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Rights are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers

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Rights are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers

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RIGHTS ARE NOT ENOUGH: THERAPEUTIC JURISPRUDENCE LESSONS FOR LAW REFORMERS

*Nathalie Des Rosiers*¹

INTRODUCTION

Therapeutic jurisprudence is a movement that examines the psychological effects of laws. It attempts to identify whether the law has healing or detrimental effects.² Although it is sometimes framed as a descriptive endeavor and a non-normative project,³ it suggests that we should seek to minimize the detrimental effects of laws and maximize their healing effects.⁴ Ultimately, we want laws to do “more good” or, at least, less harm. This is what law reformers want to do: they want to improve laws. This article reflects on the insights of the Therapeutic Jurisprudence (TJ) movement that should be incorporated in the law reform methodology.⁵ It also addresses the challenges of doing so.

I have entitled my speech “Rights are not Enough”⁶ partly to emphasize my key message: it is no longer sufficient to consider

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² DAVID WEXLER & BRUCE WINICK, *LAW IN A THERAPEUTIC KEY*, vxii (Carolina Academic Press 1996); see also Shirley S. Abrahamson, *Issues, Analysis and Applications: The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 223 (2000).

³ WEXLER & WINICK, *supra* note 2, at xvii. David Wexler and Bruce Winick suggest that TJ “does not purport to resolve the questions of what should be done when values conflict: instead it sets the stage for their sharp articulation.”

⁴ *Id.*

⁵ *Id.* TJ was identified as particularly useful for law reform.

⁶ This title is a very poor reference to a wonderful song by David Foster, Bryan Adams, Jim Vallance, and recorded by Northern Lights, *Tears Are Not Enough*, on U.S.A. FOR AFRICA (Columbia 1985) which was the Canadian equivalent of *We are the World*. The message of the song is certainly more important than this article. The idea of de-emphasizing the sole focus on “rights” is very much a heritage from TJ; see also DAVID WEXLER & BRUCE WINICK, *LAW IN A THERAPEUTIC JURISPRUDENCE: PUTTING MENTAL HEALTH INTO MENTAL HEALTH LAW* (Carolina Academic Press, 1991). But see Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and*

law reform as a process of modernizing statutes and including more rights-based solutions to correct problems. I will argue that the role of law reformers is not to ignore the impact of “rights,” but to move beyond this response, to look more broadly to how “rights” are lived, exercised and used by real people. In a sense, my message stems from a line in David Wexler’s article *Therapeutic Jurisprudence and the Culture of Critique*, where he suggests that the Therapeutic Jurisprudence (hereafter, TJ) movement seeks to “probe beneath the rhetoric of rights and to focus instead on needs and interests.”⁷

I have developed six main TJ lessons⁸ for law reformers.

- Law as lived as the scope of inquiry
- Multi-disciplinary analysis as the method
- Empirical studies as sources of knowledge
- Consultation and participation as control mechanisms
- Beyond statutory reform as the response
- Changing cultures as the measure of success

My remarks are inspired by the work that I have done for the Law Commission of Canada, an independent federal agency established by the government of Canada in 1997.⁹ The Law Commission was created with a specific statutory mandate: to “provide advice on, improvements to, and modernization and

Massachusetts Mental Health Law, in D. WEXLER AND B. WINICK, *LAW IN A THERAPEUTIC KEY*, *supra* note 2, at 671.

⁷ David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 273 (1999).

⁸ See Paul McCold and Ted Wachtel, *Restorative Justice Theory Validation*, 10 REAL JUSTICE FORUM (2000), available on the Web at <http://fp.enter.net/restorativepractices/RealJusticeForum10.pdf> (last visited on Sept. 23, 2002). The paper was presented to the Fourth International Conference on Restorative Justice for Juveniles, International Network for Research on Restorative Justice for Juveniles, Tübingen, Germany, October 1-4, 2000. I am presenting here some insights that I associate with TJ. Certainly, others may gain different insights or disagree with the key points that I have extracted. The debate about what “true TJ” is, and what it is not, is proof that the movement has truly developed and now has gathered momentum.

⁹ The Law Commission’s website is at www.lcc.gc.ca. It contains the *Law Commission of Canada Act*, R.S.C., c. L-6.7, <http://www.lcc.gc.ca/en/about/lcca.asp>, and a fuller description of the research agenda of the Commission.

reform of the law of Canada.”¹⁰ In addition, the Preamble of its statute requires: that its work be open to and inclusive of all Canadians and that the results of that work should be accessible and understandable; that it adopt a multidisciplinary approach to its work that views the law and the legal system in a broad social and economic context; that it be responsive and accountable by cooperating and forging partnerships with a wide range of interested groups and individuals, including the academic community; and that it take account of the impact of the law on different groups and individuals in formulating its recommendations.

