to arise for individuals and groups concerning the status of Quebec in the Confederation, language rights for the province and accommodation of contending voices in a situation in which Quebec was not a signatory to patriation. Furthermore, by giving to the Supreme Court of Canada the ultimate power of arbitrating disputes over the provisions of the Charter, the country stands on the brink of growing litigiousness concerning the clashes of rights articulated therein.[23] Even if it was not so intended, one consequence of the Charter is to displace onto law many issues that might have been dealt with in the sphere of politics. The Supreme Court of Canada is already reaping the fruits in growing litigation concerning the Charter coming before it.[24]

With specific reference to race, law was the instrumentality with which the United States sought to overcome centuries of discrimination against its African-American citizens and compensate them. As a result of the Civil Rights Act and associated legislation, new pockets were opened up in the area of equal protection to allow preferences to be given to black applicants in the area of school admissions, educational opportunities, job placements, up to and including the creation of non-coercive workplaces. The admittedly spectacular achievements of Civil Rights and ancillary legislation, and their multiplier effects on equal rights for women, elimination of discrimination on almost any ground, gay rights, the rights of the disabled, have buoyed the widespread confidence in the promise of law as a guarantor of a good society.

Finally, in the aftermath of the collapse of communism and the triumph of modernity and its political manifestation, liberal democracy, the movement towards its legal appurtenance, the Rule of Law, has accelerated. It is almost as if once we put a Rule of Law regime in place there is virtually no problem that is not available for solution within the ambit of law. The principle of equality before the law, the availability of the protection of the law to all without exception, the curbs on the "all-intrusive claims" of the modern state, the requirement of prospectivity in law-making and

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[23] Opinions are divided on this issue. See the summary by Monahan, Part 1.

[24] For some figures in support of this contention, see Monahan, 18.

impartiality in adjudication remain sterling achievements in human history. We must not deign to trivialize them.[25] They represent, in my mind, the supreme promise of the law.

*Law's Handicap*

Let us recall the premise of this essay. It is based on a deep skepticism about the place of law in a good society. In the previous section, I hope to have provided enough evidence to show that law's promise is not a sham. In this section, I propose to examine the other element of what I have identified as the paradox of law: law's handicap. Law's handicap will be treated under two headings. The first is the handicap that is traceable to the nature of law. The second is traceable to the historical evolution of the practices associated with law. I proceed *seriatim.*

Formally speaking, law both in its conception and its application must be universal and general. To that extent, law may not be made to serve the cause of faction either for good or ill. Needless to say, law is sometimes made for specific ends and categories. That is as it should be. What is impermissible is to conceive the law in such a manner that it is afflicted with partisanship or it becomes a weapon in the hands of its makers against others while they themselves are beyond law's pale. As a result of this requirement, lawmakers are themselves bound by the laws that they make and are required to treat all equally as subjects under law. On one reading, as was pointed out above, law's universality defeats any possibility of self-preference on the part of lawmakers or its commission to the service of those that they prefer. Yet, this universality and the promise of equal treatment concomitant to it is, formally speaking, a handicap.

It was Anatole France who once quipped that the law in its majesty forbids rich and poor alike to sleep under a bridge. This observation embodies the paradox of law. While law corrodes and undermines any order of privilege, it makes it impossible for us to isolate individual cases for especial attention. One may not deny the good that results from the prohibition against the subversion of law to the service of faction. At the same time, one must lament the

[25] See Olufemi Taiwo, "The Rule of Law: The New Leviathan?" *Canadian Journal of Law and Jurisprudence* 12.1 (January 1999): 151–68.

fact that law cannot, in formal terms, be construed in such a way that deserving cases can be examined in their specificity for relief. For example, to continue with the spirit of France's quip, the law cannot excuse a theft of food by a hungry person on the basis of the person's need. The law must put that instance and others in the same category of "unauthorized takings" and convict accordingly once the facts are so established. The most that can be done is to accept the plea as mitigation in the determination of punishment.[26] Precisely because of this requirement, the inquiry that needs to be made—why is the person so destitute that only stealing could enable him to keep life going at the material time?—is the one that is ruled out of court under law.

