RECOMMISSIONING LAW REFORM

RODERICK A. MACDONALD*

This article offers a critical analysis of expert Law Reform Commissions in Canada. The author traces the history of the idea of institutional law reform from its intellectual roots early in the twentieth century through its apotheosis in the 1960s and 1970s to its modern decline, which the author attributes to shifting cultural tendencies creating scepticism as to the value of law reform. The author argues for a reconceptualization of expert Law Reform Commissions, and his analysis proceeds in three stages. First, the author examines the concepts of law which are promoted by law reform and concludes that the widespread belief that explicit, official law (state legislation) is the superior juridical form is in fact erroneous. The author argues that formal legislation is not the only form of law, but in fact everyday practices (including non-linguistic ones) also constitute part of legal normativity. Next, the author contends that law reform is not the exclusive domain of the law reform commissioner, but in fact is carried out by judges, lawyers and all citizens every day simply by the performance of their daily activities. Finally, the author argues that in order to maintain their utility Law Reform Commissions must be willing to re-imagine themselves. They must be willing to reduce staff and work with external personnel, they must reject narrow instrumentalist processes and focus on issues of broader relevance, and they must conceive of research projects not directly related to doctrinal categories of law and which are intended to create a product digestible by the entire population. The author concludes by arguing that, while there is a future for expert Law Reform Commissions in Canada, they must be willing to recommission themselves with a new focus.

Le présent article propose une analyse critique des Commissions d'experts de réforme du droit au Canada. L'auteur retrace l'histoire du principe même de la réforme de droit institutionnelle, depuis ses racines intellectuelles du début du XX^e siècle jusqu'à son apogée des années 1960 et 1970, et à son déclin actuel — qu'il attribue à une transformation des tendances culturelles génératrice d'un scepticisme qui remet en cause la valeur de la réforme du droit. Au terme d'une analyse en trois étapes, l'auteur réclame une nouvelle conceptualisation des Commissions d'experts chargées de la réforme du droit. Il examine d'abord les principes de droit promus par la réforme du droit et conclut que la croyance répandue, affirmant que la loi explicite, officielle (la législation d'État) constitue une forme juridique supérieure, est en fait erronée. Selon lui, la législation formelle n'est pas la seule forme de droit, et les pratiques familières (y compris, non linguistiques) font également partie de la normativité juridique. L'auteur soutient ensuite que la réforme du droit ne relève pas exclusivement des Commissions. En fait, elle appartient aussi aux juges, aux avocats et à tous les citoyens dans l'exercice de leurs activités quotidiennes. Finalement, l'auteur affirme que pour maintenir leur bien-fondé, les Commissions doivent pouvoir s'imaginer sous un jour nouveau. Elles doivent réduire leur personnel et travailler avec des effectifs externes; rejeter les méthodes instrumentalistes étroites pour se concentrer sur des questions d'une plus grande pertinence, concevoir des projets de recherche qui ne soient pas directement liés à des catégories doctrinales et qui puissent aboutir à un produit consommable par la population tout entière. En conclusion, bien qu'il reconnaisse un avenir aux Commissions de réforme de droit du Canada, l'auteur estime qu'elles doivent se montrer prêtes à repenser leur mandat et leur point de mire.

* F.R. Scott Professor of Constitutional and Public Law, Faculty of Law and Institute of Comparative Law, McGill University (on leave); President of the Law Commission of Canada.

This is a revised version of the John A. Weir Lecture delivered at the Faculty of Law, University of Alberta, on 6 April 1995. I am most grateful to the Faculty of Law and to the Law Forum for their kind invitation to present the Weir Lecture. I should like to thank those who attended the Lecture, and especially William Hurlburt, Q.C., for their insightful comments and probing questions. I trust I have done these questions justice in this written version of the Lecture. While I have added conventional academic footnoting to the text, I have not otherwise sought to rework the style of the Lecture as delivered.

TABLE OF CONTENTS

I. INTRODUCTION: LAW REFORM AND ITS COMMISSION

In the mid-1990s law reform continues to be, as it has been since the mid-1960s, a major item on the public policy agenda in Canada. But it is not just the idea of law reform, or even the substance of the law being reformed, that is a contemporary preoccupation. The manner and modalities of law reform, and the institutions through which it is pursued have also moved to the centre of political debate. One such institution, the expert Law Reform Commission,[1] attracts disproportionate attention —

A caveat is in order. The final revision of this article was completed early in 1997 prior to my appointment to the new Law Commission of Canada. The opinions expressed, therefore, must be taken to be solely mine, writing in my office as a professor of law, and not as an expression of any views of the Law Commission of Canada or of its President.

I first considered the theme of Law Reform Commissions in a paper read at a Symposium sponsored by the Ontario Law Reform Commission in the fall of 1991. This paper was entitled "De- or Re-Commissioning Law Reform: Were Noel Lyon and Robert Samek on the Right Track Twenty Years Ago?" My ideas were developed further in a presentation to a workshop at the Faculty of Law, Queen's University in September 1992, and to a joint University of Montreal-McGill University seminar "Théories et émergence du droit" in October 1993. I am, of course, indebted to participants at those sessions — in particular Rosalie Abella, John McCamus, Richard Simeon, Noel Lyon, John Whyte, David Mullan, Andrée Lajoie, Guy Rocher and Jacques Frémont — for sharpening my understanding of the law reform process.

I must also record my gratitude to several colleagues at McGill — John Brierley, Madeleine Cantin Cumyn, Paul-André Crépeau, Patrick Glenn, Alison Harvison Young, Richard Janda, Daniel Jutras, Nicholas Kasirer, Colleen Sheppard, David Stevens, Stephen Toope, Shauna Van Praagh and Jeremy Webber — each of whom has helped me formulate the ideas which I present in this paper. My thanks are due as well to my two doctoral students, Seana McGuire and Desmond Manderson, for their careful reading and critical commentary on the penultimate version of this text, as well as to my research assistant, Martha-Marie Kleinhans, for her help with the final version of the essay.

Finally, I am pleased to acknowledge special debts to Blaine Baker whose encyclopaedic insight into the intellectual history of North American law was of especial assistance in connection with Part I, and to Harry Arthurs, who dissected an early draft of the Weir Lecture (not to mention my entire view of law and law reform) with his usual precision, wit and passion.

To all the above I am most grateful. None, however, should be visited with the sins of commission or omission in the present text.

[1] A comprehensive and detailed examination of the various models for expert Law Reform Commissions is offered in W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986).

not all of it favourable. If today we can celebrate the recent silver anniversary of the Alberta Institute of Law Research and Reform, and the resurrection of the Law Reform Commission of Canada in new guise, at the same time we also must now mourn the passing of one of Canada's first such institutions — the Ontario Law Reform Commission.

My immediate ambition in this article is to cast a critical light on the notion of expert Law Reform Commissions, primarily with a view to defending them against their two most evident enemies: cost-cutters and ideologues. Much of the recent criticism of expert Law Reform Commissions has, ostensibly, been budget-driven. At a time of shrinking governmental resources, they are characterized as a luxury that can no longer be afforded. But the real critique has been overtly ideological. Some erstwhile academic supporters have suddenly discovered expert Law Reform Commissions to be elitist and undemocratic institutions. Commissions are stigmatized as not responsive, either in their make-up or in the projects they undertake, to the diversity of gender, race and class in Canada. For other critics, expert Law Reform Commissions are no more than havens for self-indulgent, naive, spend-thrift, left-wing social engineers whose ideas have been discredited as impractical everywhere else. Obviously, I reject these several critiques, although I too confess to a certain unease about the expert Law Reform Commission project, especially as it is promoted in most professional and some academic circles today.[2]

I develop my defence in several stages. I begin by examining where the call for expert Law Reform Commissions originated and what were its intellectual underpinnings. This brief historical account provides a context for investigating various features of the expert Law Reform Commission idea in its Canadian vernacular. I then explore what concept of law is typically in view when these expert bodies are established. This is followed by an assessment of the purposes and practices of law reform that are usually set forth by their sponsors. I conclude with an evaluation of the assumptions about the province and proprietorship of legal knowledge that are reflected in the decision to commission law reform. This essay is, admittedly, as much about the nature and prospects for law in the late twentieth century as it is about the role of expert Law Reform Commissions. After all, determining the latter ultimately presupposes some conception of the former.

Before I proceed, two caveats are in order. Most importantly, I should note that I am not free from interest. I have undertaken research for three law reform committees and commissions, and for two Royal Commissions of Inquiry that had an important legal

---

[2] For a more complete statement of my own views about the substantive law reform process in one particular context — that of access to justice — see R.A. Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.B. Access Just. 287; and R.A. Macdonald, "Theses on Access to Justice" (1992) 7:2 Can. J. of L. and Soc'y 23. On the business of reforming the private law see R.A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 McGill L.J. 761.

aspect to their remit; moreover, I have myself chaired a government Task Force related to law reform.[3] My perspective is deeply coloured by these experiences.

A second caveat relates to the limitations I have set on the scope of this essay. This paper is about the *idea* of expert Law Reform Commissions.[4] I do not purport to examine closely the different technical forms of organization by which expert Law Reform Commissions are structured. Nor am I much concerned with variations in the specific mandate and *modus operandi* of such commissions. These differences in detail will, of course, operate to qualify somewhat the assertions made in this essay as they apply to particular Commissions. Nonetheless, I believe that the general patterns I trace are applicable at least to all Canadian expert Law Reform Commissions.[5]

II. THE INTELLECTUAL HISTORY OF EXPERT LAW REFORM COMMISSIONS

Some eighty years ago, a prominent European lawyer-sociologist trained in the civil law tradition, Max Weber, predicted that two of the principal characteristics of modern society would be the increasing bureaucratization of governance and the transformation of jobs into specialized offices.[6] He believed, moreover, that legal-rational authority would come to predominate as a mode of political legitimation. Within the law itself formal-rational decision-making would gradually achieve pride of place over systems dependent on the irrational accretions of precedent. Legislation would move to the fore as a vehicle for expressing legal normativity. Law and its administration would be reorganized functionally and systematized.[7]

---

3 Between 1985 and 1988, I served on the Ministerial Group examining the Reform of the Law of Security on Property that led to Title Six of the new *Civil Code of Québec*. On three occasions in the 1980s and 1990s I produced reports for the Ontario Law Reform Commission — most recently the Study Paper on *Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995). In 1987-88 I was a consultant to the Law Reform Commission of Canada on the administrative law project. I also was involved, like so many others, in preparing research studies for the Macdonald Royal Commission on Canada's Economic Prospects, and for the Dussault-Erasmus Royal Commission on Aboriginal Peoples. Finally, between 1989 and 1991 I was the Chair of the *Groupe de travail sur l'accessibilité à la justice* struck by the Quebec Minister of Justice, which produced the report *Jalons pour une plus grande accessibilité à la justice* (Québec: Ministère de la Justice, 1991).

4 It is important to signal that much law reform takes place and took place in institutional structures other than expert commissions: royal commissions, ministerial policy groups, the courts, Parliamentary Committees, and so on. See, for a sampling of the alternative institutional settings for law reform, Law Reform Commission of Canada, *The Object and Limits of Law Reform* by R.A. Samek [unpublished, 1976]; The Impact Group, *Evaluation Framework for the Social Issues and Law Reform (SILR) Program* [unpublished draft, 16 July 1993]; Canada (Dept. of Justice), *Toward a New National Law Reform Body* by J. O'Reilly [unpublished consultation paper, January 1994]; and *Federal Law Reform Conference: Final Report* (Halifax: Atlantic Institute of Criminology, 1993) [hereinafter *Federal Law Reform Conference*].

5 For an inventory and careful comparison of the method, membership and mandate of various commissions, once again reference should be had to Hurlburt, *supra* note 1.

6 The classical citation from Weber's *oeuvre* for this point is H.H. Gerth & C.W. Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford, 1958) c. 8 "Bureaucracy."

7 For a summary of Weber's thinking on the notions of authority, rationality and normativity see A.T. Kronman, *Max Weber* (London: Edward Arnold, 1983) at 37-96; see also M. Coutu, *Max Weber et les rationalités du droit* (Paris: L.G.D.J., 1995).

Not surprisingly, at about the same time, the first proposals for full-time expert Law Reform Commissions began to circulate in common law North America. I have in mind, of course, Roscoe Pound's critique of the machinery of American law in the first two decades of the twentieth century,[8] and Benjamin Cardozo's 1921 proposal to establish a Ministry of Justice as a means to keep the law from sliding into irrelevance.[9] Weber's prognosis and the Pound-Cardozo prescription have much in common. Both are characteristic of what has come to be called, in law, modernism.[10]

Yet the idea of permanent expert agencies to look after the update of the law had long preceded Weber and Pound. It was present, for example, in the suggestions of codifiers Jean-Marie Portalis in 1804 and Charles Dewey Day in 1866 for the creation of some official institution to keep up with the necessary revisions to the Civil Codes of France and Lower Canada respectively.[11] Indeed, the very idea of commissioning experts to codify the law has close affinities with that of commissioning experts to reform the law. Substantive improvement of the law, or at a minimum, the purging of contradiction, obsolescence, and confusion, is never far from the surface in any codification debate.[12] Even when a codification is primarily intended merely to

---

8 See, for example, R. Pound, "The Causes of Popular Dissatisfaction With the Administration of Justice" (1906) 29 Am. Bar Assoc. Rep. 395; "A Practical Program of Procedural Reform" (1910) 22 *The Green Bag* 438; "The Law in Books and the Law in Action" (1910) 44 Am. L. Rev. 12; "The Limits of Effective Legal Action" (1917) 3 Am. Bar Assoc. J. 55; "Anachronisms in Law" (1920) 3 J. of the Am. Jud. Soc. 142. For a later summary of his views, see R. Pound, "A Ministry of Justice: A New Role for the Law School" (1952) 38 Am. Bar Assoc. J. 637.

9 See B.N. Cardozo, "A Ministry of Justice" (1921) 35 Harv. L. Rev. 113. The impetus for the establishment of the New York Law Revision Commission in 1934 is often credited to this article and to Cardozo's subsequent proselytizing.

10 For a brief review and interpretation of the central features of legal modernism, see C. Douzinas & R. Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991).

11 A more complete discussion of Day's ideas may be found in J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521. See also N. Kasirer, "Canada's Criminal Law Codification: Viewed and Reviewed" (1990) 35 McGill L.J. 841 for a detailed treatment of this moment in law reform theory. The general theory of the relationship between codification and law reform is discussed in J. Vanderlinden, *Le concept de code en Europe occidentale du XIIIe au XIXe siècle* (Brussels: Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles, 1967) and in A.-J. Arnaud, *Les origines doctrinales du code civil français* (Paris: L.G.D.J., 1969).

The notion of an official overview agency did not, of course, originate with Portalis. Some argue, I think incorrectly, that it was unofficially present through the works of the great Roman jurists of the later empire, and was explicitly reflected in Tribonian's work in assembling Justinian's *Corpus juris civilis* codification of the sixth century. It also bears mention that Thomas McCord, Secretary to the Lower Canadian Codification Commission, wrote in the Preface to the second edition of his annotated Code that the first task of an ongoing overview body was to impose a moratorium on amendments to the Code. See T. McCord, *The Civil Code of Lower Canada*, 2d ed. (Montreal: Dawson Bros., 1867) at i-xiv.