It is in the course of formulating a response to this ambitious mandate that many insights from TJ prove useful. I will discuss them in turn.

I. THE LAW AS LIVED AS THE SCOPE OF INQUIRY

One of the first lessons of TJ was to look at the impact of the law on people. It challenged some of the traditional assumptions that jurists hold without much question, i.e., that freedom is always better than constraints, that winning one’s case is preferable to losing it, that more money is always better than less. TJ did not deny the validity of these assumptions, but sought to put them in context.¹¹ It asked the question whether these assumptions held true for everyone; in particular, it asked whether they held true in the mental health field.¹² The point was to ask about the effect of the law and legal processes on the lives of the people affected by them.

It is this insight that I want to develop. I want to argue that “law as lived” must be the focus of the law reform inquiry. I would like to make a couple of points in this regard. First, I will put forward that a rights-based approach to law reform has often been unsuccessful because it minimized the way in which informal

¹⁰ Preamble of the Act, *id.*

¹¹ The goal was to be grounded in reality. See Symposium *Therapeutic Jurisprudence: Bridging the Gap from Theory to Practice*, 20 NEW ENGLAND JOURNAL ON CRIMINAL AND CIVIL CONFINEMENT (1994).

¹² Bruce Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH. PUB. POL. 184 (1997).

cultural, religious and economic norms influence the context in which law operates. Rather, a “law as lived” approach may offer some changes in the understanding of the problem and shift, at times, the focus of inquiry. I will illustrate my propositions with two examples from the work done by the Law Commission.

a) “Rights” and Law Reform

Most law reform from the 1960s to the 1980s was rights-based. Academics and law reformers alike argued for and gave a great deal of thought to rights: rights for consumers against big business, rights for women to fight sexual harassment, rights of accused persons against possibly overzealous or abusive police officers, rights to maternity leave, rights to pay equity, environmental rights, and rights to equality. Poor or inadequate wording of rights – wording that could minimize the rights granted was frowned upon. Whether in consumer protection, in human rights legislation, or in welfare reform, the wording had to be accurate. It had to provide protection without too many compromises. Precise wording, strong rights wording, were victories.

Once the wording was accurate, once the battle in the legislatures and Parliament had been won, the battle for interpretation began. Generous standing rules were advocated so that affected groups could access the courts. Investment was made in public interest litigation and test cases. The judiciary was tasked with delivering on the promises of the rights fought for and won.

Rights were what mattered.

Rights certainly do matter. At the symbolic level, they represent statements about the direction a society wants to take. The political battles to entrench rights, to convince others of their importance are contributions to a healthier public debate on the inequalities of our society. The process of getting a legislature or Parliament to enact an environmental Bill of Rights or human rights legislation involves a public debate focused for a brief period of time on the environmental problems or discrimination and poverty issues. In addition, the organizing of public support for the idea, the gathering of groups, and the media attention are all tangible contributions to societal understanding of the issue. And

for some people, those who possess sufficient stamina, sufficient fortitude, and sometimes, sufficient anger, rights-based litigation may bring positive results. At the margins, rights do certainly matter.

Law reform was often about rights – about creating new ones, reforming old ones, expanding legislative remedies, removing exceptions, proposing better wording. Most attempts at law reform in the 1960s and 1970s placed a great deal of emphasis on statements of the law which were designed to correct injustices and give a voice to the weaker members of society. Much of the law reform was about creating “rights.”

But rights are not enough. Three or four decades later, the results have proven to be mixed.¹³ There were some successes, but there were also some failures. As a rule, the failures resulted from the fact that it was impossible for the very poor and the highly vulnerable to assert their rights, to gain access to the courts or even know which laws existed to help them. Blame can be placed on the lack of adequate legal aid, the lateness of the judicial process, the lack of access to justice to explain how some social legislation seemed to have little impact on the people who needed it most. There are still door-to-door salespersons who sell overpriced vacuum cleaners. There are still landlords who increase their tenants’ rents with impunity and leave their premises in appalling conditions. Women still earn less than men and racism continues to exist in our society. And the poor still make up the majority of inmates in our penitentiaries and prisons.

And this, after several “law reforms.” It could be that it is too early to judge and that reforms take time to take effect and to make their way into how people think. Thirty or forty years may not be long enough to render a final judgement.