There are other formal aspects of law that constitute additional manifestations of law's handicap. The requirements of jurisdiction mean that judges can decline with finality to hear a case simply by declaring that they have no jurisdiction. Judicial power is not self-activating and, absent parties invoking law's interest, its remedies cannot be available. Where illiteracy is rife or poverty is rampant many potential litigants are unable to summon the law to their aid.[27] Additionally, even after the parties have managed to invoke the law, they must still satisfy the judges that they possess *locus standi*, standing to sue. That is, they must convince the court that they have interests that are going to be impacted by the action/rule that they are challenging should the courts not find for them. In all these, the outcome may not turn on the merits of the relevant case of the truth of the matter but rather on what a com-

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[26] I am aware that in the hands of a creative court, the outcome may be otherwise. But it is a confirmation of my thesis that the judge is required to be 'creative' to escape the vise of universality. Nor can it be urged against my thesis that under a defence of necessity or any other number of novel defences in the modern state—post-traumatic stress disorder, battered-wife syndrome, etc.—many crimes have been excused. The exigencies of space will not permit a full explication of my view concerning these possibilities. It suffices to say that the defence of necessity fails more often than it succeeds and the others often only lead to mitigation at the post-conviction stage.

[27] In the countries under discussion, under conditions of racial exclusion and oppression, many of the subordinate groups were often frightened away from seeking to establish their rights in law by the threat of reprisals from the dominant racial groups.

mentator has dubbed "picayune technicalities" for which the law is justifiably notorious.[28]

The difficulties associated with the formal aspects of law may not be obvious or they may be attributed to the nature of the beast. The same cannot be said for the historical evolution of the practices associated with law or mandated by it. I use one example generated by the operation of the principle of universality and of the doctrine of equal protection of all by the law.

To a very great extent, individualism supplies the metaphysical template from which the modern legal system was fashioned. Hence the equal parties to legal tussles are individuals or are presumed to be individuals. The rights that are affirmed under the law given this metaphysical underpinning pertain and attach to individuals. However much we may embrace the strength of this individualist tradition, we cannot deny the persistence of groups. It is true that many of the injuries that we identified above have surely been borne by individuals but not because they are the individuals that they no doubt are but because they are members of certain groups, their personal merits or lack thereof notwithstanding. For example, when individuals of African descent were *prima facie* ruled out of opportunities, the issue of whether or not they possessed the requisite merit never could arise. The only reason for their *prior* exclusion from consideration is the sheer fact of their membership of a certain group. When Japanese Americans were interred in the United States during the Second World War many of them possessed the requisite merit—they wished to fight for their country. But this individual merit never came up for consideration. Being Japanese was held to be sufficient proof of the absence of merit.

A similar issue has arisen in adjudication concerning the limits of Native Rights in Canada and the US. As Kymlicka puts it:

> The crucial difference between blacks and the aboriginal peoples of North America is, of course, that the latter value their separation from the mainstream life and culture of North America. Separa-

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[28] There are many ways in which judges and other officers of the law use technicalities to subvert justice and make their preferences legitimate. For another instance, the doctrine of complete freedom of commerce is often used to legitimize discrimination in employment.

> tion is not always perceived as a 'badge of inferiority.' Indeed, it is sometimes forgotten that the American Supreme Court recognized this in the *Brown* desegregation case. The Court did not reject the 'separate but equal' doctrine on any universal grounds. The Court ruled that, in the particular circumstances of contemporary American white-black relations, segregation was perceived as a 'badge of inferiority.' The lower motivation of black children in their segregated schools was a crucial factor in their decision. But in Canada segregation has always been viewed as a defence of a highly valued cultural heritage.[29] It is forced *integration* that is perceived as a badge of inferiority by Indians, damaging their motivation.[30]

I think that Kymlicka and others who share his interpretation are too sanguine about the desire of African Americans for integration in the United States and that of Indians for separation in Canada. In a situation where assimilation on terms imposed and dictated by the dominant group meant and continues to portend cultural death it is arguable that separation may not have been freely chosen. The same is now being affirmed by African Americans who see that the integrationist component of Civil Rights Movement has accelerated the death of erstwhile bustling African American communities and undermined the stability of Black culture.

Meanwhile, Canada's longstanding recognition of group rights has always occasioned serious controversies and tensions. These tensions occur among groups in several areas—between the claims of individuals and the rights conferred on the groups to which they belong, the latter rights being considered inimical to their individual preferences or entitlement, or their sheer capacity to be who they wish to be. In the case of Native communities, the constitutional provisions for Native self-government and the continual juggling of who is and who is not an Indian have led some commentators to conclude that being an Indian in Canada is a legal creation. "Culture and race no longer affect the definition of an

[29] As I pointed out earlier, this ignores the experience of Black Canadians.
[30] Kymlicka, 145.