12 On the politics of codification in France see A.-J. Arnaud, *Essai d'analyse structurale du code civil français, la règle du jeu dans la paix bourgeoise* (Paris: L.G.D.J., 1973); in Lower Canada, see B.S. Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen's University Press, 1993); and in the United States see C.M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport: Greenwood Press, 1981). See, generally, J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 98-106 (paras. 84-90) and bibliography cited for a discussion of these features of codification.

"restate" the manner in which the law is expressed, its motivation is always more than mere form.[13]

Despite these civil law precedents, and despite the growing realization (prompted by nineteenth century legal historians such as von Savigny, Maine and von Ihering) that legislation was overtaking equity and fiction as a means of law reform,[14] at the turn of the century most members of the *élite* common law bar seemed reluctant to acknowledge either the need for, or the special burdens of, legislative law.[15] However great the need for systematic law reform, especially in matters of judicature and procedure, and however much such reforms were in fact a perennial feature of the law throughout the nineteenth century, legislative law reform for the most part amounted to little more than a pragmatic response to everyday professional concerns. As long as the substance of the law remained an affair of the courts, and law reform an incidental outcome of the litigation process, the need for independent, professionally controlled, legal expertise was not perceived by mainstream jurists as central either to legislative activity or to the law reform project.[16]

But once legislatures subject to popular political influence gained control of the law-making process and saw reform of the common law as a legitimate exercise of their political authority, some vehicle for reasserting the systemic character of law and the rationality of its reform was seen to be necessary.[17] Moreover, once the traditional hierarchies of the bar began to lose influence over a growing and increasingly diverse legal profession, even the common law generated through litigation became unstable, prompting a call for new initiatives to rediscover law's latent coherence. In other words,

---

13 See the discussion of the reform elements of the recent civil law recodification process in Quebec in P.-A. Crépeau, "La renaissance du droit civil canadien" in J. Boucher & A. Morel, eds., *Le droit dans la vie familiale: Livre du centenaire du Code civil*, vol. 1 (Montreal: Presses de l'Université de Montréal, 1940) at xiii; P.-A. Crépeau, "Civil Code Revision in Quebec" (1974) 34 Louisiana L. Rev. 921; and J.E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New *Civil Code of Québec*" (1992) 42 U.T.L.J. 484; for a discussion of the reform process in France see L. Julliot de la Morandière, "The Reform of the French Civil Code," trans. K. Nadelman (1948) 97 U. Pa. L. Rev. 1. For the special patterns of codification movements in the United States see R.W. Gordon, "Book Review of *The American Codification Movement* by C.M. Cook" (1983) 36 Vand. L. Rev. 431.

14 See F. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. A. Hayward (New York: Arno Press, 1975); H. Kantorowicz, "Savigny and the Historical School of Law" (1937) 53 Law Q. Rev. 326; H.S. Maine, *Ancient Law* (London: J.M. Dent & Sons, 1861); R. von Ihering, *Geist des romischen Rechts* (Leipzig: Breitkopf und Härtel, 1866). See generally R. Pound, *Jurisprudence*, vol. 3 (St. Paul: West Publishing, 1959) at 377-738; and J. Stone, *Social Dimensions of Law and Justice* (Stanford: Stanford University Press, 1966) at 94-162.

15 For a spirited defence of the common law against what he deemed "socialistic legislation," see J.C. Carter, *Law: Its Origins, Growth and Function* (New York: Putnam, 1907).

16 Indeed, throughout the nineteenth century in the United States the dominant view of the legal profession was that codification (and legislative law reform in general) was not desirable. See, for example, P. Miller, *The Life and Mind in America from the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965).

17 What occurred in the late nineteenth and early twentieth century was a significant expansion in the compass of what legislatures conceived it within their competence to reform. See G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 60-74; L.M. Friedman, *A History of American Law* (New York: Simon & Shuster, 1973) at 580ff; see also L.M. Friedman, "Law Reform in Historical Perspective" (1969) 13 St. Louis U.L.J. 351.

once the lawsuit became a privileged vehicle of progressive legal practice — a means of contesting, not rationalizing, common law doctrine — the traditional organic-evolutionary counter-offensive of the *élite* bar to anti-legalist sentiment could no longer be sustained.[18]

The United States witnessed manifold responses to this coherence crisis. With the proliferation of published judicial opinions, other forms of doctrinal control besides professional acculturation began to emerge.[19] "National" law schools[20] and authorized "Restatements"[21] competed to fulfil the censorial role played by the great treatises of the nineteenth century.[22] With the proliferation of legislation overturning particular common law doctrines, often at the behest of political progressives, jurists (including many of these same progressives) began to look for new official institutions to redeem law's promise of systemic rationality. Hence the motive for creating free-standing Law Reform Commissions — whether official or, like the American Law Institute, unofficial — comprised of disinterested experts undertaking both doctrinal and empirical studies of large segments of the law of a given political jurisdiction.[23]

Notwithstanding these developments in the United States, the Law Reform Commission idea did not, however, immediately take hold anywhere in Canada. Nor, largely because of the power of the Law Society of Upper Canada, did the idea of a

---

18 The literature on the American legal profession — including the history of the legal professions — is extensive. See generally R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989); and M.A. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus & Giroux, 1994). What one discovers in this history of the U.S. legal professions is the desire to hold onto the idea of "the artificial reason of the law" as against the "democratic justice of the masses" reflected in Benthamite ideas. See, for example, the story as told in C. Warren, *A History of the American Bar* (Boston: Little Brown, 1911) at 508ff. On the history of the legal professions in Canada see W. Pue, "Evolution By Legal Means" in H.P. Glenn, ed., *Contemporary Law* (Cowansville: Yvon Blais, 1995) at 1; and W.W. Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta.L. Rev. 730.

19 See G. Gilmore, "Legal Realism: Its Cause and Cure" (1960) 70 Yale L.J. 1037.

20 See R. Stevens, *Law Schools: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983); A.S. Konefsky & J.H. Schlegel, "Mirror Mirror on the Wall: Histories of American Law Schools" (1982) 95 Harv. L. Rev. 833. For a contemporary account, see A.Z. Reed, *Training For the Public Profession of the Law* (New York: Arno Press, 1976).

21 For the early history of the American Law Institute, see N.E.H. Hull, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute" (1990) 8 L. & Hist. Rev. 55; a look at the modern influence of the Restatement project is given by S.L. Schwarcz, "A Fundamental Inquiry into the Statutory Rule-making Process of Private Legislatures" (1995) 29 Georgia L. Rev. 909.

22 For a discussion see A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 U. Chi. L. Rev. 632.

23 For the earlier history of various law reform agencies in England see W.H. Hurlburt, *supra* note 1 at 15ff; W.S. Holdsworth, "The Movement for Reforms in the Law 1793-1832" (1940) 56 Law Q. Rev. 33, 208, 340; and A.H. Manchester, "Law Reform in England and Wales 1840-80" [1977] *Acta juridica* 189. For a brief review of U.S. developments see L.M. Friedman, *supra* note 17; G.B. Warden, "Law Reform in England and New England, 1620-1660" (1978) 35 William & Mary Quart. 668.

national law school affiliated with a university.[24] Indeed, early twentieth century thinking about law reform and its agencies in Canada had less a progressive *motif* than a constitutional hue, being subsumed largely in debates about the Uniform Law Conference and the role of the Canadian Bar Association in promoting uniformity of legislation.[25] Even after official Law Revision Commissions were established in the United Kingdom and in New York State in the 1930s,[26] the idea still did not attract the attention of Canadian legislatures. Only in the 1960s and 1970s was legislation creating such commissions widely enacted.[27] After a brief flourish, in which every jurisdiction but one (New Brunswick) established some sort of expert Law Reform Commission, it now seems that the development has run its course.

In the early 1990s, the Law Reform Commissions of both British Columbia and Ontario were downsized (the former Commission having first been threatened in 1982) and the Law Reform Commission of Canada was disbanded. On 30 May 1996 the Chair of the Management Board of the Cabinet of Ontario announced that the Ontario Law Reform Commission was being closed, effective 31 December 1996. In August of the same year, the Ministry of the Attorney General of British Columbia announced that program funding for the Law Reform Commission of British Columbia was to be discontinued as of 31 March 1997. Early in 1997 the Government of Manitoba introduced legislation to abolish the Manitoba Law Reform Commission. While that statute never came into force, the section of the statute creating the Commission was repealed and the Executive Director of the Commission was transferred to the provincial Justice Department. The activities and budgets of other Commissions seem to be diminishing. For example, the Saskatchewan Law Reform Commission has but two members and an annual budget of only $55,000 and the Commissions in Prince

---

[24] The role of the Law Society of Upper Canada in stifling academic legal education during the first half of the twentieth century is outlined in C.I. Kyer & J.E. Bickenbach, *The Fiercest Debate: Cecil A. Wright, The Benchers and Legal Education in Ontario 1923-1957* (Osgoode: Osgoode Society, 1987). Reviews of other attempts to establish "national law schools" outside of Ontario may be found in J. Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979); and in R.A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dalhousie L.J. 211.

[25] The uniform law movement was not, however, a great success, largely because of scepticism from Quebec. See, for example, the reviews by E.F. Surveyer, "L'association du barreau canadien et l'uniformité des lois" (1923) 1 Can. Bar Rev. 52; F. Roy, "Unification des lois" (1919) 22 *Revue du Notariat* 225. See also J. Willis, "Securing Uniformity of Law in a Federal System — Canada" (1944) 5 U.T.L.J. 352.

[26] For example, the New York Law Revision Commission was established in 1934, as was the Law Revision Commission in the United Kingdom. On the history of these early twentieth century initiatives, see N.S. Marsh, "Law Reform Commissions Compared: A Review Article" (1989) 38 Int'l & Comp. L. Quart. 185 at 187ff. A more contemporaneous report is given in H.E. Yntema, "The American Law Institute" (1934) 12 Can. Bar Rev. 319.

[27] For early reflections on institutionalized law reform in Canada see, generally, G. Sawer, "The Legal Theory of Law Reform" (1970) 20 U.T.L.J. 183; R.L. Deech, "Law Reform: the Choice of Method" (1969) 47 Can. Bar Rev. 395; J. Beetz, "Reflections on Continuity and Change in Law Reform" (1972) 22 U.T.L.J. 129; L.C.B. Gower, "Reflections on Law Reform" (1973) 23 U.T.L.J. 257. Thoughtful critiques of the law reform project also emerged in the 1970s. See especially J.N. Lyon, "Law Reform Needs Reform" (1974) 12 Osgoode Hall L.J. 421; J.W. Mohr, "Comment" (1974) 12 Osgoode Hall L.J. 437; R.A. Samek, "Beyond the Stable State of Law" (1976) 8 Ottawa L. Rev. 549; and R.A. Samek, "A Case for Social Law Reform" (1977) 55 Can. Bar Rev. 409.

Edward Island and Newfoundland appear to be in abeyance. Currently only Nova Scotia and Alberta have fully functioning expert Law Reform agencies.

Yet, there are some counter-currents. After abolishing its Law Reform Commission, the federal government undertook a process of reassessment of its law reform agenda.[28] Similarly, in British Columbia a new expert law reform agency, the British Columbia Law Institute, was incorporated under the *British Columbia Societies Act* in January 1997 and began operations following the closure of the Law Reform Commission in March of that year. And Quebec, which despite having had a Civil Code Revision Office that flourished from 1955 through 1978,[29] never established an expert Law Reform Commission with a general mandate, enacted legislation to create such a body on the eve of the coming into force of the *Civil Code of Québec.*[30] Nonetheless, the statute authorizing this law reform institute has not yet been proclaimed in force.

What explains this waxing and waning of the expert Law Reform Commission idea in Canada during the twentieth century? In my view, much of the motivation behind the questioning of today's expert Law Reform Commissions stems from the same sources that delayed implementation of Weber's and Pound's ideas for almost half a century. That is, I believe that, regardless of the particular membership, mandate and *modus operandi* of expert Law Reform Commissions, the political saleability of the notion itself is tributary to broader intellectual and social tendencies.[31] Four such tendencies of the interwar decades in North American legal thinking are worthy of note — especially given their apparent recurrence (albeit in slightly modified form) in the

---

[28] For a recent article on federal consultations for re-establishing a Law Reform Commission of Canada see A. Macklin, "Law Reform Error: Retry or Abort?" (1993) 16 Dalhousie L.J. 395. On 6 October 1995 the federal Minister of Justice introduced the *Law Commission of Canada Act*, which after achieving second reading on 23 October 1995, died on the order paper at the end of the session. It was, however, reinstated as amended on 6 March 1996 and received Royal Assent as the *Law Commission of Canada Act*, S.C. 1996, c. 9 on 29 May 1996. The Act was proclaimed in force on 21 April 1997 and the new Law Commission of Canada — Commission du droit du Canada came into existence on 1 July 1997.

[29] On Quebec's 30 year civil code revision odyssey, see P.-A. Crépeau, "La Réforme du Code civil du Québec" (1979) 31 *Revue internationale de droit comparé* 269; and J.-L. Baudouin, "Quelques perspectives historiques et politiques sur le processus de codification" in *Conférences sur le nouveau Code civil du Québec* (Cowansville: Yvon Blais, 1992) at 13. See generally, Brierley & Macdonald, *supra* note 12 at 84-93 (paras. 71-78) and bibliography cited.

[30] See *An Act respecting the Institut québécois de réforme du droit*, S.Q. 1992, c. 43.

[31] Let me immediately disclaim any pretence to Hegelian metaphysics. I do not believe, as did von Savigny, Maine, von Ihering and Pound, that societies go through various evolutionary stages and that there is a form of law most suited to each phase. See R. Pound, *Interpretations of Legal History* (New York: Macmillan, 1923). Nor do I believe in the social determinism of these theorists. My view of these matters tracks that elaborated in, for example, R.W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 and R.W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale L.J. 1017. But I do claim that there is a relative coherence to the configuration of social artifacts in any given society: the dominant and subordinate themes in music, architecture, art, dance, sculpture, poetry and prose literature, not to mention the metaphors of scientific inquiry in physics, chemistry, geology, biology and psychiatry, for example, tend to overall coherence. See generally on this point, M. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Chicago: University of Chicago Press, 1958); and S.K. Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art*, 3d ed. (Cambridge: Harvard University Press, 1957).

1990s. They may be described under the following headings: (i) the dematerialization of law; (ii) the politicization of adjudication; (iii) the limits of legal action; and (iv) the ethic of anti-intellectualism. Each bears brief elaboration.

First of all, the legislative law reform agenda of the post-World War I decades was sidetracked by a pervasive dematerialization of the concept of law (and especially of the private law) as a unified state-managed endeavour administered by courts and subject to the overall surveillance of the Lord Chancellor's (or Attorney General's) department.[32] Administrative agencies under the control of, and responsible to, individual ministries rather than to the Attorney General proliferated. Increasingly law came to be seen as a policy instrument of the state, and of individual ministers promoting the interests of their own departments.