Nevertheless my proposition is that, at times, law reformers focused too much on the wording of the right and not enough on the context in which it was going to be implemented, too much on the formal enactment, not enough on the informal norms which created the context for the law reform.

¹³ For a critique of the focus of some law reform efforts in Canada, see 35 ALTA. L. REV. 831 (1997).

b) *Law as Lived – A Look at Some Projects of the Law Commission of Canada*

One of the first challenges for sound law reform, therefore, is possibly to question the reality and the reasons why earlier reforms met with limited success.

One example was provided recently in a study of the financial exploitation of older adults. Financial exploitation is a serious social problem that many people identified, such as the physical and psychological abuse of older adults that sometimes accompanies the financial exploitation.

It is the reflex of the jurist to look at comparative law to see whether other jurisdictions have something worthwhile to offer: possibly the laws governing the protection of older adults that exist in some Canadian provinces and the United States that some social workers hold up as good examples.

However, an examination of the question and consultation with older adults revealed that it is not so much the formal law that is inadequate but rather the suppositions on which it is based. The criminal law is sufficient, but it is not used. Seniors do not lay complaints against the members of their families who deprive them of their assets bit by bit. They do not wish to complain. Some older adults speak to the shame of having to admit publicly that their offspring have taken advantage of their parents. Some described what they saw as the devastating effect of criminal proceedings on them and their family. In the words of one participant, "Who wants to go to court and wait there for hours simply to be told that the case has been adjourned to a later date when one has so few years left to live?" Some were not knowledgeable of the extent of their rights. Many referred to our concept of family that makes parents responsible for the failings of their children so that they are loath to complain later.

It reminded me of Antonine Maillet's fictional character, *La Sagouine*,¹⁴ a literary work about Acadians (the French speaking people in the province of New Brunswick). In the play, *La Sagouine*, an older woman, describes her life to the audience. At one point she says: "I don't come out of the confessional until I

¹⁴ ANTONINE MAILLET, *LA SAGOUIE* (Montreal, Simon & Pierre, 1985).

have finished confessing my sins as well as the sins of my husband and the sins of my children.” La Sagouine would not complain to the police of the “sins,” or financial exploitation of her husband or children because she feels “responsible” for their “sins.”

A law reform effort, which was limited to recommending changes to the provisions of the Criminal Code to eliminate any uncertainty as to its application to the financial exploitation of older adults or even to make the job of the prosecution easier, would be out of place. The answer is less obvious and requires us to take a different approach: consultation with social services and the police, mediation efforts, programs managed by older adults for older adults. It may be that legislative changes are necessary, perhaps as a way to minimize risks of exploitation, not so much in the criminal field or in the protection of older adults, but in banking laws, to counter the somewhat facile tendency of the banks and other financial institutions to accept powers of attorney and the other legal instruments that are often used to deprive seniors of their life savings without asking too many questions. The answer is not clear, but this process forced us to look at the role of informal norms as shaping the legal environment.

A second aspect of our research, this one on restorative justice also led us to similar conclusions. The movement for restorative justice has made great strides in Canada. It has become part of the Criminal Code and is used more and more frequently. There are several programs that have demonstrated the success of the approach. But there is resistance to embracing the implementation of restorative justice more widely. The women’s groups and the victims’ group have voiced some concerns. In 1999, the Law Commission participated in the funding of a research project by the Aboriginal Women Association Network (AWAN). The project aimed at uncovering the experience of Aboriginal women with restorative justice. Traditionally the question is framed in fairly rigid terms: is restorative justice good or bad for women? Are you for or against it?

The picture is far more complex than that. This participatory research project demonstrated several things. Aboriginal women do not support punitive sentences more than anyone else. They worry about the effect of jail on the men in the community. However, violence is often so normalized at times

that the idea that the community could deal fairly and responsibly with these issues seems difficult to accept in the short term. The traditional justice system is no panacea for Aboriginal women either: they feel the racism and the marginalization that it creates for them and for the men they accuse.

This ambivalence is very rich: it tells us many things about how both the adversarial model and restorative justice programs may be improved. It tells us about the risks of failures of the two systems. It tells us how the success of a law reform initiative is closely linked to broader changes in a community's values. It suggests that informal norms matter.

c) *The Role of Informal Norms*

People modify their behaviour in a number of ways. They consciously and unconsciously obey all kinds of imperatives, including religious or cultural. Their relationships with others also shape their own conduct. The regulation of the conduct of the vast majority of people does not therefore depend on the formal law but rather on a host of other constraints that apply to them.