Indian: today's definition is a legal one. If someone who exhibits all the racial and cultural attributes traditionally associated with 'Indianness' does not come under the terms of the *Indian Act*, that person is not an Indian in the eyes of the federal and provincial governments."[31] One need not go into the debate about the theoretical reach of this characterization. What is significant is that being a Status Indian could mean a severe restriction on an individual's ability simultaneously to be a Canadian citizen. It is assumed that Canadian citizenship and membership of an Indian nation are mutually exclusive. Meanwhile, membership of an Indian nation is a legal creation. It follows that the law makes it extremely difficult, if not impossible, for an Indian person to enjoy the benefits of Canadian citizenship and vice versa. This situation is further complicated by the fact that the individual's own preference, especially that concerning being a Canadian *and* an Indian, is hardly ever recognized. That is why I said earlier that Kymlicka and others may be too sanguine about the preference of Native Canadians for separation from their fellow citizens in the Canadian state: individuals are forced to choose one or the other but, apparently, not both.

A fresh set of difficulties emerges when we shift our attention from the Indian person caught in the dilemma described above to the situation of non-Indian Canadians in Indian Territory. The recognition and affirmation of Native self-rule may mean the disability of non-Indians to exercise their citizenship rights within Indian communities. When this happens non-Indians are denied the equal protection of the law. The denial of citizenship rights to non-Indians in Indian communities is premised on the valuation of group preservation which itself is premised on the recognition that cultural membership is essential to the constitution of personal identity.[32] This is why there are exceptions in the Canadian Consti-

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[31] James Frederes, *Native People in Canada: Contemporary Conflicts*, 2nd ed. (Scarborough: Prentice-Hall, 1983) 13. Quoted from Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation," in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford UP, 1995) 179–201; Evelyn Kallen, *Ethnicity and Human Rights in Canada* (Toronto: Gage, 1982).

[32] Kymlicka has discussed the theoretical justification for this within the context of liberalism. See *Liberalism, Community and Culture* chapter 8. For a discussion of the impact on Native peoples, see John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics," in Schneider and Sutherland, 172, 182.

tution for Quebec, for publicly funded Catholic education in Quebec and for the disenfranchisement of fellow citizens in Indian communities. To extend equal protection of the law to Indians *as* Indians, we must abridge the rights of other Canadians. Should we uphold the full exercise of citizenship rights for all Canadians, we must diminish the rights of Indians to be Indians. Again, Kymlicka articulates it forcibly:

> If we respect Indians as Indians, that is to say, as members of a distinct cultural community, then we must recognize the legitimacy of claims made by them for the protection of that culture. These claims deserve attention even if they conflict with some of the requirements of the Charter of Rights. It may not seem right, for example, that aboriginal homelands in the north must be scrapped just because they require a few migrant workers to be temporarily disenfranchised at the local level. It doesn't seem fair for the Indian and Inuit Population to be deprived of their cultural community just because a few whites wish to exercise their mobility rights fully throughout the country. If aboriginal peoples can preserve their cultural life by extending residency requirements for non-aboriginal people, or restricting the alienability of the landbase, doesn't that seem a fair and reasonable request? …
>
> Yet if we respect people as Canadians, that is to say as citizens of the common political community, then we must recognize the importance of being able to claim the rights of equal citizenship. Limitations on, and unequal distribution of, individual rights clearly impose burdens.[33]

The questions posed by Kymlicka have come to the fore in the United States in the raging controversies over the Affirmative Action policies of all levels of government in the country. The desire to make amends for the injuries of racial discrimination in

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[33] Kymlicka, 151.

the United States runs full blast into the contradiction between the demands of equal protection of the law and those of equal concern and respect for the well-being and well-doing of our fellow citizens. Yet, in light of the displacement of many social and political problems onto law and the historical benefits that have been extracted from law's promise, more and more people are being led to think that the solution to those problems is to be found in more and more law. This is where I think that people have not come to terms with the fact that what they always revere as law's promise may also be law's biggest handicap.