Much of the political pressure for amendments to the legal regimes of property, contract and tort was diffused not through minor modifications to the common law rules that set out baselines for self-directed planning by private rights-holders, but rather through the publicization of private law.[33] The creation of regimes of workers' compensation, automobile accident compensation, labour relations, employment standards, consumer protection, landlord-tenant relations, telecommunications, highway transport boards, energy boards and securities commissions, to suggest just a few examples — many of which embraced overtly distributive goals quite at odds with those reflected by the common law, and which stood surrogate for the common law — generated a concept of law and legal knowledge which was at odds with traditional understandings of its province.[34] Substantive and particularistic information rather than

---

[32] In 1997, dematerialization can mean two distinct things. First, it can refer to a crisis within state law. This is what I intend in the text. I mean to draw attention to the fact that the conception of the state legal order we associate with Dicey was losing its prescriptive force by the late 1920s, as "ordinary courts" applying "ordinary law" became less central to the state legal enterprise. The classical references to the apprehensions of jurists about administrative law are: in the United Kingdom, Lord Hewart, *The New Despotism* (London: Ernest Benn, 1929); and in the United States, J. Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge: Harvard University Press, 1927).

The second idea which is captured by the notion of dematerialization is that of "legal pluralism," or the recognition of the importance of non-state legal ordering. On this latter point, see H. W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985). I discuss the challenge of legal pluralism later in this article.

[33] See F. Éwald, *L'État providence* (Paris: Bernard Grasset, 1986) for a thorough discussion of the transformation of private law in France. Éwald's thesis applies, with only modifications to its detail, equally to common law jurisdictions. See Y.-M. Morissette, "Une épistémologie du droit: *L'État providence* de François Éwald" (1987) 28 *Cahiers de droit* 407.

[34] See, for a statement of these traditional understandings of the province of private law, O. W. Holmes, *The Common Law* (Boston: Little Brown, 1881) and a century later E.J. Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995). A good picture of these intellectual currents in Quebec is painted by J.-G. Belley, "Une croisade intégriste chez les avocats du Québec: *La Revue du droit* (1922-1939)" (1993) 34 *Cahiers de droit* 183; S. Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559.

formal and universalistic insight became the touchstone of expertise.[35]

After World War II, however, a different pattern was discernable. The development of systematizing theories of legal knowledge in the form of, for example, overarching concepts of institutional competence promoted by the Harvard legal process school[36] paved the intellectual pathway for the establishment of expert Law Reform Commissions in Canada. This trend in U.S. legal education soon crossed the border, where it tacitly informed the scholarly project of Canada's expanding legal education establishment, largely through a younger generation of Canadian law teachers colonized by American LL.M. programs.[37] But even in its moment of triumph, this new conceptualism in the U.S. legal academy was met by a resurgence of nominalistic tendencies. The integrative theories of the 1950s and 1960s that sought to rescue law's normativity from mere instrumentalism and the legislative programme of the New Deal proved unable to resist the politics of the civil rights movement that again blurred seemingly neat distinctions between private law and public regulation. The post-War synthesis disintegrated in the face of external theoretical challenges during the 1970s and 1980s in the form of law and economics, critical legal studies, critical race theory and critical feminist understandings of law. By the 1990s the language of post-modernism became one of the dominant discourses in academic legal analysis, and the ambition to universalistic rationality fell into disfavour in many circles.[38]

A second reason why the 1920s idea of expert Law Reform Commissions only saw the light of day in the 1960s and 1970s can be traced to developments within the theory of common law adjudication itself. While enacted constitutional law and ordinary legislation was readily perceived as being politically rooted and not immutably given, a similar perception was not visited by Anglo-American jurists in any widespread manner upon the unenacted common law until after the end of World War II. In the preceding decades, the dominant metaphors of legal change were either Mansfield's conception of the common law gradually working itself pure or the more generally held view that the immanent truth reflected in the law was just being discovered by ideologically neutral judges.[39] Indeed, the foundation of the resistance by the legal

---

35 For an analysis of parallel developments in the academy (and especially in the so-called social sciences) see D.M. Ricci, *The Tragedy of Political Science: Politics, Scholarship, and Democracy* (New Haven: Yale University Press, 1984).

36 See most notably L.L. Fuller, *The Problems of Jurisprudence*, temp. ed. (Brooklyn: Foundation Press, 1949); and H.L.A. Hart & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tent. ed. (Cambridge: Harvard Law School, 1958). For an evaluation of the contributions of the legal process school, see N. Duxbury, "Faith in Reason: The Process Tradition in American Jurisprudence" (1993) 15 Cardozo L. Rev. 601.

37 See the observations of B. Laskin, "Cecil A. Wright: A Personal Memoir" (1983) 33 U.T.L.J. 148; P. Horwitz, "Bora Laskin and the Legal Process School" (1995) 59 Sask. L. Rev. 77.

38 See A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507. A series of critical studies of doctrinal scholarship in various fields of Canadian law is presented in "Symposium on Legal Scholarship" (1985) 23 Osgoode Hall L.J. 395-695.

39 See the analysis of traditional judicial method, and the modest suggestions for how it might be revised, set out in B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921).

professions to codification and legislative law reform lay in their commitment to the special rationality of common law legal science.[40]

No doubt, it was the realist challenge of the 1930s which ultimately forced the change in theoretical perspective in the United States. Whatever was truly determining judicial decisions, realists illustrated that it was not just common law doctrine.[41] While legal realism never had the same impact on private law scholarship in Canada during the 1930s,[42] ideological criticism of judges found reflection in the academic commentary in public law: reaction to the rearguard actions of courts in contesting the jurisdiction of administrative agencies,[43] and criticism of the constitutional decisions of the Judicial Committee of the Privy Council.[44] By exposing clearly the incoherence of the prevailing view of common law adjudication, however, realists inadvertently provoked a quest for a new synthesis. This bore fruit in the 1950s, as many jurists sought to provide a justification for a common law that would be capable of evolving over time. For example, Lon Fuller's view of common law adjudication as the "collaborative articulation of shared purposes" seemed to be responsive to the realist challenge,[45] yet to offer a plausible explanation for re-orienting judgments in the 1930s and 1940s such as *Donoghue* v. *Stevenson*[46] in tort, *Hightrees*[47] in contract, and *Re Drummond Wren*[48] in real property law. So too, Herbert Wechsler's criticism of *Brown* v. *Board of Education* on the grounds of its failure to rest on neutral principles of constitutional law,[49] and the justification of Supreme Court of Canada civil liberties decisions in the 1950s through the notion of an implied Bill of Rights.[50]

Towards the end of the decade, human agency was once again seen as central both to the formulation and to the application of even the common law.[51] By the mid-1960s

---

40 See generally G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986); D. Alfange, "Jeremy Bentham and the Codification of Law" (1969) 55 Cornell L. Rev. 58. Of course, the paradox is that the legal professions were defending in the name of legal science a conception of law that, to use Weber's terms, was at its heart "substantively rational" against their characterization of democratic legislation as too passionate (even though the Benthamite codification project was premised on an ideology that was at bottom "formally rational").

41 See K.N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962) for an end-of-career summary of the realist challenge by one of its major proponents. See also W.W. Fisher *et al.*, *American Legal Realism* (New York: Oxford University Press, 1993).

42 For a rare example of classical realist scholarship published in Canada see J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

43 See J. A. Corry, "Administrative Law and the Interpretation of Statutes" (1936) 1 U.T.L.J. 286.

44 A leading example of this tendency may be found in F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485.

45 See L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353 (posthumous publication of an essay written and widely circulated in the late 1950s); L.L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968) at 89-112.

46 [1932] A.C. 562 (H.L.).

47 *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] K.B. 130.

48 [1945] O.R. 778 (H.C.).

49 H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1.

50 See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 774-77.

51 See, for example, R.M. Dworkin, "The Model of Rules" (1967) 35 U. Chi. L. Rev. 14; P. Weiler, "Two Models of Judicial Decision-Making" (1968) 46 Can. Bar Rev. 406; P. Weiler, "Legal Values and Judicial Decision-Making" (1970) 48 Can. Bar Rev. 1; and for a later statement, M.

even the House of Lords was prepared to admit the possibility that it might depart from its own precedents.[52] And yet, in the 1970s and 1980s, just as increasing attention to the theory of adjudication began to provide an intellectual justification for rethinking (and perhaps recodifying) common law doctrine, under the pressure of the freer-form justification associated with statutes such as *Family Law Acts*, *Dependents' Relief Acts* and the *Canadian Charter of Rights and Freedoms*, once more scholarly analysis came to focus on the determinacy deficit in legal regulation.[53] By the late 1980s, whatever the rhetoric of after-dinner speeches by lawyers and judges, the politics of strict legalism ceased to capture everyday litigation practice, and a belief in the futility of any quest for normative coherence reigned paramount.[54]

A third source of the current scepticism about the value of expert Law Reform Commissions also has its echo in the 1920s. By the turn of the present decade, optimism about the capacity of the human intellect to devise the means to bring the external world fully under control had turned to scepticism. The failed promise of rationality — a misguided promise itself a product of the 1960s faith in technology that produced a generation of social engineers, pop-psychiatrists, purveyors of pharmaceuticals disguised as doctors, and law reform experts — has left doubt about whether human artifice is capable of improving the material conditions of society at all.[55] Forty years earlier, a succession of policy set-backs produced a similar despondency. The failure of the League of Nations, the stock market crash, the rise of fascism, crop failure and drought all seemed to point to the same incapacity of humans to shape their political, economic, social or even environmental destinies.

In a culture that doubts the power of human reason to devise the means to improve the lot of the world, proposals for expert commissions seemed grossly misplaced. Moreover, as the legislative form becomes little more than executive *fiat*, even in political states supposedly committed to the withering away of law, claims that law has a latent rationality waiting to be uncovered by specially selected jurists smacked of the absurd. From the late 1920s until well into the 1950s the legalistic view of both formalists and realists verged on non-cognitivism and the prevailing critical ethic in law was one of resignation.[56] The mantra was simple. Because we cannot know the perfect,

---

A. Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988).

52 See "Practice Statement" [1966] 1 W.L.R. 1234.

53 The literature on indeterminacy is vast. See, for an example of the debate as carried on in Canada, B. Langille, "Revolution Without Foundation: the Grammar of Scepticism and Law" (1988) 33 McGill L.J. 451; and A.C. Hutchinson, "That's Just the Way It Is: Langille on Law" (1989) 34 McGill L.J. 145.

54 Given its attraction to "children of the 1960s" who began law teaching careers in the 1970s and 1980s it is not surprising that the literature on the topic of legal indeterminacy is enormous. For a representative sampling, see A.C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988); and A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

55 See the litany set out in C. Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (New York: Warner Books, 1989).

56 A contemporary portrait of this sceptical intellectual attitude is evocatively painted in L.L. Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1940). See also T.W. Arnold, *The Symbols of Government* (New Haven: Yale University Press, 1935); and T.W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937). On the extremes lay figures at Yale like Fred Rodell and Wesley Sturges. See L. Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill:

we despair of our ability to know the good; because we cannot produce totally determinate law, we despair of the legal enterprise altogether.[57]

But the 1950s and 1960s announced a new faith in human progress, a faith foreshadowed in the McDougall-Lasswell "law, science and policy" approach pioneered at Yale.[58] Only after World War II, when scientific knowledge in fields of biology, immunology, physics and chemistry seemed to suggest that human reason could understand the physical world, did the pursuit of social-scientific knowledge re-emerge as a worthy human activity. If expert knowledge could be marshalled in support of science, surely it could also be marshalled in support of law reform.[59] Shifting paradigms, and not just tinkering at the edges of legal doctrine, became the metaphor and the mode of legal thinking. In the United States, social engineering as seen in the activist jurisprudence of the Warren Court and the legislative agenda of Lyndon Johnson's "Great Society" was hailed as law's new vocation. Within a decade, however, this new faith was losing its allure: stagflation, untreatable viruses and pandemics, and the seeming persistence of race-connected discrimination began to generate a jurisprudence of despair.[60] Fact-based law reform foundered when the contingency of apparently objective facts was exposed. In the lexicon of scholarship, there could be no empiricism that was not a critical empiricism;[61] in the lexicon of law reform, de-regulation, privatization and procedural due process became the holy trinity of those who gave up on substantive law.[62]

The pervasive mood of anti-intellectualism in many political circles in Canada today is yet another cultural support for those who question the need for expert Law Reform Commissions. Anti-intellectualism also characterized the 1920s, the decade of so-called "normalcy." Notwithstanding that reform of the common law and civil procedure was high on the agenda of progressive elements of the bar in the early decades of this

---

University of North Carolina Press, 1986).

57 A classical example of the self-indulgence of the disappointed perfectionist, pretending himself to be above contingency, may be seen in P. Legrand, "*Antiqui juris civilis fabulas*" (1995) 45 U.T.L.J. 311.

58 See H.D. Lasswell & M.S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 Yale L.J. 203; see also M.S. McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community" (1947) 56 Yale L.J. 1345.

59 For representative expressions of this conception of law reform in common law Canada see Deech, *supra* note 27; Gower, *supra* note 27. As for the Civil law of Quebec, see J.-L. Baudouin, "Le Code civil québécois: crise de croissance ou crise de vieillesse" (1966) 44 Can. Bar Rev. 391; and P.-A. Crépeau, "Les enjeux de la révision du Code civil" in A. Poupart, ed., *Les enjeux de la révision du Code civil* (Montreal: Faculté de l'éducation permanente de l'Université de Montréal, 1979) at 11.

60 See G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); for a polemical and controversial contribution to the literature, see R. Herrnstein & C. Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994).

61 See D.M. Trubek & J. Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?" (1987) 14 L. & Soc. Inquiry 3.

62 For a critique of this attitude of resignation, see H.W. Arthurs, "Law as an Instrument of State Intervention: A Framework for Enquiry" in I. Bernier & A. Lajoie, eds., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 77.

century, the expert Law Reform Commission idea was above all a conservative ambition designed to save appearances. A losing battle against popular (and populist) legislation led the legal professions to substantially alter their take on expert law reform. Because the progressive tide could no longer be resisted (in large measure because a conservative appellate judiciary tried so desperately to do so), the *élites* in the profession jumped on the law reform bandwagon to preserve their control of law's doctrine. This permitted them to assert ownership of the process of legislative law reform, to show the public a concern for the improvement of the law, and to claim a role for their own expertise in managing reform.[63] In Canada, the strategy followed by the leaders of the bar was more successful than in the United States. The continuing dominant influence of professional organizations on the law until the late 1950s — for example, the Canadian Bar Association and the Law Society of Upper Canada — precluded (and perhaps even obviated the need for) any official law reform agency.