Formal law, the Criminal Code, the regulation of drivers' licences, the Uniform Commercial Code or the *Consumer Protection Act*, has an impact of which we may be more or less aware. Often, however, people's behaviour is conditioned by the prohibitions imposed by other institutions or even the results of legend, morality tales or proverbs,¹⁵ e.g., the teachings of *La Sagouine* that influence how parents assume responsibility for the failings of their children.

The idea is, of course, that much of our cultural heritage provides us with lessons about experiences and warnings about the dangers that may occur in society. The living law is accordingly an informal law that consists of a host of conventions, prohibitions

¹⁵ The proverbs that adorn our language are, to a great extent, yardsticks for our conduct, often of a legal nature. "Don't count your chickens before they hatch," is not an admonition to buy on credit but is probably a cautionary preamble to the *Bankruptcy Act*. "A bird in the hand is worth two in the bush," sounds like the principle of mitigation of damages in the law of contracts. "Speech is golden, silence is divine," would appear to be good advice for preventing defamation.

and rules of conduct that shape the ways in which people react with one another.

The challenge of law reform is to better understand how this web of informal norms will affect the implementation of the message of the formal law: will the “right” not to be exploited financially be recognized and embraced, rejected, minimized¹⁶ or distorted?¹⁷

How then to understand this complex interplay between formal and informal rules, between the written law and the law as it is lived? The remaining portion of this article reflects on how several aspects of the TJ methodology may be of assistance, among others, the multidisciplinary analysis, the reliance on empirical studies and consultation and participation of the subjects.

II. MULTIDISCIPLINARY ANALYSIS AS THE METHOD

The example of the older adults illustrates the challenge of law reformers to attempt to understand how the law is lived. It is one reason why multidisciplinary studies are essential to law reform. TJ has been one of many important movements that values exchanges between disciplines, between law and psychology, and more generally law and social sciences. Different areas of expertise certainly broaden the jurist’s approach to law. They incite the jurist to ask different questions.

A multidisciplinary analysis is therefore essential and in fact is part of most law reform methodologies. However, it is not without challenges. Such challenges are well known: different disciplines speak different languages, true multidisciplinary teams are hard to find and they are not well supported by the institutional structures of academia, which often supports specialization. Nevertheless, creativity and flexibility may respond to these difficulties.

¹⁶ One participant suggested that it only applied when people were on welfare: it was alright to give your money to your children until the day society had to provide for you.

¹⁷ Many older adults feared the increased power of the social workers to project their own cultural values: values that appeared more individualistic and less family-oriented.

One idea is to define issues in general terms as opposed to legal terms: to examine problems not through the already defined paradigm of legal knowledge but more generally. At the Law Commission, for example, the research program was articulated around four themes: personal relationships, social relationships, economic relationships and governance relationships as opposed to family law, criminal law, commercial law and administrative and constitutional law. The difference in vocabulary allowed for non-jurists to describe an issue without having to use the legal terminology that they may not master. It shifted the balance of power between legal experts and social sciences experts. The vocabulary no longer belonged to the legal experts. Everyone was empowered to organize their thoughts according to the social fact.

In addition, one may think of asking a variety of disciplines to examine the same question. Partnerships with policy research agencies and with community-based organizations may also prove worthwhile.

Requiring experts to explain to one another, using plain language, their contributions to the science is difficult but necessary. In my view, the law reformer can often translate from one discipline to another. Nevertheless, insisting that experts explain to one another their research is also a service to them: their views are more likely to be adopted by decision-makers if they can be couched in language that ordinary mortals, politicians and the general public can understand. The challenges are significant, but they must be overcome. Law reform is too important to fail at the difficulties of bridging worlds of experts.

A social sciences perspective has meant a greater reliance on empirical studies. This is the subject that I want to discuss briefly.

III. EMPIRICAL STUDIES AS A SOURCE OF KNOWLEDGE

The Therapeutic Jurisprudence movement was marked by the demand for better empirical knowledge to base its findings.¹⁸

¹⁸ WEXLER & WINICK, *supra* note 2, at viii; *see also* Christopher Slobogin, *Therapeutic Jurisprudence; Five Dilemmas to Ponder*, PSYCHOL. PUB. POL'Y & L. 193, 204 (1995). David Wexler and Bruce Winick described empirical work

This respect for empirical knowledge that comes from the social sciences is beginning to reach the legal academic world. It must continue to do so.