In the first place, the absolutization of, say, the equal protection doctrine turns conflicts and their resolution into zero-sum games—one person's win is always another's loss, preservation of one person's cultural integrity translates into the diminution of another's citizenship rights, and so on. This is as true of the problem of group rights in Canada as it is of anti-racist affirmative action policies in the United States or women's rights to nondiscrimination in employment.[34] For example, consider Kymlicka's question: "If aboriginal peoples can preserve their cultural life by extending residency requirements for non-aboriginal people, or restricting the alienability of the land-base, doesn't that seem a fair and reasonable request?" He assumes that diminishing the force of the doctrine of equal protection of law is not too big a price to pay for respecting the rights of Indians to be Indians. This is because we recognize being Indian as a constituent element of their conception of the good life, and the centrality of an Indian identity to its realization.[35]

No doubt, Kymlicka's suggestion is appealing. However this may be, it runs afoul of the requirement of universality and, for those who are inclined to be uncharitable, it subverts law to the service of interests, of faction, if you will, and hence is a solution that does not cohere easily with other aspects of law. For it to be plausible, Kymlicka's solution must draw its justification from outside of law's confines, more specifically, from the sphere of politics. It is in politics that the commitment to a good society and the awareness of what is required to attain it makes it less intolerable

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[34] For a similar view of the impact of the Charter in Canada, see Monahan, 43.

[35] For a contrary view, see the reaction of Native women discussed in Borrows, 182.

to abridge law's reach. I am suggesting that as long as we make law the preferred vehicle of resolution of the disputes arising from the inevitable conflicts occasioned by our imperfect attempts at constructing a good society, we will keep running into the handicap that I have identified.

The trend towards running to law to resolve sociopolitical problems is likely to intensify in the years ahead. Canada has not awoken to its race problem. This is due, in part, to the absence in Canada of the equivalent of the Civil Rights Movement of the type and scale that has continued to alter the United States racial landscape. This is without prejudice to the occasional but increasing protests of racial incidents and sporadic community organizing against police brutality in cities like Toronto and Montreal. Furthermore, many Canadians continue to believe that there is no race problem in their country. I would like to suggest that as indigenous Black Canadians and their immigrant cohort become more vociferous in their protest of racial disenfranchisement, we will, as in the case of Native Canadians, come up against the force of law as a handicap. When this happens, I predict that conflicts arising from the Charter of Rights and Freedom will become more intractable, perhaps more deleterious to the coherence of Canadian society.

Part of the reason that the doctrine of equal protection of the law and of the formal universality of law become handicaps is that in either case the law and its agents are required to remain indifferent to historical circumstances. That is, they are not required to inquire into, for example, how Native Canadians came to be in danger of losing their identity simply by opening up to integration with their non-Indian fellow Canadians or how African Americans came to be without entitlements in the first place. In other words, the law proceeds from the presumption of the formal equality of all the parties before it and, in the cases that we have mentioned, that there are no disabling inequities in the being of Native Canadians or of African Americans. But, as Anthony Lester has pointed out,

> justice stands blindfold, equally indifferent to the identity of either party, and it is the stronger party which is able to tip the scales. In such circumstances, equality before the law is only an illusory equality, and the very neutrality of the law becomes an instrument of inequality, for it defers to

> the power of the stronger party and enforces his legal rights against the weak.[36]

In his conclusion to an analysis of a single case Lester further averred. "The source of the injustice in [the specific case] lies not with the judges, but with the traditional neutrality of the common law towards the inequality of the parties—an injustice captured beautifully by William Blake in the phrase 'One Law for the Lion and Ox is oppression'."[37] Canadian scholars who have studied the impact of the Charter on law and politics have expressed similar sentiments. For example, Backhouse, in her argument against the call for colour-blindness in law, submits:

> Drawing lessons from history, some commentators today insist that we should completely foreclose the use of racial designations in the new millennium. They advance the theory that a modern, race-neutral society should reject racial distinctions for the absurdity they are. The argument asserts that the elimination of all 'racial' designations, discussion, and analysis would constitute one more step towards fostering an egalitarian society. But proponents of 'race-neutrality' neglect to recognize that our society is not a race-neutral one. It is built upon centuries of racial division and discrimination. The legacy of such bigotry infects all of our institutions, relationships, and legal frameworks. To advocate 'colour-blindness' as an ideal for the modern world is to adopt the false mythology of 'racelessness' that has plagued the Canadian legal system for so long. Under current circumstances, it will only serve to condone the continuation of white supremacy across Canadian society.[38]

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[36] Anthony Lester, "Is There Equality Before the Law?" in *What's Wrong with the Law?*, ed. Michael Zander, Leslie Scarman, *et al.* (Montreal: McGill-Queen's UP, 1970) 18.

[37] Lester, 21.