By the 1960s, however, one was witness to the flourishing of academic legal education and scholarship, the euphoria of an expanding economy and an expanding state, a faith in the capacity of instrumental reasoning, and a series of high-profile federal initiatives in matters of divorce, criminal law, administrative law and the judicial appointments process.[64] Coupled with an explosion of provincial social legislation in matters of family law, health care, legal aid, landlord and tenant law, consumer law, and so on, these developments generated a conception of the legal enterprise that once again made the rationalizing project of institutional law reform seem both worthwhile and necessary.[65] In Quebec, this same foment produced an energy that drove the Civil Code Revision Office for more than a decade, and the re-codification project itself for a quarter-century.[66] And as in the 1920s, the self-image of the legal profession as the guardian of law's integrity, its perception of a potential loss of control over law's doctrine, and its conception of its place in the social universe as an engine of legal progress led it to embrace this initiative.[67]

Especially at the federal level, law reform and constitutional reform were acts in the same play. Yet within a decade, the reactionary backlash was manifest. A concern with the cost of government provided a convenient cover for the anti-professionalism, anti-

---

[63] See Hull, *supra* note 21. See also N.M. Crystal, "Codification and the Rise of the Restatement Movement" (1979) 54 Wash. L. Rev. 239.

[64] See the summary in H.W. Arthurs, *Law and Learning* (Ottawa: Social Sciences and Humanities Research Council, 1983) [hereinafter Arthurs Report].

[65] As a law student between 1969 and 1975 I can attest to the "progressive ethic" in legal education, and to the perception that all the "forces for good" were ranged on the side of those who favoured legislative law reform. One need only scan the pages of the law reviews over this period to note the change in tenor of doctrinal commentary from that of the 1950s. Only because of the reaction it generated and because it stands in such sharp counterpoint to the dominant perspective, one should consult J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351.

[66] On this story, see the accounts in L. Perret, "L'évolution du Code civil du Bas-Canada ou d'une codification à l'autre: réflexion sur le Code civil et son effet de codification" (1989) 20 *Revue générale de droit* 719; J.-L. Baudouin, "Réflexions sur le processus de recodification du Code civil" (1989) 30 *Cahiers de droit* 817. See also, for a general overview, Brierley & Macdonald, *supra* note 12 at 82-97.

[67] For discussion of this conjuncture of events in the context of one profession, see R.A. Macdonald, "L'image du Code civil et l'imagination du notaire" (1995) 74 Can. Bar Rev. 97, 330.

scientism and anti-intellectualism of certain latter-day political movements. However trivial the actual savings from closing politically independent bodies of analysts such as economic councils, councils on social development and law reform commissions, budget compressions were trotted out to justify the action. Even today, the management of public affairs depends in part on playing to popular suspicion of academic knowledge as a means to delegitimate external critique of governmental initiatives or lack thereof.

Surprisingly, this know-nothing critique of expertise also found qualified support in two other places: the law teaching community, large segments of which bemoaned the lack of relevance of such commissions,[68] and the policy-making bureaucracy in some departments of justice that also disliked an independent body of advisers outside the hierarchical control of the official policy process. In much the same way that the Prime Minister's Office came to usurp the policy function of various ministries during the 1970s and 1980s, the policy bureaucracy of various ministries went on the offensive against external advisory bodies.[69] In this light, the concomitant build-up in the policy development branches of Canadian departments of justice could be interpreted as an attempt to render these expert commissions redundant.

If these ruminations are at all correct, then the prospects for traditional expert Law Reform Commissions in the 1990s are not bright. The place of expertise and bureaucratic rationality in law reform seems much diminished when competing expressions of the relationship of law to social processes such as post-modernism, neo-conservatism, political correctness and public choice also vie for supremacy. Put bluntly, if I am right in arguing that expert Law Reform Commissions were established in the first place as a consequence of the belief that ideology could be made subservient to knowledge, then the case for maintaining or resurrecting them (at least on the traditional model developed in the 1960s) is sure to be much weaker today, now that the reverse belief is ascendant.[70]

---

[68] The literature is actually quite extensive. For a sampling, see R. Hastings & R.P. Saunders, "Ideology in the Work of the Law Reform Commission of Canada: The Case of the Working Paper on the General Part" (1983) 25 Crim. L. Q. 206; M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" in D.K. Weisberg, ed., *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press, 1993) 539 at 548; and T. Scassa, "A Critical Overview of the Work of the Law Reform Commission of Canada: Learning From the Past" in *Federal Law Reform Conference, supra* note 4.

[69] On the former point see the chapters on Marc Lalonde and Michael Pitfield in C. McCall-Newman, *Grits: An Intimate Portrait of the Liberal Party* (Toronto: Macmillan, 1982). On the latter point, the experience with the Civil Code Revision Office is instructive. Once the report was tabled, the policy bureaucracy of the Quebec Attorney-General's department took it over and produced what is universally acknowledged as a grossly inferior product as the new *Civil Code of Québec*. See for discussion M. Tancelin, "Les silences du *Code civil du Québec*" (1994) 39 McGill L.J. 747.

[70] It is important to signal here that the "expert law reform commission" idea is just one example of how a perennial problem of law is made manifest in the common law tradition. That problem, centring on the ownership of legal knowledge, is as old as the arguments between Bacon and Hobbes on the one hand, and Coke on the other. See, for example, T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Chicago: University of Chicago Press, 1971) and Lord Coke, *Institutes of the Laws of England* (London: J. & W.T. Clarke, 1832). It played out in the eighteenth and nineteenth century as a contest between Mansfieldian and Benthamite ideologues. See, for example, J. Oldham, "From Blackstone to

Testing this assertion demands careful consideration of exactly what is meant by law reform. For heuristic purposes, the three components of the subject as revealed in the expression Law Reform Commission are examined:[71] first, LAW — what concept of law and normativity is being promoted? Second, REFORM — who actually does the reforming? Third, COMMISSIONS — where does ownership of legal knowledge reside?

III. LAW — WHAT CONCEPT OF LAW AND NORMATIVITY IS BEING PROMOTED?

Given the genesis of the expert Law Reform Commission idea it is hardly surprising that the standard formula for official law reform in the 1970s and early 1980s was highly instrumental. Indeed, the explicit mandate of most Commissions reflected this orientation.[72] Its essential elements repeated themselves over and over again in Working Papers, Studies and Final Reports. Even in an agency such as the Law Reform Commission of Canada that was initially conceived and organized to do more than recommend changes to the text of the law, the pattern persisted.[73] What is this classical formula for instrumental law reform? It is threefold, encompassing distinctive

---

Bentham: Common Law versus Legislation in Eighteenth Century Britain" (1991) 89 Mich. L. Rev. 1637; P.J. King, *Utilitarian Jurisprudence in America: The Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* (New York: Garland Press, 1986). And it has played out in the twentieth century in the libertarian critique of legislation. See, for example, F.A. Hayek, *Law, Legislation and Liberty* (Chicago: University of Chicago Press, 1973). For a thoughtful overview of this tension, see Beetz, *supra* note 27.

[71] Interestingly, a similar strategy has also been adopted by Macklin, *supra* note 28, who uses the headings "federal," "law" and "reform" to somewhat analogous purposes.

[72] See, for example, that of the Law Reform Commission of Canada as set out in the *Law Reform Commission Act*, R.S.C. 1985, c. L-7, s. 11 (repealed 1993, c. 1, s. 34; brought into force 15 March 1993):

> to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada with a view to making recommendations for their improvement, modernization and reform, including, without limiting the generality of the foregoing,
>
> (a) the removal of anachronisms and anomalies in the law;
>
> (b) the reflection in and by the law of the distinctive concepts and institutions of the common law and the civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions;
>
> (c) the elimination of obsolete laws; and
>
> (d) the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society.

[73] The Law Reform Commission of Canada was a pioneer in many respects. A sociologist, Hans Mohr, was appointed as a member. Numerous background papers and studies — in administrative law, in criminal law, in the bilingual character of Canadian law — not intended to produce immediate outcomes were produced. Perhaps a leading example of this approach was the Symposium under the title "Law and Leviathan" held in 1988 and published in (1990) 40 U.T.L.J. 305-686. See also E.F. Ryan & A. Lamer, "The Path of Law Reform" (1977) 23 McGill L.J. 519 for an earlier statement of the Commission's approach. The Law Reform Commission also adopted a pedagogical stance. It sought out summer research students, its members frequently visited Canadian Law Faculties, and in conjunction with the Canadian Association of Law Teachers, it sponsored a prize in law reform research.

conceptions of (i) how research problems are to be identified, (ii) what processes of research are to be undertaken, and (iii) what kinds of solutions are to be recommended.

First, then, *problem identification*. Here the questions are: what does the Commission perceive as problems, and how does it decide to select particular law reform projects?

In theory, it is the expert Law Reform Commission itself that determines its research agenda.[74] At policy sessions, or in broader consultation with the community (typically the legal community) an inventory of possible projects is developed. Invariably, considerations such as public profile, budget limitations, and seriousness of the problem in question as perceived by the Commission shape the planning process. What is more, the selection process typically is cast in doctrinal terms and focuses on rules of lawyers' law rather than institutions and procedures. After all, doctrine may be apprehended scientifically, and concomitantly, lends itself to being improved scientifically. Institutions and processes, like judicial selection,[75] rarely attract the attention of expert Law Reform Commissions because they are perceived as trenching on matters essentially political.

As a matter of practice, however, much of a Commission's agenda is set reflexively, usually in response to one of three stimuli. Often it is expert suggestions that are at the origins of project proposals. Some law professor, public servant or professional association such as, for example, the Law Society of Alberta, perceives a coherence problem in legal doctrine. This is typically with some area of the common law (*e.g.* certain rules and principles in the law of trusts or the law of contracts seem out of date or contradictory), but occasionally with a statute (*e.g.* a *Limitations Act* or a *Petty Trespass Act* or the *Criminal Code*), or series of statutes (*e.g.* those statutes dealing with security on personal property such as the *Chattel Mortgages Act*, the *Conditional Sales Act*, the *Hire-Purchase Act*, the *Assignment of Choses in Action Act*, the *Corporate Securities Registration Act*, and so on). The informant then proposes to examine the problem with a view to rationalizing and modernizing the law by enacting new legislation or amending existing legislation.

Alternatively, but less frequently in view of the greater pay-off through direct lobbying in the political arena, the initiative arises in a policy constituency. Some legal lobby such as the Canadian Bar Association, or some interest lobby such as the Canadian Bankers' Association or the National Advisory Committee on the Status of Women perceives an anachronism or anomaly in the substance of the law. Even when the anachronism or anomaly appears to be largely technical and therefore directly cognizable by an expert Law Reform Commission, inevitably it persists for political

---

[74] Surprisingly, given the importance of topic selection to the mandate of expert Commissions, there has been little material published, either by the Commissions or by commentators, on the process of topic selection. Occasionally, as in the cases of the Alberta Law Reform Institute and the Ontario Law Reform Commission, a Commission will produce an internal protocol for project selection; but this protocol is usually not widely circulated.

[75] Compare, however, the work of the Law Reform Commission of Canada on the jurisdiction of the Federal Court, and the Study Papers produced by the Ontario Law Reform Commission entitled *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) [hereinafter *Appointing Judges*].

reasons having little to do with the technical reasons advanced by proponents as a justification for studying and remedying the problem.

Or, finally, the initiative may be political. Some Minister of Justice or Attorney General perceives or is confronted with a substantive problem in a particular area of the law (*e.g.* the division of matrimonial assets upon marriage breakdown or the confidentiality of medical records). Often the hope is to avoid having to make a political decision about how to proceed. In these cases, the expert Law Reform Commission is deployed as an institution lying halfway between in-house policy development departments of Ministries of Justice, and free-standing Commissions of Inquiry. Unfortunately, it is neither capable of spending the millions of dollars necessary to examine a problem in detail, nor is it close enough to the policy process to tailor its recommendations to outcomes that have a high likelihood of being adopted. The reference to the expert Law Reform Commission is almost by way of last resort; perhaps independent expert advice might generate some unanticipated, apolitical structural or procedural solution to an intractable substantive problem.

Of course, with the exception of the mandatory Ministerial reference, the expert Law Reform Commission is free to decide whether or not to adopt any projects proposed to it. Nonetheless, however it selects its projects, the motivation for most proposals is predominantly instrumental.

Second, *the process of study and research.* Here the questions are: what are Commissions good at doing, and how can they proceed most efficiently in organizing and examining the identified problem?

Following its preliminary evaluation of the problem as presented, an expert Law Reform Commission usually appoints a group of experts, almost always either law professors or, if the Commission has a full-time staff, in-house staff to study the question. Occasionally lawyers and judges and, very occasionally, economists, sociologists, political scientists, experts in public administration, and the like may also be hired as consultants. The mandate of the experts is generally cast in the doctrinal language in which the initial proposal was formulated: for example, if the problem is court over-crowding, the mandate is to examine how to reduce demand, not how to enhance access to justice by providing other state-financed conflict-resolution resources. The selected experts are then constituted into a Study Group under a project director and are charged with conducting research and producing a background Working Paper on the question so framed.

The *modus operandi* of the study group will usually purport, especially since the publication of the SSHRC Report *Law and Learning* in the early 1980s,[76] to have a significant empirical component. But in practice, the empiricism is pseudo-empiricism that is principally directed to analysis of legal texts and reported judicial decisions. Occasionally, this empiricism involves surveys and samplings of collectable data from official sources (*e.g.* from court offices, registry offices of various descriptions, police records, and so on). And sometimes, it even extends to a survey of recent critical

[76] *Supra* note 64.

literature relating to gender, race and class. That is, depending on the source of the project — whether it comes from the coherence concerns of the academy, the policy concerns of lobby organizations or the prudential evasions of a politician — the particular mix of empirical studies will differ slightly. Rarely, however, will these studies pass muster with professional social science researchers. This is mainly because the problem is cast in terms of legal doctrine and not in a fashion that lends itself to the formulation of testable hypotheses.

The researchers producing the various study papers usually seek input from high-profile participants in the field of law concerned. Who these high-profile participants are believed to be is also often determined by reference to the manner in which the problem was first presented to the Commission. If the problem is framed as one dealing with security interests in personal property, the obvious inclination is to hire a legal academic or a lawyer who specializes in personal property security law. The synthetic Study Paper is then submitted in draft form to official representatives of the constituencies deemed affected. Thereafter, it may be released by the Commission as a Working Paper or a Discussion Paper, prior to the production of a Final Report issued in the name of the Commission. Or it may simply be incorporated directly into the Commission's Final Report.

In all events, the direction of research tends predominantly to be research in, but not on, law. The research protocol normally is designed to solve the problem as presented, not to attempt an inquiry into whether the problem is, in fact, a problem, and if so, what are its probable causes.

Third, *the solution recommended.* Here the questions are: what reinforces the Commission's own view of its special talents, and how can it solve the problem in a manner that maintains and reinforces the notion that it has an expertise in diagnosing and remedying societal pathologies by a better deployment of formal law?

When the Commission resolves to issue a Final Report setting out its considered views on a topic, rather than leave the matter at the stage of a Working Paper or Discussion Paper, the instrumental character of the process becomes most apparent. Invariably the Final Report is an elaborate justification, usually unanimous, for legislative law reform designed to remedy the initial coherence problem or to overcome the perceived political difficulty. Almost never does a Final Report of an expert Law Reform Commission conclude that there is, indeed, no real problem to be addressed or that whatever problem there may be, it is not one that requires a legislative solution.