Empirical studies are useful for law reformers in several respects. First, they may signify the extent of a problem and prompt interest from decision-makers. The inefficiencies of a statute may prompt change if it can be demonstrated forcefully with numbers. The insatiable appetite for statistics by the media may be the trigger to generate support for change.

Second, empirical data may help measure the failures of past law reform attempts. Law reform should be instrumental in asking new questions and requiring that different data be gathered.

Third, empirical data should also prompt a question about the missing data. Statistics are gathered through a process of asking specific questions. They often test a hypothesis framed within a specific mental image of the results to be obtained. For example, in one project undertaken by the Commission in the context of its "Personal Relationships" theme, data revealing that people who were living with another person tended to be less sick than people who lived alone could suggest that governments should support adult relationships. However, as our consultations demonstrated, the reverse hypothesis may be equally true: sick people have problems finding life partners. The point is this: empirical studies are necessary, but a process of consultation and qualitative studies must complement them.

IV. CONSULTATION AND PARTICIPATION AS CONTROL MECHANISMS

TJ is a movement that has put the client, the participant, at the centre of the academic discussion.¹⁹ The question asked was: Is the system helping the client? This shift from the client/

as an essential feature of the therapeutic jurisprudence project. It has also been described as inviting "painstaking" methodologies.

¹⁹ Winick & Wexler ask the question, "Who will decide what constitutes a therapeutic outcome?" See *supra* note 2, at 695. This is an important insight for law reform bodies as well. This question is debated in TJ circles. Some argue that the TJ movement is paternalistic, that it will replace one hierarchy, the legal power brokers and their "rights talk" by a second hierarchy, social sciences experts who will use "statistics talk."

accused/ plaintiff /defendant as object to him or her being the subject of inquiry is fundamental. Justice is not done to people, it is done by and through people.

A similar shift can be seen in law reform.²⁰ Law reform is no longer possible unless it consults with the people who will be affected by the reform, and not only the lawyers and the judges.²¹ They are the people who have to live with it and who make it. In its first Annual Report, the Law Commission said: "Those who reform the law in Canada are, above all, the public. They renew the law by living it."²²

These efforts at consultation lie at the very core of the reform and form part of the attempt to understand the law as it is lived. As the example of the older adults demonstrates, contextual information is necessary to understand how law is lived by people and the reasons why legal mechanisms are badly used, misused or not used at all. At the Law Commission, we have tried in our research methodology to build in mechanisms for consultation: we convene study panels consisting of not only the experts but also the people who will be affected. We conduct community meetings, focus groups and webcast consultations to hear stories of people dealing with the law on a specific issue. It is done to better understand the reality of the law as it is lived, and not just to obtain the views of Canadians about a particular issue.

I would like to emphasize how research and researchers cannot shy away from consultation in the process of understanding law and its impact. Empirical research is needed and is essential, but it must include involvement of the subjects. Statistics disembodied from context can be misleading. Referring to the subjects and the citizens to verify whether the research conclusions and the statistical image confirm their reality must become an essential step in research.

²⁰ See Audrey Macklin, *Law Reform Error: Retry or Abort?* 16 DALHOUSIE L.J. 395 (1993).

²¹ Law reform bodies around the world have begun to engage in serious consultation concerning the impact of law on various groups. See Victorian Law Reform Commission, *Sexual Offences: Law and Procedure* (2001).

²² Law Commission's website, *supra* note 9.

Once consultation and participation become part of the research process, it becomes obvious that the response must reach beyond statutory reform or governmental changes.

V. BEYOND STATUTORY REFORM AS THE RESPONSE

One of the contributions of TJ to our legal thinking was to question the “legal culture.”²³ TJ has been instrumental in questioning the centrality of the adversarial model²⁴ and supporting alternatives to dispute resolution mechanisms and preventive law.²⁵ It has even led to a critic of the “argument” culture, the culture of critique and opposition as opposed to a culture of believing, dialogue and cooperation.²⁶ In a sense, it has forced us to think beyond the statute or the case to the way in which the actors behave: the judges, the lawyers, and the academics. Law is a practice, not just formal enactments in decisions or statutes. Hence, changes, it was suggested, will occur not only by suggesting statutory or regulatory amendments or even a modification of a jurisprudential rule. Changes will occur when the actors behave differently.