[38] Backhouse, 274. For additional views on the differential impact of the Charter on different groups in Canadian society, see Schneiderman and Sutherland, 344.

*Conclusion: Bringing Politics Back In*

I aim, in part, in this discussion to persuade my readers to acknowledge the limits of law and turn instead back to politics. A similar suggestion was made by Lester when he wrote: "Parliament alone is capable of effectively ending the oppression, by turning laws which are at best neutral, and at worst biased in favour of the strong, more in favour of the oppressed." The United Kingdom did this with the Race Relations Act 1968 under which it became unlawful "to discriminate on racial grounds in employment, housing, education and commerce."[39] The United States and Canada have done so with different Acts of Congress and Parliament, respectively. It is important to point out that although Parliament's or Congress's remedies are formulated sometimes in legal terms and given force through the instrumentality of law, they are not, strictly speaking, legal remedies. Hence, laws that prohibit racial discrimination represent inroads, at times despotic ones, on the right to freedom of association or assembly, and, in so doing, deny equal protection to would-be discriminators. But they are adopted because they reflect society's consensus that a good society cannot be a reality where the prohibited discriminations occur. In other words, they result from our attempts, however imperfect, to move towards the inauguration of a good society. I am suggesting that Kymlicka's questions in the above passage are, properly speaking, political questions, and not legal ones. They have for their subtext the fundamental questions of social and political philosophy: what is a good society? How might we go about realizing one? So when Kymlicka asserts that it is not too much to ask that a few whites be disenfranchised in order thereby to respect the cultural integrity of Native Canadians, he means that doing so is a requirement, an aspect of the transaction costs, of constructing a good society. This is not a return to bad utilitarianism. It is an acknowledgment that it is wishful thinking to behave as if we can build a good society where conflicts of preferences will be absent or all preferences will be accommodated or do all these without any associated costs.

By the same token, when conflicts arise over affirmative action policies designed either to ameliorate gender discrimination or racial ones, a good multiracial, plural society must work out a complex pattern of give and take among its diverse communities.

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[39] Lester, 21.

That is a task for politics, not for law—a truth well put by Monahan in the following passage:

> Democracy does not guarantee civic enlightenment. But if the collective morality of the community is to become more informed, this will be achieved through more rather than less democracy. By designing institutions which facilitate ongoing civic participation, citizens will be given the opportunity to participate in public talk and public action
> ....
>
> Judicial fiat is no substitute for such civic deliberation. Rule by judiciary supposes that the only way to deter oppression is to impose external restraints on the political process. But because such external restraints deny the competence of citizens to arrive at informed ethical judgments, they undermine the very process of reflection and self-criticism which might lead to a more mature collective morality. Elitist politics breeds only a mob; to produce citizens, one needs democracy.[40]

This brings us back to South Africa. South Africans realized that although the excesses of apartheid may have been formalized in and by law, they were forged in the crucible of politics in the differential distribution of power at the outset and that the solution, to be effective, must be forged in the same milieu. Hence, in the South African case, the leaders decided that building a new society in which no group will be inferior to another, those who have been hurt are made whole and those who have hurt others are made whole, too, they must proceed differently. They decided that those who have done wrong must confess and ask for forgiveness and those who have been wronged must be willing to be magnanimous in victory. This is not the way of the law. Under law, many will take refuge in their denial of responsibility, causal and moral, for actions taken in their name. Others will seek to disavow the fact that the privileges that they now enjoy and wish to defend as rights are, in their origins, disabilities on the part of others. In

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[40] Monahan, 138.

the specific case of Canada, it must begin from an acknowledgment that it does have a race problem in the prostrate, almost invisible states of its indigenous Blacks. In that of the United States, the country must recommit to affirmative action or similar remedies as flawed and insufficient but necessary preconditions for building a better society. In such a society, the descendants of those who had inflicted pain in the past will acknowledge that wrong had been done to some segment of the population whose descendants deserve to be made whole in the present. Such remedies become necessary for the building of a future society in which there will be no need for them and where all of America's peoples shall be reconciled. That the justice promised by law for some white beneficiaries of extant race-derived privileges might be abridged must not be denied. But that a society cannot be whole until it has made its historically disabled minority whole, too, will be the ultimate, even if legally inconvenient, justification for upholding affirmative action and similar remedies. The issue is not whether it violates the law, but whether we can arrive at a good society without it. It is the lesson that South Africa stands to teach the world in its success. It is the challenge that is before us in the area of the intersection of race and law in the century that we are entering.