

SJTO

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the world a better place

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IS THE LAW A TOOL FOR POSITIVE CHANGE

Is the law a tool for positive change?

The proposition is a shallow, meaningless true-ism. Of course it is.

And so are good corporate governance. And journalism. And religion. And the United Nations. And electoral politics. And even revolutionary politics. So is the plain language movement. And so are good manners.

Each of these - and many more - can be thought of as a tool for a positive change. The problem is that they all may be - including the law - tools for negative change.

The substantive question really is - should you, by voting yes to this proposition, encourage people to put their faith in the law as ... an effective ... a realistic ... a trustworthy ... a reliable tool for positive change - today.

Or should you - by voting NO - acknowledge what we all know - that the law is, as it has always been, a tool of control by the rich, a tool that in form and substance always favors the rich and that almost always the resort to the law does not lead to significant, positive change although it might add some flowery positive rhetoric to what is happening anyhow.

Think about it. Vulnerable and impressionable young people may be watching and listening and might give up their punk bands and go to law school. Then where will we be!

So my first point is - vote NO to a meaningless bit of verbal fluff - that sends the wrong message.

What's my second point?

The law is not a tool - it is a *machine*. The law is not something at your disposal, which you can use as a craftsman, which you can deploy for a purpose of your own. The law is a machine and you are a widget, maybe a gear. On a good day I think of myself as a ball bearing or a bit of sandpaper.

After a few years in my practice as a plaintiff lawyer trying to help my clients who were almost always being ... *taken advantage* of - and knew it - I came to understand that almost the most important functions I performed - which takes place in my office and not in court and which they never taught me in law school - was to act an emotional toilet for people who were going through hell. Whether we were winning or losing.

A toilet is not a tool.

The law is not a tool in your hands. You are a tool in the hands of the law.

What's my third point?

All the positive changes you think the law has achieved and all those cited by my idealistic friends opposite are either

- minor considered in the broad sweep of history
- would have happened anyhow
- has come at cost that is too high to pay
- are mere procedural window-dressing
- or are freak good luck
- and

the sum total of all these is no good reason to put the law on the pedestal asserted by muddle-headed resolution my kindhearted friends ask you to support.

First, set aside the specific **individual cases** where you ... even me ... think we have achieved positive result for a particular individual in a specific case.

I used to start the interview with each new client saying – don't ask me to get you justice, all I can get you is a little money.

'A little money' in the broader context of the proposition before us – is not a positive change'. It's merely a job well done.

Well, you say, what about **fair procedures**? That's one thing the law has wrought! It is the pith and substance of the law. It's pride and joy. That's positive change. You can't deny that, you old cynic.

And I don't.

Indeed fair and transparent procedures are the crowning glory of late 20th century legal liberalism. And some would your Tribunals are crown jewel!

And isn't that pathetic. And a poor excuse to vote yes.

The nice lawyer pats your hand and person at the front nailing shut the coffin of poverty listens with exquisite politeness to your protests and the expensive words of your three expert witnesses and explains ... in well crafted reasons that what you're asking is beyond the jurisdiction of the Tribunal.

Procedural-ism as a substitute for income re-distribution is no virtue. Cynicism in response to legal hypocrisy is no vice.

I say that if you vote in favour of this resolution you are accepting procedural-ism instead of justice as a raisin d'etre of your work. Don't do it.

Why - because - as we all know - the core problem is - that the rich have too much money. And everything - all social progress turns on correcting that - and everything else offered up is an excuse and a distraction.

Well what about ... you say ... **peaceful resolution** of disputes as opposed to brawling and bloodshed? Isn't that a contribution of law to positive change.

There is an element of truth here. But really all the law is doing is functioning as a no mans land, neutral turf, it's not positive change.

But the greater truth is that the poor would be better off shouting in the streets or going to J-school or learning creative graffiti. Aside from the fact that the net, net result for the poor is almost always that they lose using legal strategies given the unavoidable central issue of the day - redistribution of wealth ... no legal strategies will come close to affecting that in a positive way.

I suspect that you don't want to admit that. You want to believe that your tribunals are exception to this terrible truth. You believe you're on to something - a way to get the poor substantial money at low cost.

But I say, what you do is a distraction from the main event - which is to get a good chunk of the wealth in private hands - and I mean a good, big, fat chunk - redeployed in a positive way for the greater good of us all. I say that doing a good and tidy good of dividing up the bribe offered to the poor, does not advance the central problem.

Last point - I should admit there are some examples of positive change that have come from the courts alone, where the law has been a tool for positive change.

I asked my friend Professor Doug Hay, distinguished professor of Legal History at Osgoode Hall Law School for a solid example of the law as a tool for positive change - that stood independent of legislative change. He thought hard and directed me Lord's Holt's ruling at the end of the 18th century that the evidence of witchcraft then used by the court was unreliable from a scientific point of view - which put an end to witchcraft prosecutions well before Parliament got around to ending the witchcraft as an offence.

It's more or less down hill for my friends' argument after that - historically speaking.

Would the broad package of reforms related to sex, sex based discrimination - in which I include **reproductive rights, same sex marriage, pay equity**, which are hailed as a result of the *Charter* ... has the law been a tool of positive change here?

My answer is that the key strategies and moves in those areas have been first political and then legal. Trudeau changed the Criminal Code in Parliament and the legal battles that followed have been window dressing.

If some keen young person asks - how can I affect positive social change in the next fifty years - given income and wealth distribution is the fundamental problem in society - what would I say? I would say - the leopard does not change its spots.

The last, the last strategy I would recommend would be a legal strategy.

The *Charter* has been fun while it lasted, a great rhetorical dance party, but it's over. The *Charter* is not a vehicle for redistributing wealth and income. If there was fleeting moment of hope and glory for the law as an instrument of positive change, it has passed.

So on balance, now, given the core problem we face, *is the law a tool for positive change?* Or has the law fallen back into its traditional role as a bulwark for the rich?

Tell the deep truth about the law.

Vote NO