The scientism of the law reform exercise is carried to its logical conclusion with the appending of a draft statute to the Final Report. This addition helps to reinforce the apolitical and pragmatic character of the reform proposal by demonstrating that it can be made to work within the conventions of everyday legislative expression. Admittedly, there are pragmatic advantages to supplying draft legislation: ideas that sound plausible in the abstract may prove unamenable to formulation in legislative language; legislative drafting departments of Ministries of Justice may be overworked, or may miss the subtleties of the Commission's narrative report. But the draft statute has an important symbolic purpose as well. It demonstrates the Commission's claim to technical expertise. The Final Report itself is typically accompanied by explicit claims about the

ambitions of the endeavour, all of which reinforce the self-image of the expert Law Reform Commission: the proposed legislation is rational, modern, progressive and above all, apolitical, in its ambitions.

Even the manner by which such Final Reports are released and the explicit invitation of critical doctrinal commentary by Commissions sustains this world view. A critical academic conference or a less than laudatory law review article, far from being an embarrassment to the Commission, are the highest form of praise. These confirm that the Final Report has identified a real issue and has formulated a position that engages the polemical imagination of that very *clientèle* whose support is crucial to maintaining the operation. I mean, of course, the legal academy and the legal professions. For an expert Law Reform Commission, there is no fate worse than being ignored.

Viewed in such a light, the expert law reform endeavour can be seen to have the same hermetic character as the civil litigation process. The process of civil litigation is designed not to solve conflicts between people, but simply to provide closure on a civil dispute that has been created out of the inter-personal or social conflict in question.[77] So too law reform stylizes a particular problem, and works inexorably towards the solution that the problem so stylized necessarily commands. At bottom, the success of institutionalized expert law reform agencies is to be measured not by their success in having their proposals enacted, but by their success in convincing their primary constituencies — in government, in the legal professions and in the legal academy — that institutionalized expert law reform is necessary.[78]

The above description of the mandate and method of expert Law Reform Commissions admittedly lacks subtlety. It is, nonetheless, not a caricature. What merits attention now are the assumptions about law and the legal system that sustain this conception of the endeavour. In my view, there are four. This conception of mandate and method presumes that the highest type of law, and the only type which is worthy of the efforts of experts, is law that is made explicitly by an official body such as the legislature or its delegates. It also implies that legislation is the most effective way of controlling and changing people's behaviour. Moreover, it seems to concede that the state legal system, rather than any other legal order, is the most perfect juridical form. And finally, this approach to law reform rests on the view that expertise backed by empirical evidence is the best insurance against the politicization of law.

I happen not to agree with any one of these assumptions. For I believe that they rest on an impoverished view of law and normativity. Paradoxically, not only do proponents of expert law reform implicitly accept these assumptions, so too do most contemporary scholarly critics of the work of Law Reform Commissions, including those who castigate Commissions for being insufficiently sensitive to the law in action.[79] In other

---

77 I have tried to explore the reasons for this feature of the litigation process in a study prepared for the Ontario Civil Justice Review. See Macdonald, *Prospects for Civil Justice*, *supra* note 3.

78 A similar point is made by Sawer, *supra* note 27.

79 See, for example, the papers collected in the published version of the consultation managed by the federal Ministry of Justice in 1994 (*Federal Law Reform Conference*, *supra* note 4). See also *Summary of Proceedings, Department of Justice Law Reform Consultation: Toronto — October 20, 1994* [unpublished]; Canada (Department of Justice), *Creating a New Law Reform Commission*

words, my complaint is not that expert Law Reform Commissions pay insufficient attention to the law in action; it is, rather, that because they have typically adopted a narrow conception of law, they examine only a small part of the phenomenon of the law in action. They do explore the practical consequences of certain legislative rules, especially for the day-to-day practice of law. But it is far from clear that these lawyers' rules have much relevance to the normative commitments that shape the way most people live their lives[80]: whatever action the law produces, it is not meaningful to large segments of the population.[81]

I start from the observation that there are other types of normativity besides the formal and explicit variety we associate with legislation.[82] Legislation is, of course, the most stylized form of normative expression as well as being that which most closely corresponds to the Weberian model of formal-rationality in a legal/rational authority system.[83] Hence, if one wants to believe that authority in democratic states can only be legitimated through legal/rational structures rather than through traditional or charismatic principles, and if one also wants to believe that expertise is the necessary precondition to normative objectivity, it follows that legislation will be the preferred, if not the only, vehicle for expressing legal rules. Alternatively, if one believes that legitimation can and does derive from a complex amalgam of, among other things, tradition, competence, charisma and office, then the pretence of legislated law to normative exclusivity must be erroneous.

Two main consequences flow from adopting the latter approach. First of all, one would have to accept that all other legal texts would likewise constitute, each in their own way, part of a society's normative arrangements. So, for example, judicial decisions, contracts and doctrinal legal writing in treatises, factums, opinion letters, *etc.*, as well as statutes and regulations, would contribute to the total discourse of language-

---

of Canada [unpublished consultation paper, 1994]; and O'Reilly, *supra* note 4. For critical comments that also adopt this ideology of the law reform endeavour, see the papers delivered by Allan Hutchinson ("The Politics of Law Reform") and Donna Greschner ("A Contextual, Pragmatic and Political Commentary of 'The Politics of Law Reform' by Professor Allan Hutchinson") to the Symposium on Law Reform sponsored by the Ontario Law Reform Commission in September 1991 at which an early version of this essay was also presented. Compare, however, H.W. Arthurs, *Social Issues and Law Reform — Research Program* (July 1993) [unpublished].

80 For an exploratory survey of the limited relevance of official law in one domain — access to justice in small claims courts, see S.C. McGuire & R.A. Macdonald, "Small Claims Courts Cant" (1996) 34 Osgoode Hall L.J. 509.

81 The reader will detect in the paragraphs that follow a number of ideas that were first expressed, albeit in inchoate form, by Lon Fuller. See, for example, *The Morality of Law*, 2d ed. (New Haven: Yale University Press, 1969); *Anatomy of the Law*, *supra* note 45; and the essays collected by K.I. Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham: Duke University Press, 1981) [hereinafter *Essays*]. For similar assessments of the character of law and legislation in Fuller's legal theory see G. Postema, "Implicit Law" (1994) 13 L. & Phil. 361; and K.I. Winston, "Legislators and Liberty" (1994) 13 L. & Phil. 389.

82 See L.L. Fuller, "Human Interaction and the Law" (1969) 14 Am. J. of Juris. 3. This theme is developed further in R.A. Macdonald, "Pour la reonnaissance d'une normativité juridique implicite et 'inférentielle'" (1986) 18 *Sociologie et sociétés* 47; R.A. Macdonald, "Les Vieilles Gardes" in J.G. Belley, ed., *Le droit soluble: contributions québécoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996) at 233.

83 For a discussion of these key concepts in Weber's thought see Kronman, *supra* note 7 at 37-96.

expressed normativity. Moreover, one would have to accept that much legal normativity is non-linguistic. So, to give further examples, patterns of interaction among individuals, among families, among communities, and between buyers and sellers, as well as shared patterns of belief and commitment would all be seen to contribute to a society's normative order (or orders).[84]

The more complex view of authority and legitimacy just outlined is, of course, that actually adopted by lawyers and judges in practice, even if it is rarely expressed as such in their speeches or essays. Yet the implications of this juristic practice are not often traced out. Some merit notice. This view implies that legislation has no claim to normative superiority simply because it is a consciously made artifact. Further, this view implies that the written words in a statute or regulation are not themselves the legal norm: legislation is a particular manner in which a legal rule is expressed, not the rule itself.[85] In other words, even though the linguistic formulation which appears in a statute is canonical and forever fixed (by contrast with a "legal rule" as presented in a judicial decision), the apparently unchanging form (*e.g.* Thou shalt not kill) is still only the material support by which the legal rule is rendered explicit.[86]

It follows that a faith in the capacity of legislative texts to control or to change behaviour instrumentally is misplaced. Legislation may, like assembly instructions for an electric fan, or like a recipe for a cherry cheesecake, provide suggestions about a structure for apprehending a task and a method for pursuing a purpose. It may even, like a list of New Year's resolutions, or like the mass or the *seder*, offer us a ritual to reflect upon our duties to ourselves and others. But neither legislation, nor instructions, nor ritual, in themselves directly control behaviour. To the extent we decide to accept their counsel, words arranged as expressions of legal rules certainly influence human conduct: they may change the way we talk, the way we organize our modes of living, and the way we justify our actions. The central question is, therefore, when and why do we decide to accept their counsel?

---

[84] This, of course, is the insight of legal pluralists. See, for example, J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. Leg. Pluralism 1; S.E. Merry, "Legal Pluralism" (1988) 22 L. & Soc'y. Rev. 869. But compare B.Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20 J. L. & Soc. 192.

[85] This point is obvious to anyone who routinely works with legislative texts which are drafted in two or more "official languages." No translation can ever be "exact," and if both versions are official, whatever the norm is must be something which exists beyond its formulation in either of the individual linguistic versions. See R.A. Macdonald, "Bilingualism or Dualism" (1988) 25 Lang. & Soc. 40. I believe that this is a feature of language generally, even in unilingual legislative instruments. A careful analysis of this theme is undertaken in D.R. Klinck, "The Language of Codification" (1989) 14 Queen's L.J. 33.

[86] This point is much easier for a common lawyer who has been exposed to the multiple expressions of legal rules in the formulation of the "so-called" *ratio decidendi* of a case: no one would today claim that, with the possible exception of certain historical rules where the court attempts a canonical formulation that has become accepted by practice (for example, the rule in *Shelley's Case*), there is an official linguistic expression of a common law rule. But the lesson is harder in so far as legislation is concerned. Nonetheless, as conventions for the repeal of statutes illustrate, an important distinction must be drawn between the legal rule and the linguistic support by which it is expressed. See P.A. Côté, *Interprétation des lois*, 3d ed. (Cowansville: Yvon Blais, 1993) at 99-101.

These reflections suggest that the monopoly of legislatures on law's central expressive form does not translate directly into a monopoly on its substance.[87] The lesson is broader. If it is true that the law is not congruent with legislative texts, it must also be true that legal normativity cannot be just about what people holding official offices do either. The mistake of legal realists was to assume that if law were not captured by official texts, it would nonetheless be captured by official acts. In the place of an *a priori* or analytical positivism of legal texts, realists wished to substitute an *a posteriori* or pragmatic positivism of legal agents.

But the acts of office holders (Karl Llewellyn's "what officials do about disputes") are no more an exclusive source of normativity than official texts. These official acts comprise symbolic patterns of behaviour undertaken by many people, in various places, over an indeterminate period of time. Actions, like words, are sometimes fluid, sometimes canonical (as in ritual) but, like words, they can never do more than reflect legal norms. Either these actions may be understood by reference to their expression in the language of legal treatises or other studies that purport to go behind the text of legal decisions (O.W. Holmes' "predictions of what the courts will do in fact") or they will be inferentially understood by those trained to recognize them.[88] Our acts and our sayings are both the reflection of, and the aspiration towards, normativity. The state, whether through its texts or through its office-holders, alone cannot construct a normative order.[89]

With this background, I should like to return to the issue with which this section began. Is it inevitable that expert authority in law reform will replicate Weberian formal-rationality in its policy program? Put slightly differently, the question is whether expert Law Reform Commissions can deploy alternatives to draft statutes as a means of law reform. Even though the first instinct of a bureaucratic law reform institution is to produce bureaucratic law in the form of legislation, surely the answer must be yes.

Imagine each of the following as possible textual outcomes to a law reform project:[90]

---

87 For a critical evaluation of the concept of legislative monopoly see, most recently, B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 56ff.

88 Donald Black goes even further. He argues that the most appropriate method for understanding (and predicting) law is to renounce legal categories (whether textual or experiential) and deploy in their stead the basic building blocks of sociological analysis. See, for example, D. Black, *Sociological Justice* (New York: Oxford University Press, 1989).

89 Illustrations of the point may be found, in particular, in the various studies of micro-legal systems undertaken by Michael Reisman: M. Reisman, "Looking, Staring and Glaring: Microlegal Systems and Public Order" (1983) 12 Den. J. Int'l L. & Pol'y 165; "Lining Up: The Microlegal System of Queues" (1985) 54 U.C.R. 417; "Rapping and Talking to the Boss: The Microlegal System of Two People Talking" in *Conflict and Integration: Comparative Law in the World Today* (Chuo, Japan: Chuo University, 1988) 61. See also W.O. Weyrauch & M.A. Bell, "Autonomous Law-making: The Case of the 'Gypsies'" (1993) 103 Yale L.J. 323.

90 Let me add an important caveat. Each of the following examples of possible outcomes presumes that something actually has to be done or a new text has to be produced. Might it also be the case that the Final Report of an expert Law Reform Commission on a given topic could conclude that the "common law," or the "statute," or the "customary practice" is working? Might it then not try to explain why this is the case, notwithstanding the fact that the *perception* that a problem exists

1. a Law Reform Commission Report concludes with a series of "examination hypotheticals" raising the legal/social issues canvassed in the Report followed by a number of appellate court judgments disposing of the "hypothetical" disputes;

2. a Law Reform Commission Report concludes with a similar series of "examination hypotheticals," this time followed by several in-house Legal Memoranda exploring the options for dealing with the questions;

3. a Law Reform Commission Report concludes with a series of "examination hypotheticals" followed by an inventory of draft standard-form contracts addressing the contractual ordering problems being raised;

4. a Law Reform Commission Report concludes with a series of "examination hypotheticals" followed by a carefully crafted section or chapter of a legal treatise discussing and commenting on the doctrinal points in issues;

5. a Law Reform Commission Report concludes with a series of "examination hypotheticals" followed by a modern day equivalent of Hillaire Belloc's *Cautionary Verses*[91] devoted to exploring the human dilemmas posed;

6. a Law Reform Commission Report concludes with a series of "examination hypotheticals" followed by a draft statute designed to overcome the perceived "mischief" in the law.

The reason why, in the late twentieth century, the last of these is generally held to be the only acceptable outcome of expert Law Reform Commission process flows, I suggest, from the commitment of most jurists, regardless of their political persuasion or theoretical extroversion, to the idea that real law can only be made:[92] because law is fundamentally the product of legislative will it can, therefore, be remade or reformed only by legislation.[93] But if legislation itself does not make legal rules in the instrumental sense, would this not suggest that the law reform project ought also to be about providing alternative linguistic vehicles for expressing legal rules?[94] And, if law and legal rules are also expressed in non-linguistic forms, it would not be unthinkable for a Law Reform Commission to engage in non-linguistic symbolic discourse designed to suggest new legal practices. All human communicative symbolisms can become

---

generated the remit to the Commission in the first place?

91 (London: Duckworth, 1940).

92 This point is often underappreciated. Even those lawyers whose practice is in areas arising at common law imagine law as an "official product" of a state agency. In the legal academy, the object of external critiques of law — from the right as in "law and economics" or from the left as in "critical legal studies" — is always the product of the state and its agencies (the courts). See the discussion in Postema, *supra* note 81.