The Law Commission of Canada has attempted to reflect this in the scope of its recommendations. In its first report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, it made recommendations to the Bar Associations to better train their members in the pursuit of childhood sexual abuse claims. It also made recommendations with respect to the conduct of litigation, suggesting, for example, that the government should not rely on limitation periods in the context of past institutional abuse of children. Its recommendations also move beyond the traditional players such as judges and parliamentarians and departments of justice to look at other actors such as police officers.

²³ WEXLER & WINICK, *supra* note 2, at xx (There has been interest in looking at the therapeutic application of existing laws).

²⁴ See A.J. Stephani, *Therapeutic Jurisprudence in the Appellate Arena: Judicial Notice and the Potential of the Legislative Fact Remand*, 24 SEATTLE U. L. REV. 509, 511-13 (2000) (discussing the “therapeutic legal administration” approach).

²⁵ *Id.*

²⁶ Abrahamson, *supra* note 2, at 223.

One could go even further: changes in concepts should affect the way in which other private actors conduct their business, the way in which insurance companies, corporations and unions resolve their disputes. It should also change the way in which the clients express their expectations. If the expectations are modelled after adversarial concepts, it would be impossible to move restorative justice beyond the periphery of the legal system. For experiments to become mainstream, they must become part of the consciousness of the general population. Otherwise, the "alternative" dispute resolution remains "alternative" and people wait for their "real" day in court, their real experience with the law. It is therefore incumbent upon law reformers to reach out to the public, to speak in a language that they can understand and relate to. In that sense, the Law Commission has developed case scenarios, short stories that give examples of how the law affects people in a particular circumstance. It has commissioned a play to demonstrate the changing relationships among adults and the challenges of law reform in this regard. It has produced videos. It has launched an essay contest in high schools across the country with a view of engaging Canadians in the renewal of the law. In fact, it has defined its mission as a commitment to "engaging Canadians in the renewal of the law to ensure that it is relevant, responsive, effective, just, and equally accessible to all."²⁷ The general public must embrace change for it to truly occur.²⁸

All of these experiments are risky: they challenge traditional notions of what a good law reform agency should do. Traditionally, law reformers measured themselves through the number of legislative changes that implemented their recommendations. There is certainly value in changing the statute at a time when it is in need of change. But often, to be truly effective, changes must occur at several levels: in the wording of statutes, in the remarks of judges, in the arguments of lawyers, in the expectations of clients, the comments from witnesses, and the reactions from the observing public. It is an ambitious task to

²⁷ Law Commission's website, *supra* note 9.

²⁸ For a discussion of how the public reacted to the recommendations of the Commission with respect to its report on responding to institutional child abuse : N. Des Rosiers, *Moving Forward with Dignity* <http://www.lcc.gc.ca/en/pc/speeches/20010815.asp> (last visited on Oct. 3, 2002).

reach out to the general public. It requires a new approach to measuring success.

VI. CHANGING CULTURES AS THE MEASURE OF SUCCESS

If rights are not enough and it is a culture of rights that must be changed, then the true measure of success would be the change of culture. Wanting a change of cultures would support some of the ways in which TJ has shifted from the academic circles to the training ground. Judges are being trained in TJ and so are law students. Ultimately, the next challenge is to infiltrate other disciplines, the media, and the general public as stated above. This is not an easy task. Law reform bodies are faced with the same challenges. The way in which one measures one's success becomes more complex than counting the times that the name of a law reform agency has been referred to or whether statutes have been amended in accordance with the recommendations of the law reform body.

One can measure such changes through polling and public opinion surveys by witnessing decreases in discriminatory attitudes or violent behavior, but it requires a more long-term vision.

I have described above some of the strategies to reach out to the public that are possible and that have been tried. Much remains to be done. This is an area in its infancy in the law reform community and will continue to require attention.

CONCLUSION

I have tried to reflect on how one might integrate some TJ insights into a law reform agenda. There is a lot that TJ can teach law reformers: from looking at the reality of the people affected by the law to engaging the subjects of research in the solutions, through empirical and multidisciplinary studies.

Ultimately, TJ is about a change of culture. It is about asking different types of questions about the law. It is time that these questions are asked. Law reformers can no longer ignore movements like TJ, which ask squarely whether law and the legal process do more harm than good. It certainly complicates the life of law reformers: they must undertake multidisciplinary studies,

conduct empirical studies, engage in extensive consultations, speak to broader audiences and even change their tools to measure success. In my view, there is no choice. We cannot afford to have law reform that ignores these insights. Ignoring the way law is lived and the way in which social culture has to change to remedy many of the social problems leads to responses that are too narrowly focused. Rights are not enough if we want a just society.