

American myths: Part two of five

Is America the Real Just Society in North America?

There's another and better way to think of justice: a just society is not one that seeks to achieve fair results, but one that lives by fair rules, fairly enforced.

By David Frum

American Myths is a joint project of the National Post, the Dominion Institute and the Canadian Defense and Foreign Affairs Institute.

As he opened his 2004 election campaign, a scandal-battered Paul Martin reached for a time-tested election winner:

"I know the arithmetic of the tax cut equation," he said. "You can have a country like Canada. You can have a country like the United States. That's a choice you can make.

"But you cannot have a health-care system like Canada's, and you cannot have social programs like Canada's, with taxation levels like those in the United States."

Now as a matter of literal truth, Martin's words were not quite accurate. Canadian federal and provincial governments together spend just south of \$2500 US per person on healthcare. Multiplied by the 296 million people who live in the United States, that translates to \$740 billion – or \$60 billion US *less* than American federal and state governments spend now on their existing health programs.

Put it this way: Canada *could* have American tax rates and the Canadian health care system – *if* Canada had an economy as rich as that of the United States.

But if Martin's words were literally false, there is no doubt that they expressed a psychological truth. Many Canadians want to believe that America is a radically less just society than Canada – and Canadians most especially want to believe that when they notice that the American economy is outperforming Canada's, as it did throughout the years when Paul Martin was managing Canada's finances.

And so they tell themselves that America's lower taxes and higher GDP per capita, lower unemployment and faster growth are all achieved at the expense of more important values: equality, fairness, and healthcare for all.

And indeed, in some important ways, Canada does deliver better results to Canadians than US society delivers to Americans. Crime is generally lower in Canada, as is infant mortality, as is child poverty. (In other respects, it should be said, Canada does worse: unemployment is higher in Canada, average incomes are lower both before and after tax, and Canadians who suffer heart attacks and other illnesses requiring prompt medical attention are less likely to survive than their American neighbors.)

But is this "justice"?

Critics of American society have a habit of equating justice with equality – the more equal the society, the more just it is. By this criterion, Canada is more just than the United States, and France is more just than Canada, Denmark is more just than France, and so on. By this criterion, the Soviet Union was more just than post-Soviet Russia, Mao's Cultural Revolution was more just than Hong Kong, and North Korea may well be more just than South Korea – and down the backward slide we go, from error to absurdity to horror.

There's another and better way to think of justice: a just society is not one that seeks to achieve fair results, but one that lives by fair rules, fairly enforced. The philosophers describe this kind of justice as commutative rather than distributive justice. Lawyers describe it as "the rule of law." Maybe it's most vividly summoned up by a British music-hall song from the 1930s quoted in one of George Orwell's essays:

"Oh you can't do that here,
No you can't do that here.
Maybe you can do that over there,
But you can't do that here."

What is it that they can do over there – but can't do over here? Lawyers and philosophers have battled over precise definitions for centuries, but here are some of the main elements of a society under the rule of law:

- 1) The rules are equal: What is lawful for one person should be lawful for all; what is forbidden to one should be forbidden to all.
- 2) The rules are predictable: Individual rights and duties should be knowable in advance, and should not be changed after the fact without the individual's consent.
- 3) The rules are stable: When the rules change, they change only with enough notice so that individuals can alter their behavior in time.
- 4) The rules are supreme: Nobody can be punished unless they have violated one of those equal, predictable, and stable rules.

You can find some version of those rules in every bill of rights of every modern democracy, including Canada's. But it was the Americans who were the first to incorporate them into their fundamental law, 216 years ago. And even now, all these years later, the Americans still live by the principles of the rule of law more consistently than any other nation – and far more consistently, it is sobering to reflect, than Canadians ... despite Canada's free healthcare.

Take principle 1, equality before the law. That principle has been bent in the United States by affirmative action and racial preferences, but it has not been utterly discarded. In her majority opinion in the 2004 case of *Grutter v. Bollinger*, which upheld racial preferences at the University of Michigan Law School, Sandra Day O'Connor opined that preferences should be seen as a temporary deviation from the enduring principles of equal justice. She warned that the court expected such preferences to disappear over the next 25 years, explaining: "Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle."

But Canada has enshrined permanent racial preferences into Canadian law.

Canadian citizens of native origin for example may hunt and fish when other citizens cannot. (*R. v. Marshall*, 1999.)

British Columbians of native origin may claim lands on the basis of oral evidence that would be thrown out of court if offered by a non-native. (*Delgamuukw v. British Columbia*, 1997.)

Generally speaking, governments may legally discriminate in favor of certain groups in hiring, firing, and the distribution of public money. (*Lovelace v. Ontario*, 2000.)

The Canadian and American legal systems are likewise diverging in their respect for the *stability* and *predictability* of the law.

The US constitution prohibits *ex post facto* laws and forbids states to pass laws impairing the obligations of contracts.

In Canada, unmarried individuals have had the rights of marriage conferred on them and the obligations of marriage imposed upon them after the fact. (*Miron v. Trudel*, 1995; *M. v. H.*, 1999). Private corporations have been punished for firing people they had every right to fire under the laws in place at the time. (*Vriend v. Alberta*, 1998.) And "final" marital separation agreements can be reopened by courts at any subsequent time, if those agreements are seen to disadvantage one spouse (*Miglin v. Miglin*, 2001) – although as a practical matter, courts will only do so if the spouse is the wife.

The increasing divergence between American and Canadian norms of justice is not occurring by accident. The rule of law is a fundamentally individualist concept, and the ideal of justice protected by the rule of law is libertarian, not egalitarian. Canadian courts, by contrast, increasingly think in collectivist terms. If in order to attain some vision of equality, men must be treated differently from women, or blacks from whites, or aboriginal Canadians from everybody else – well so be it. Canada's newest Supreme Court justice, Rosalie Abella, warns that courts err when they have "allowed the individualism of civil liberties to trump the group realities of human rights."

Every legal system has its flaws and failures. The American civil justice system wreaks plenty of havoc: Just a very few weeks ago, for example, the drug-maker Merck was hit with a \$253 million judgment against its painkiller Vioxx, in a case marked by blithe disregard of scientific and medical evidence by a Texas jury. ("Jurors who voted against Merck said much of the science sailed right over their heads," reported the Wall Street Journal. 'Whenever Merck was up there, it was like wah, wah, wah,' said juror John Ostrom, imitating the sounds Charlie Brown's teacher makes in the television cartoon. 'We didn't know what the heck they were talking about.'")

The defects of other legal systems are, however, weak condolence for the failures of one's own. "Justice, justice shalt thou pursue," decrees the lawgiver of Deuteronomy, and it is an obligation binding on each and every nation.

The United States has sought to pursue justice by adhering to the ancient ideals of the rule of law. Canada, like the social democracies of Europe, has attempted a different path. Justice has anciently been depicted blindfolded, weighing litigants in her scales without partiality. The Canadian ideal, however, increasing demands that justice open her eyes – and put a thumb on the scales to assist her chosen favorites.

Almost four decades ago, the most anti-American of all Canadian prime ministers urged Canadians to make themselves a "just society." It would shock him and those who think like him to hear those words applied instead to the United States. But that only means that in the interim, Canada has itself drifted so far away from justice as to have lost sight of the most fundamental and most important meaning of the word in the civilization to which Canada belongs.

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