93 This belief (and the erroneous assumptions on which it rests) is elaborated in detail in Fuller, *Anatomy of the Law*, *supra* note 45 at 57ff.

94 For a longer development of the thesis that legislative language is only one manner of making law explicit and that language is only one of a plurality of communicative symbolisms for rendering legal normativity see R.A. Macdonald, "Legal Bilingualism" (1997) 41 McGill L.J. 119.

resources of law reform.[95] Thus, a Law Reform Commission could, conceivably, commission symphonies, put on plays, sponsor art exhibitions, undertake sports activities, and so on.[96] If law is about practice as well as text, then the symbolic forms of non-linguistic communication must also be part of its reform.[97] That these last few suggestions seem to be ridiculous leads directly to the issues canvassed in the next two parts of this article. For it is only if we have a reasonably comprehensive idea of who actually does the reforming and how this reform might occur that the special, but limited, virtues of expert Law Reform Commissions become clear.

IV. REFORM — WHO ACTUALLY DOES THE REFORMING?

In the contemporary political state, law comprises a complex amalgam of rules and principles (legal doctrine), procedures, institutions and practices. By implication the writ of an official Law Reform Commission ought to run not only to questions of legal doctrine, but also to questions of procedure and institutional structure, practices and governance.[98] More radically, because law comprises both made and implicit elements, the evaluation and interpretation of legal doctrine as elaborated in legislation and judicial decisions is only a part of the task of an expert Law Reform Commission.[99] Still more radically, law as a social phenomenon is not exclusively the product of the political state: many legal orders compete for the attention and loyalty of citizens.[100] In other words, the official legal systems of Alberta, Ontario and Canada, ostensibly the systems upon which the work of the Alberta Law Reform Institute, the Ontario Law Reform Commission and the Law Reform Commission of Canada would, respectively, be focused, constitute only one possible site of normativity for citizens of Alberta, Ontario or Canada. The diverse non-official legal orders in a given geography affect the formal and informal processes of law reform within the official legal order such that

---

95 On this conception of symbols see Langer, *supra* note 31.

96 For a preliminary exploration of this theme see N. Kasirer, "Larger Than Life" (1995) 10 Can. J. of L. & Soc. 185.

97 These alternative modes and methods of law reform are discussed in Samek, *The Objects and Limits of Law Reform*, *supra* note 4; and in Samek, "A Case for Social Law Reform," *supra* note 27. More recently, Alan Reid has attempted to evoke the spiritual dimensions of law's multiple symbolisms. See A. Reid, *Seeing Law Differently* (Ottawa: Borderland Publishing, 1992).

98 Many Law Reform Commissions have taken this broader approach to their mandate. See, for example, the studies of various administrative agencies undertaken by the former Law Reform Commission of Canada — namely, of the National Energy Board, the Canadian Transport Commission, the National Parole Board, the Atomic Energy Control Board, the Unemployment Insurance Commission, the Immigration Appeal Board, the Anti-Dumping Tribunal, the C.R.T.C., the Pension Appeals Board, the C.L.R.B. and the Tariff Board — which led to Working Paper 25 and Report 26 (both entitled Independent Administrative Agencies).

See also the studies of the Ontario Law Reform Commission: *Appointing Judges*, *supra* note 75; *Prospects for Civil Justice*, *supra* note 3; and *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996).

99 For a series of papers sponsored by the Law Reform Commission of Canada that address these more informal elements of law reform, see *supra* note 73.

100 See, on the kinds of competing normative systems that nourish (and are nourished by) official law, R.C. Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Cambridge: Harvard University Press, 1991).

understanding their evolution is fundamental to understanding the reform of official law.[101]

There is a further idea. Most changes to operative legal rules (that is, the law in action) are not produced by official bodies such as expert Law Reform Commissions or by specialized state institutions and offices such as legislatures and courts. The vast bulk of law reform operates at the level of individual and group conduct, through normative beliefs, practices and verbalizations.[102] That is, most real agents of law reform have no authority to actually change the texts of the law. How the work of these unofficial law reformers interacts with the work of expert Law Reform Commissions is the question now to be addressed.

As a point of entry for imagining the diversity of agents and practices that can lead to changes to the doctrinal structure of the law it is instructive to consider a range of everyday situations of human interaction — involving citizens, courts, scholars, legal educators, and legislatures — that can have normative impact. If one can imagine the different ways in which everyday practices generate legal rules, then one can also begin to imagine how each of these different agents of law reform in the modern political state reform the law.

The following examples concern the impact of primary practice on legal rules. They reflect how changing practices may modify the content of an apparently unchanged norm (the reasonable person standard, for example) and how changing practices may actually modify the formulation of the norm itself (the effect of electronic communication on the postal rule, for example). But examples can just as easily be conceived where practice modifies the procedures and institutional features of official law. To take one contemporary instance, the wholesale abandonment of the official courts in favour of consensual arbitration in complex matters of international commercial law effects a substantial reform of the overall system of official law, even in those cases where consensual arbitration does not in any way directly affect the specific doctrinal rules of law actually being applied.[103]

---

101 I have addressed this question of normative plurality in greater detail elsewhere. See R.A. Macdonald, "Recognizing and Legitimating Aboriginal Systems of Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) 232. A similar point is made by N. Kasirer, "The Annotated Criminal Code *en version québécoise*: Signs of Territoriality in Canadian Criminal Law" (1990) 13 Dalhousie L.J. 520. On internormativity generally, see J.-G. Belley, ed., *Le droit soluble*, *supra* note 82.

102 On the impact of these beliefs and practices on law reform see generally, Macdonald "Access to Justice and Law Reform," *supra* note 2.

103 The realization that A.D.R. has the potential to transform the myth of the unitary, centralized normative system characteristic of most contemporary views of law is at the root of much of the suspicion of the legal profession for these new approaches to civil disputing. On this challenge, see generally, Alberta Law Reform Institute, "Dispute Resolution: A Directory of Methods, Projects and Resources," Research Paper 19, (Edmonton: Alberta Law Reform Institute, 1990); J.K. Lieberman & J.F. Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 U. Chi. L. Rev. 424; and C. Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'the Law of ADR'" (1991) 19 Fla. Stat. L. Rev. 1.

Consider the effect of changing practices on customary norms. Suppose banks and other purveyors of consumer credit came to the conclusion that the non-judicial recapture of chattels was simply not worth the aggravation. If they ceased recapturing would it be sufficient to describe the now operative legal norm in the following way: "the law of secured creditor recapture exists but never arises in practice?" Since the official norm itself has never been enacted (that is, since it exists only as a common law norm relating to the assertion of the prerogatives of ownership within the constraints of liability in tort),[104] this would be a curious claim. Because a customary norm arises from the reciprocal expectation generated through human interaction, it is difficult to conceive that a customary norm can continue to exist when it is no longer the custom.[105] Here the law is being directly reformed by a changing primary practice.

Take another example. Suppose the Supreme Court of Canada were to begin routinely to cite both Aristotle's *Nichomachean Ethics* and the judgments of the High Court of Australia as dispositive in all tort cases. If it continued to do so over a period of time would it be sufficient to describe the court's conception of the sources of tort law in the following way: "the Court has decided to speculate upon extra-legal materials?" Even on the most positivistic reconstructions of the content of a momentary municipal legal system, the hypothetical rule of recognition is a customary rule of the most authoritative official law-applying organ.[106] Hence, these changed practices of authoritative justification necessarily change (and are perceived by lawyers and other jurists to change) the sources of legal justification.[107] Here legal doctrine is being reformed at one remove through reform to the practices and processes of judicial decision-making.

Statements of legal normativity may also be found in monographs, textbooks and treatises. Indeed, some of the most important doctrinal constructions were first proposed by text and treatise writers: the rule of law, the reliance interest in contract damages,

---

104 On the theory of recapture of chattels see D.M. Paciocco, "Personal Property Security Act Repossession: The Risk and the Remedy" in M.A. Springman & E. Gertner, eds., *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1985) at 365.

105 In other words, the invocation of notions of estoppel, desuetude, and so on, as a means to explain changed custom is not the occasion of law reform itself, but only the occasion for a judicial recognition that the norm has changed. These judicial concepts serve to reconstruct the changed practice as a changed common law legal rule. On the general theory of custom in the common law tradition, see C.K. Allen, *Law in the Making*, 7th ed. (Oxford: Clarendon Press, 1964).

106 Following the tradition of analytical positivism I take the practices of the supreme law-applying organ of the state to be the best indicator of what the normative content of the official legal order is: see J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 1970) c. 6, building on H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) c. 5.

107 Many commentators have noted, for example, changing patterns of citation and justification in the judgments of the Supreme Court of Canada since the enactment of the Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. See, for example, M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson, 1994); W.A. Bogart, *Courts and Country* (Toronto: Oxford University Press, 1994) c. 9.

the civil law concept of patrimony.[108] Suppose that in his work on banking and bills of exchange Falconbridge were to assert a proposition of law that subsequently was adopted by courts, primarily on the basis of Falconbridge's own authority.[109] Were the current editor of the treatise to decide that Dean Falconbridge had actually misunderstood the point of law in question, and were he substantially to rewrite the relevant sections of the treatise, would this effect a change to the operative norm of banking law? To claim that the law only changes when the courts, recognizing the erroneousness of Falconbridge's view, themselves change their interpretation of the statutory or common law rule in question, is to claim, as in the case of changed practices, a purely formal criterion for the identification of law.[110] At its extremes such a position simply means that only the highest court can ever reform or restate non-legislative legal rules, a result inconsistent with the everyday activity of lawyers who must advise clients.[111]

The impact of doctrinal reformulation is even greater when changes buffet the legal academy. The meta-theory of law learned during one's legal education usually retains a dominant influence on one's understanding of the enterprise throughout one's career.[112] Suppose that a significant number of law professors were to begin to teach an American rather than an English conception of precedent, or were to proselytize about the desirability of adopting U.S. models of adjudication, emphasizing the significant indeterminacy of legal rules.[113] If lawyers and judges began to act consistently with such views would that mean that the methodology, if not the ideology, of legal regulation had changed? Just as by changing the way in which courts are perceived, the *Charter of Rights and Freedoms* has had an impact on the way in which law and the judicial process are understood, so too by its capacity to change what is understood to be law, legal educators themselves can produce equally important changes in legal geometry.[114]

---

108 See, respectively, A.V. Dicey, *The Law of the Constitution*, 10th ed. by E.C.S. Wade (Oxford: Clarendon Press, 1959); L.L. Fuller & W.R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 373; C. Aubry & C. Rau, *Cours de droit civil français d'après la méthode Zachariae*, 1st ed. (Paris: Marchal et Billard, 1839).

109 This is not hypothetical. The Supreme Court has frequently cited J.D. Falconbridge, *Banking and Bills of Exchange*, 6th ed. (Toronto: Canada Law Book, 1956), the last edition prepared by Falconbridge.

110 This is, of course, the position adopted in France as to the jurisprudence of the Cour de Cassation. See, for example, J. Ghestin *et al.*, *Traité de droit civil: Introduction générale*, 3d ed. (Paris: L.G.D.J., 1995).

111 The point is, obviously, that should practitioners generally modify their advice to clients on the basis of this changed opinion, to all practical purposes changing doctrinal interpretations effect a reform of the law.

112 The influence of the legal education establishment in France and Germany on the direction of modern law is explored in J.P. Dawson, *Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968), especially at 205-36 and 339-50.

113 See, for example, the comparisons drawn in R.S. Summers & P.S. Atiyah, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987).

114 For an early exploration of this theme in Canadian context see E. Vietch & R.A. Macdonald, "Law Teachers and Their Jurisdiction" (1977) 52 Can. Bar Rev. 665.

Consider now legislative law-making. The legislative process has multiple dimensions, not all of which imply the explicit enactment of a statutory rule: a legislative decision not to regulate market activity is an implicit delegation of regulatory authority.[115] Again, legislatures often explicitly delegate law-making authority to both public as well as private bodies: delegated legislation made by administrative agencies is an example of the former, while corporate by-laws and collective agreements are examples of the latter. These techniques involve not only the delegation of law-making authority, but also the authority to reform or modify the law so made.[116] Today, moreover, these explicit delegations often take the form of an ambulatory incorporation by reference.[117] Would this change in the locus of law-making authority modify the traditional conception of legislative law reform? To claim that because Parliament always retains the power to revoke the delegation, only it is really reforming the law, is to miss the vast bulk of day-to-day legal regulation of large sectors of the economy. With the proliferation of consent regulation and self-regulation, the reform of legal rules generated through delegated law-making is becoming increasingly autonomous from meaningful *ex ante* or *ex post facto* Parliamentary control.

This review of different mechanisms for restating the form of written legal rules and amending their substance reveals the complexity of normativity in modern legal systems. Although these mechanisms comprise only a partial inventory of law reform activity in modern society, they are sufficiently diverse to suggest the kinds of inquiry necessary to an understanding of law reform. Three questions may be asked: who controls the meaning of legal rules in any legal system? How is this control actually exercised? What are the justificatory components of legal decision-making? The challenge is to express how the process of law reform and the role of expert Law Reform Commissions might be reconceived so that non-official law reformers would be accorded in theory the status that they enjoy in practice. To put the matter slightly differently, the challenge is to situate the law reform activity of expert Law Reform Commissions within a larger context that depends neither on office nor on textuality.[118]

Apart from legislation, the process of norm generation most familiar to legal professionals is judicial adjudication. In what ways does law reform occur in the judicial process? Intuitively, most jurists conceive of adjudication as involving the presentation of evidentiary proofs and reasoned arguments about past events on the

---

[115] While the point is generally contested by libertarians who see regulatory structures only where they see government, most political scientists recognize the regulatory function of markets and acknowledge that governmental abnegation is nonetheless a regulatory choice: see C.E. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (New York: Basic Books, 1977).

[116] See, generally, R. Dussault & L. Borgeat, *Traité de droit administratif*, vol. 1, 2d ed. (Sillery: Presses de l'Université Laval, 1984) at 385ff.

[117] For example, the legislature of Alberta might choose to incorporate by reference the entire body of product safety standards adopted by a trade association — those established by the Canadian Standards Association and Underwriters Laboratories — or it might incorporate by reference the United Nations *Convention on the Rights of the Child.*

[118] On the former point (office) see generally L.L. Fuller, "The Law's Precarious Hold on Life" (1969) 3 Georgia L. Rev. 530; on the latter point (textuality) see J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986).

basis of fixed standards.[119] Whether or not such a conception of adjudication is ever achievable,[120] it is now the case that many tasks assigned to judges are simply not amenable to adjudication in the fashion that lawyerly intuition requires.[121]

Today, the judicial role has been transformed in matters of legislative interpretation for one of two reasons. Frequently the standards that judges are required to apply call forth a largely unbounded implication from general policies and goals, or from broader, consciously indeterminate, principles such as those found in regulatory or constitutional documents; the task of determining "public convenience and necessity" or "fundamental justice" in particular cases is not one that depends on a "strict adjudication of rights."[122] Or, almost as frequently, the criterion we ask judges to apply is not a criterion of desert based on a pre-existing entitlement, but is rather a criterion of need based on a potential future benefit; rather than ask for a decision about a land-use permit based on, say, the respective date of application of two bidders, judges are asked to decide based on, say, the possible contribution which the applicant might make to the betterment of a neighbourhood.[123] Unlike a criterion of past desert, a criterion of future need is such that it can only be established on the basis of a judgment about facts which are to be proved in the present and the future, even if the standard itself may be frozen in the past.[124]

Whenever adjudication requires judges not only to take account of "hot facts" that are in constant evolution and to apply a standard the content of which cannot be assimilated to the redressment associated with corrective justice, a law reform endeavour is taking place. But to say that this means judges are legislators is to misconceive both the acts of judging and of legislating. It is true that adjudicators under these types of legislative standard are reforming the law simply because the rule in

---

119 The classical presentation of this conception of adjudication is that of Lon Fuller. See L.L. Fuller, "The Forms and Limits of Adjudication," *supra* note 45. See also Eisenberg, *supra* note 51.

120 For purposes of the present discussion it is not necessary to consider whether the inherent indeterminacy of language is such that the judicial process can ever be managed according to the dictates of the classical model of adjudication. For discussion of the indeterminacy thesis as applied to private law adjudication see G. Peller, "The Metaphysics of American Law" (1985) 73 Cal. L. Rev. 1152.

121 That is, the insight of A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281, is now seen as uncontroversial. This now occurs not only in public law areas, but also in private law matters such as the allocation of property rights upon marriage breakdown, or upon death. See the discussion in Macdonald, *Prospects for Civil Justice*, *supra* note 3 at 58-83.

122 See generally Bogart, *supra* note 107 *passim*, but particularly chapters two and three.

123 In the language of judicial review of administrative action these "non-entitlement" decisions have traditionally been said to involve privileges, not rights. While the rights/privileges distinction has been shown to be almost impossible to manage in a coherent manner, the fact that it commands a difference in the manner of judicial inquiry is generally taken as incontrovertible. See the discussion in, for example, L.L. Fuller, "Irrigation and Tyranny" (1965) 17 Stan. L. Rev. 1021.

124 A single example will suffice. The list of the (incommensurable) factors that must be weighed when a judge is determining whether a dependent's relief award should be made, and if so, in what amount, simply does not lend itself to deductive reasoning. See for an example of one statute where these incommensurables are juxtaposed, *Succession Law Reform Act*, R.S.O. 1990, c. S-26, ss. 62, 63, 71.

question cannot be fully captured by the language deployed.[125] But all judicial adjudication involves a systematic expression of inferential normativity. As such it is constantly addressing changing circumstances and attempting to specify the application of a standard in novel circumstances. Necessarily, its office is to reform the law.

This point is even more evident when adjudication of a common law standard is in issue.[126] Each application of a common law standard necessarily contributes to the elaboration and explication of that standard: whether the interpretation is strict or extensive, the judicial instantiation contributes to the evolution of the standard. Of course, the theory of the common law that judges simply discover the immanent law preserves the formal characteristic of normative adjudication. Nonetheless, the point remains that judges are constantly reforming and re-articulating the normative standards they are purporting merely to follow.[127] Whether this should be described as the common law working itself pure, or the special rationality of the common law, or the collaborative articulation of shared purposes by judges, the point is that the process of common law adjudication is ineluctably a process of law reform.

What is true for judges is true, *a fortiori*, for administrative agencies. The discovery and elaboration of normative order in the administrative state is not exclusively a product either of legislation or adjudication. Bureaucratic rationality must always be checked by the actual practices of the institution.[128] Here the term administrative agency is being used in its generic sense. I mean to include all complex bureaucracies — be these boards and tribunals, be these inferior courts, be these statutory delegates in the private sector, be these registrar's and Crown prosecutors' offices, be these the policy development branch of government ministries, be these expert Law Reform Commissions. To recognize how each undertakes law reform (and more importantly, to recognize that each necessarily undertakes law reform and cannot be prevented from doing so) is the first step to understanding the relationship between them and the expert Law Reform Commission.[129] In brief, all normative institutions in modern Canadian society play an important role in articulating and reforming law through their decision-making processes.

But law reform is not just the product of explicit decisions of a legislative or an adjudicative character. In the current configuration of law reform in Canada, three other institutions play a significant semi-official law reform role: the organized legal profession, and especially individual lawyers; the law book publishers, and especially textbook writers; and the law faculties, and especially full-time law professors. Their

---

125 Hence, the principle conundrum of legislative interpretation. No explicit rule can ever comprehensively state the conditions of its own application (or non-application). For a discussion of this feature of rules expressed in a natural language, see the famous debate between H.L.A. Hart and Lon Fuller: H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593 at 606-15; L.L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630 at 661-69.

126 See Fuller, *Anatomy of the Law*, *supra* note 45 at 90ff, for a discussion of theories of the common law. See also Postema, *supra* note 40.

127 See the excellent discussion in Eisenberg, *supra* note 51.

128 See R.A. Macdonald, "On the Administration of Statutes" (1988) 12 Queen's L.J. 488; and R.A. Macdonald, "Office Politics" (1990) 40 U.T.L.J. 419.

129 See Samek, *The Objects and Limites of Law Reform*, *supra* note 4.

unique contributions to the overall process of law reform deserves further attention. These groups daily reform the law by their practices and by their conception of what constitutes law. What is taught as law today, is published as law tomorrow and is practiced as law next week. Indeed, the most influential law reform activities are not strictly instrumental: tinkering with some principle of the common law, or with some section of a statute does, of course, produce doctrinal change. But deep law reform changes the symbolic constructions by which law and its institutions are imagined and evaluated: it occurs, for example, when we come to believe that new models of, say, labour relations, securities regulation and rights protection should be engrafted onto existing official legal structures.[130]

Few would dispute that the legal profession exerts substantial influence on the configuration of contemporary law and the possibilities for its reform. The conventions of the profession influence the law that gets litigated and the issues that such litigation addresses. What is less appreciated is the impact of law book publishers. By controlling secondary literature, and even by making certain forms of primary literature available in certain forms, publishers shape the materials of legal justification. Today few dispute how much computerization of legal research has substantially modified the lexicon of authority for legal propositions and, by modifying the manner of legal argument, has modified approaches to law reform.

Nonetheless, because many of the central components of the practitioner's legal ontology are inculcated in law faculties and not modified thereafter, law reformers properly turn to contemporary developments in legal education.[131] Indeed, it could plausibly be said that the Harvard LL.M. has had a disproportionate influence on Canadian law reform simply because, from the 1930s through the 1970s, it was the primary agent through which Canadian common law came to substitute U.S. for U.K. colonial shackles. Substantial law reform also occurs when law faculties modify their curricula or their ideology. Law professors who teach, to take a single example, in the vernacular of law and economics are not only explicitly arguing that the law and economics approach is sufficiently correct (or useful) to merit discussion, but more importantly, that external non-doctrinal critique of law is valuable in and of itself.[132] They are implicitly inculcating a view that has no internal standards against which its

---

130 One need only watch how developments in various branches of U.S. law find their echo in Canadian legislation and jurisprudence. These sea-changes not only modify legal rules, they modify the way in which law is practised and conceptualized. See, most recently, the manner in which U.S. thinking has begun to affect Canadian public law through the *Charter*, *supra* note 107. Compare M.A. Glendon, *Rights Talk: The Impoverishment of Legal Discourse* (New York: Free Press, 1991) with S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990).

131 The point also applies to the judiciary. For a candid discussion of the relationship between clerks and judges, and the influences that the former bring to bear see L. Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada" (1996) 30 U.B.C. L. Rev. 279.

132 This, of course, is the ground of several unfavourable responses to the Critical Legal Studies movement. By denying the rationality of law, it is argued that critical scholars seek to change the ontology of law and, ultimately, the practice of the profession. For an expression of the concern as it affects the curricula of law faculties and the ethical obligations of lawyers, see P.D. Carrington, "Of Law and the River" (1984) 34 J. Leg. Ed. 222.

doctrinal rules ought to be evaluated. This, of course, is a profound epistemological shift, the legitimacy of which is far from self-evident.[133]

It has become fashionable to ascribe to the policy development branches of various Ministries of the Attorney General an increasing role in official law reform.[134] What is interesting about their proliferation over the past two decades, is that they are exactly the mirror image of the Weberian expert authority reflected by the concept of independent Law Reform Commissions. If, as suggested, the expert Law Reform Commission is the outcome of a belief that ideology can be made subservient to knowledge, the policy development branch is the institutional response to the desire to make knowledge subservient to ideology.[135]

Given this instrumental logic, an increasing role for the policy development sector in substantive law reform is understandable. What is less appreciated, however, is the conception of law and legal normativity that this increasing role promotes: namely, a politics of law reform which is one of legislative *fiat*.[136] The constitutional theory of Parliament's unlimited legislative competence, subject only to side constraints imposed by federal division of powers and supereminent principles expressed in the common law constitution or in entrenched *Charters of Rights and Freedoms*, translates into a presumption that the legislative wand automatically generates desired outcomes.[137] This faith in the efficacy of legislation is consistent with a general commitment to statism characteristic of modern politics. Since there is no law other than state law, and since legislation is the highest form of state law, law reform should only emanate from the body that is charged with enacting state law: Parliament.[138]

---

133 Among contemporary theorists Ernest Weinrib has been the most persuasive critic of this epistemological shift. See Weinrib, *The Idea of Private Law*, *supra* note 34; see also A. Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley: University of California Press, 1995).

A similar observation could be made about legal pluralism or any other alternative conception of the idea of law. Thus, not only are legal pluralists explicitly arguing about the multiplicity of legal orders in a society, they are also implicitly claiming that theories justifying a claim by the State to exercise a monopoly on the production of law are flawed. Were such a view generally accepted, it too would constitute a significant piece of law reform. See B. de Sousa Santos, *supra* note 87.

134 See the discussion in The Impact Group, *supra* note 4; O'Reilly, *supra* note 4.

135 The point can also be put in the language of economics. At the limit, an expert Law Reform Commission presumes that law is an independent variable that has an internal logic exogenous to expediency, while a policy development branch presumes that all law is an instrumental dependent variable that has a content entirely endogenous to policy. This same point is made, in a slightly different way, by Lyon, *supra* note 27; and by Samek, "A Case for Social Law Reform," *supra* note 27.

136 For an alternative conception, first elaborated by Lon Fuller, see Winston, *Essays*, *supra* note 81; see also J. Waldron, "Why Law — Efficacy, Freedom, or Fidelity?" (1994) 13 L. & Phil. 259.

137 The literature on perverse consequences and judicial decision-making in substantial. See Rosenberg, *supra* note 60. There are much fewer discussions in connection with legislative action, although this is a recurring theme of law and economics analysis of regulatory endeavours. See, for the initial expression of this perspective, Hayek, *supra* note 70.

138 Contemporary political debate in Canada is almost exclusively centred on questions of legislating behaviour instrumentally: commissions on reproductive technologies, assisted suicide, abortion, gang laws, and aboriginal peoples, to name just some, invariably see an official legislative solution as the policy prescription. A telling illustration of the differences in approach that independent Law

The above canvass of institutional agencies of official and unofficial law reform reveals their significant role in modern liberal democracies.[139] Of course, Parliament alone has the power to change the *verbum* of legislation. But once law reform is understood as embracing normative change and not simply textual modifications, it is impossible to resist the conclusion that it is an activity not centrally within the control of the state and its official agencies. In any reasonably liberal-democratic, pluralistic society, the central law reformers are, necessarily, citizens. Much more than any popular political science conception of law allows, it is the citizenry who controls legal development; not just secondarily through electing Parliamentary representatives, but as a primary agent.

I ground this conclusion in my experiences some half-dozen years ago as Chair of a *Task Force on Access to Justice* sponsored by the Attorney-General of Quebec.[140] That Task Force was mandated to discover the causes of inaccessibility of justice in Quebec and to recommend solutions to enhance accessibility. In retrospect, it appears that the basic premise underlying the creation of the Task Force was simply wrong. The apparent inaccessibility of official institutions of dispute resolution has no necessary connection with the inaccessibility of justice.[141] That citizens often have no access to lawyers and courts does not mean that they have no access to or concept of justice.[142] Indeed, what happens to citizens in official institutions of dispute resolution argues to the contrary. Empirical studies of litigation reveal that repeat player litigants win their cases a disproportionate share of the time;[143] that status rather than the merits of particular cases seems to be the best predictor of success;[144] and that informal

---

Reform Commissions and policy development branches bring to questions of law reform is that provided by the Ontario Civil Justice Review. Compare the materials published by the Ontario Law Reform Commission — *Prospects for Civil Justice*, *supra* note 3; *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, *supra* note 98 — with the documents released by the Review Commission itself, both as to scope of inquiry and policy prescription.

139 I restrict this comment to non-totalitarian states since it is arguable that totalitarian states do not have official law in the sense intended here. Once official law becomes little more than executive *fiat*, the principle sources of normativity in a society are displaced elsewhere. On this point see S.L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses" (1994) 13 L. & Phil. 313.

140 See *Jalons pour une plus grande accessibilité à la justice*, *supra* note 3. The work of this Task Force is reviewed in R.A. Macdonald, "Accessibilité pour qui? Selon quelles conceptions de la justice?" (1992) 33 *Cahiers de droit* 457.

141 The various contours of this affirmation are explored in the following studies: Macdonald, "Access to Justice and Law Reform," *supra* note 2; Macdonald, "Theses on Access to Justice," *supra* note 2; S.C. McGuire & R.A. Macdonald, "Judicial Scripts in the Dramaturgy of the Small Claims Court" (1995) 11 Can. J. of L. & Soc. 63; S.C. McGuire & R.A. Macdonald, "Small Claims Court Cant," *supra* note 80; S.C. McGuire & R.A. Macdonald, "Tales of Wows and Woes From the Masters and the Muddled: Navigating Small Claims Court Narratives" (forthcoming Windsor Y.B. Access Just.); S.C. McGuire & R.A. Macdonald, "For Whom the Court Toils" (forthcoming R.J.T.); and M.M. Kleinhans & R.A. Macdonald, "What is a Critical Legal Pluralism?" (forthcoming Can. J. L. & Soc.).

142 See, S.E. Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990); and E.N. Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (New York: New York University Press, 1949).

143 M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 L. & Soc'y Rev. 95.

144 See the conclusions in Black, *supra* note 88.

disputing is equally as effective, and much less costly, than institutionalized civil litigation.[145]

Some studies even suggest that institutional initiatives such as small claims courts, state-organized A.D.R., and pre-paid legal insurance programmes are always most responsive to the needs of a predictable group of citizens: in the case of the Small Claims Court in Quebec, for example, to middle-aged, well-educated, male, francophone, professionals, suing for enforcement of a contractual debt.[146] Again, it appears that public legal information programmes and plain-language contracts do little to increase the accessibility of law for citizens; rather they co-opt citizens into a rhetorical legal discourse which they can wield but never master. To presume that official texts, official institutions and official procedures are sufficient to reform the law is suspect; concomitantly, to presume that citizens are disempowered from reforming the law simply because they lack the levers to modify legal texts is suspect.

Citizens are constantly making law and reforming the law by their daily practices and by their accumulated understandings of the social rules by which they live. The formal intervention of law and legal officials in matters of civil justice most often disimproves the position of ordinary citizens in a conflict situation. There are two complementary reasons for this. The agencies and processes of state justice necessarily respond to a liberal norm of universality, a norm that postulates formal equality and discounts disparities in social power; and the responses of official law are almost always of the type that treats symptoms, and discounts causal factors.[147]

How might official law reformers act differently? Take the field of consumer law. To achieve responsive consumer law reform that genuinely addresses power imbalances between merchant and consumer, many authors propose that the focus should be on procedures and institutions: for example, retail sellers, landlords, finance companies, *etc.* could be required to plead their cases not before the official courts but before informal neighbourhood tribunals.[148] It might even be better to prevent sellers and service providers from externalizing the cost of credit checks onto their clients by denying them various causes of action to enforce debt as against those to whom they overextend credit. That is, it may be that much of the problem in consumer law is not with the law *per se*, but with the way in which the consumer credit market functions.

In making these last suggestions I am not really proposing that we dispose of official dispute resolution institutions over a wide range of cases. Private law rules and

---

145 See R.L. Abel, ed., *The Politics of Informal Justice* (New York: Academic Press, 1982).

146 See McGuire & Macdonald, "Small Claims Courts Cant," *supra* note 80.

147 Many now believe that remedial law has no other vocation than to treat symptoms. See, for example, P. Noreau, *Droit préventif: le droit au-delà de la loi* (Montreal: Thémis, 1993).

148 Let me make clear that by "informal neighbourhood tribunals" I mean those very informal settings in which people transact their daily affairs. This could mean, at one level, a discussion in a tavern, or on a playing field; or it could mean a discussion at a children's play group, or on a street corner; or it could mean a parents' meeting for a Boy Scout Troop, or Guides Group; or it could mean a home and school meeting, a block party or a community garage sale. These are the settings where the wisdom of experience is least likely to be trumped by the intellect of the expert. On the character of a consumer law with this orientation, see I. Ramsay, "Consumer Law and the Search for Empowerment" (1991) 19 Can. Bus. L. J. 397.

common law courts are an indispensable component of liberal-democratic states. I am attempting, however, to put the question how far current conceptions of law and its reform acknowledge the important role that informal normativity actually plays in modern society. The point is to recognize that the true forces of law reform lie in the structures and practices by which multiple, informal social orders are constituted and modified. Once the plurality of law reform agents is noticed, a meaningful role for expert Law Reform Commissions can be imagined. This role and the activities of an expert Law Reform Commission that derive from it are the themes taken up in the next section of this article.

V. COMMISSIONS — WHERE DOES OWNERSHIP OF LEGAL KNOWLEDGE RESIDE?

It is all very well to speculate about law reform as if ownership of legal knowledge (and hence, real law reform) were primarily the affair of ordinary citizens. After all, who could oppose a conception of law reform that compelled the direct inclusion of all citizens in its processes? But, paradoxically, the contemporary rhetoric of citizen empowerment advanced by many progressive legal scholars rests on the same pragmatic-instrumentalist assumptions about the ownership of legal knowledge that have afflicted classical approaches to law reform.[149] It presumes that there is some body of experts that can actually manage and fully direct the business of reforming the law, and that there is some body of legislators that can translate the reforms this expert body recommends into operable legal rules. In these respects, today's progressive law reform agenda is no different from the agenda of expertise trumpeted by those members of the legal *élite* who first promoted the expert Law Reform Commission idea.[150] The legal theory of pragmatic instrumentalism, in other words, still drives most conceptions of law reform, be these traditional or critical.[151]

Not surprisingly, by privileging the instrumental aspects of law, both models of law reform minimize the important symbolic role that law plays in modern society. Far more important than any particular legal rule is the commitment to legalism that the idea of expert law reform promotes.[152] Yet concern about why a system of rules is

---

149 For a discussion of pragmatic-instrumentalism in law see R.S. Summers, *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press, 1982).

150 The traditional justification for expertise in law reform, and the institutions which such a justification spawned in the United States, are considered in Hull, *supra* note 21. For an example of progressive views of law reform that reinforce traditional epistemologies see Macklin, *supra* note 28.

151 One of the most surprising illustrations of the power of pragmatic instrumentalism to capture understandings of the law reform process can be found in the "law reform archetype" proposed in the Arthurs Report (see *supra* note 64 at 63-71). I say surprising since the principal author of the document, Harry Arthurs, has been among the most persistent critics of narrowly conceived law reform. It should be acknowledged, however, that this Law and Learning Report was trying only to model types of existing legal research, and was not offering a prescription for what "law reform" research should be.

152 I take the idea of legalism — the ethical attitude that right conduct consists in the following of rules — from J.N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1964). More recently, the idea has been subsumed in the notion of the "rule of law." See A.C. Hutchinson and L. Greene, *Rule of Law: Idea or Ideology?* (Toronto: Butterworths, 1979).

legitimate rarely reaches express consideration. Today, few deny that those with economic and moral resources, and those who are willing to invest the time and energy to do so, will always be able to take any human artifact or institution — be it law, the stock market, cultural industries, the educational establishment, or whatever — and deploy it to maximum advantage. Social stratification based on disparities in social power is an inevitable consequence of social living.[153] As others have noted, even were one to establish absolute equality in every sphere among all people in a given normative community, within a short period of time a plurality of inequalities would arise.

One cannot expect the rules of official law to be the salvation for all a society's ills. Indeed, philosophical debate about the conditions of social justice and the contribution of law to attaining it is intractable. Still less, therefore, can one expect law reform and expert Law Reform Commissions to achieve an outcome that official law has proved, over the past two centuries, incapable of reaching. Unfortunately, having the aspiration to perfection become the quest for the perfect solution is exactly one of the instrumental transformations that has compromised attempts to theorize about law reform in the past, and which must be avoided in any rethinking of law reform today.[154]

A necessary first step in resisting this instrumental transformation of aspiration is to frankly acknowledge our limited capacity to learn from the past sufficiently to be able to predict the future.[155] Having done so, we will then be more reconciled to the limited capacity of any of the professional agencies of explicit law reform — expert Law Reform Commissions, policy development branches of various Ministries of the Attorney General, *ad hoc* Royal Commissions of Inquiry — to effect, by a simple act of will, much substantive legal change.

There is another element to the limits of law reform: the concept of jurisdiction. As the fate of the Meech Lake Accord and the Charlottetown Agreements shows, in the realm of constitutional law, Prime Ministers and Premiers tend to be jealously possessive of the central artifacts of the constitution;[156] as the fate of the Dussault and Ouellette Reports on Administrative Tribunals in Quebec indicates, once ministries acquire a sense of proprietorship over specific agencies or over fields of law, it is very difficult to embark on any general reform of administrative law;[157] and as the fate of

---

153 The *locus classicus* in Canada is J. Porter, *The Vertical Mosaic: Analysis of Social Class and Power in Canada* (Toronto: University of Toronto Press, 1965).

154 How the idea of perfection and perfectibility shapes the manner in which all human beings conceive their life possibilities is explored in M. Foss, *The Idea of Perfection in the Western World* (Princeton: Princeton University Press, 1946). As applied to law, see Beetz, *supra* note 27.

155 See the observations of Gilmore, *supra* note 17.

156 I have attempted to explain the reasons for this in R.A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: The Canadian Experiment" in K. Kulcsár & D. Szabo, eds., *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Hungarian Academy of Sciences, 1996) 52.

157 Recently, the Ministry of Justice of Quebec proposed a substantial reform to the organization and jurisdiction of administrative tribunals in the province. The main thrust of this reform was the creation of an Administrative Appeals Tribunal to oversee all agencies. For the implications of this centralizing endeavour see *Symposium: La justice administratif en question ... et en questions* (Montreal: Centre de recherche en droit public, 1996) [unpublished].

much everyday legislation designed to correct mischiefs of the common law or to recast *desuet* legislative rules illustrates, judges guard jealously their authority over the administration of the common law and statutes that they have assimilated into the common law.[158]

What, then, does this apparently modest prospectus for deploying the technique of legislative law reform tell about the role for expert Law Reform Commissions in the 1990s? Does the failure of the intellectual project of the 1960s, that is, the achievement of rationalistic, scientific, instrumentalist law reform, necessarily mean the failure of the principal vehicle by which such reform was to be managed: the expert Law Reform Commission? Put slightly differently, the question is whether there can be an ontology of law reform that will justify the continued existence of expert Law Reform Commissions as permanent rather than *ad hoc* agencies, and as agencies independent of the ordinary governmental policy process.

The title of this article — Recommissioning Law Reform — obviously reveals my belief that there is a future for expert Law Reform Commissions. But this future is much different from that they have fulfilled over the past three decades.[159] This future is tied to recasting our understanding of the character of law in modern society and to refocusing our reformist ambitions. The future of expert Law Reform Commissions depends on their adopting a more heterogeneous view of where ownership of legal knowledge resides. What this means for a reconstituted or reimagined expert Law Reform Commission can be explored by focusing, successively, on issues of personnel, process and projects.

Inevitably, consideration of *personnel* raises questions that are now being debated in policy circles under the general theme of identity politics.[160] The question is how the diversity of non-official constituencies with a direct interest in law reform — constituencies that I have identified as the central agents of real law reform — may participate in the official processes of an expert Law Reform Commission. There are numerous settings and occasions where such participation is, in theory, possible. Within the organizational structure of the agency, however, four possible sites of involvement have typically been imagined. These concern: (1) the research personnel of the Commission; (2) the members of the Commission itself; (3) the members of an external Advisory Council with whom the members of the Commission would interact; and (4) the members of advisory groups for specified projects.[161]

---

158 For a full discussion of the methods and implications of judicial nullification see G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982).

159 It is, however, somewhat analogous to that envisioned by the federal government in the *Law Commission of Canada Act*, *supra* note 28.

160 For a brief discussion of the nature of the phenomenon, see C. Taylor, *Multiculturalism and "The Politics of Recognition,"* 2d ed. (Princeton: Princeton University Press, 1995).

161 It follows from this quadrochotomy that I believe the model adopted in the early 1990s by the Ontario Law Reform Commission and the Alberta Law Reform Institute, and now by the Law Commission of Canada, is appropriate. On these law reform models generally see Hurlburt, *supra* note 1.

In principle, direct participation might be sought in all four areas. Given budgetary constraints and the dynamics of group interaction, however, the first two are less likely candidates for fully reflecting the variousness of contemporary society. This is not to say that an expert Law Reform Commission should be insensitive to the diversity dimensions of its mandate. The question is, rather, whether it should generate a large, representative research staff to carry out its projects or whether it should attempt to achieve diversity of perspective *extra muros*. A number of considerations argue in favour of the latter approach. If the Commission sets itself up as a Research Institute, it will not necessarily attract the country's best legal researchers as full-time personnel; competition from the legal professions, the legal academy and the public service is intense. Nor, unless it becomes a large bureaucracy, will it be able to assemble a sufficient diversity of talent from a range of academic and other backgrounds to generate the cross-fertilization needed for thoughtful studies; moreover, the chances of building a multi-disciplinary research staff that can function as a team across several substantive fields are remote. Nor will it be able to rotate the persons from whom it seeks counsel and research as Project Directors; if diversity includes intellectual diversity, it is implausible for this to be built from within a small research staff. Nor, finally, will it have the opportunity to respond to socio-demographic diversity; a full-time research staff will necessarily be drawn from a very thin slice of Canadian society.

I believe that an expert Law Reform Commission should not undertake any research studies exclusively with its own personnel. The most interesting role that it could play would be that of a broker of law reform research. The in-house research staff of a Commission should be reduced to an absolute minimum, comprising perhaps only a Director of Research whose job it would be to solicit broad input about various projects to undertake, to make recommendations about potential persons to undertake them, and to monitor the ongoing activities of the designated Project Directors. Co-opting non-academic and academic, as well as non-legal and legal, expertise invariably is both more efficient and more intellectually enriching. Furthermore, expertise should not necessarily be determined on the basis of already recognized doctrinal insight or competence. If the exercise of law reform is not to be captured by instrumental concerns, then the research projects to be undertaken cannot themselves be cast in doctrinal terms. In this light, the worst Project Director for a project in which, for example, the law of agency plays a central role would be someone who has written the leading legal textbook on the subject.[162]

Such a conception of the size and role of its research staff has direct implications for the membership of an expert Law Reform Commission itself and for the composition of its different advisory bodies, including its external Advisory Council. Take first membership on the Commission itself. Effective policy discussion presupposes that the number of commissioners remains relatively small: ideally between five and seven. While commissioners must be able to make claims of expertise, the conception of expertise envisioned need not be narrowly drawn; members should be reflective,

---

[162] This is not to say, however, that the leading doctrinal scholar should not be an important participant in the project. But if the notion of reform is to transcend doctrine, the very conception of the project in issue cannot be cast in doctrinal terms. On these questions, see R.A. Macdonald, "Curricular Development in the 1980s: A Perspective" (1982) 32 J. Leg. Ed. 569.

although not necessarily the representatives, of as many different constituencies as possible.[163] These include constituencies perceived to play an important function within the official legal system itself: the bench, bar, academia, government, public agencies, and community clinics. They also include constituencies having no function within the official legal system: users, beneficiaries and victims. Preference ought especially to be given to those whose voices are less likely to be heard in routine policy debate, including those from constituencies that do not have the organizational capacity to participate in formalized discussions.

But membership on the Commission must also reflect socio-demographic and intellectual diversity. Neither can be pursued to the exclusion of the other. For example, a socio-demographically diverse Commission comprised exclusively of lawyers with a pragmatic-instrumentalist orientation is likely to be disinclined to undertake projects that put basic assumptions about law and legal ordering into question. Conversely, an intellectually diverse group drawn from a relatively homogenous socio-cultural cohort will have at least some difficulty in excavating the full range of legal issues confronted by all groups of Canadians. Intellectual diversity points to the expertise of the Commission being one in law and society studies rather than one in law's doctrinal artifacts. Socio-demographic diversity means simply that the life experiences that commissioners bring to the table must be as broadly varied as those of Canadians generally.

The central role of an external Advisory Committee must be to challenge the assumptions of commissioners and to destabilize traditional ways of responding to legal problems. Its purpose is to assist commissioners in keeping the partiality of their own perspectives constantly in view. Given that an Advisory Committee may comprise a larger number of persons than a Commission, it should be a locus for exploring the implications of the multiple ownership of Canadian law. An Advisory Committee is thus an important resource for promoting interaction between the Commission and the public, and for helping the Commission understand how ideas of normativity migrate between the official legal system and various unofficial legal systems in society at large.[164]

Project Advisory Groups can also be a key site of diversity. They can be used to accommodate various professional constituencies in the law: judges, advocates, notaries, law professors, public servants, administrative tribunals. Presumably, the multiplicity of interests and perspectives within the legal professions in particular should be reflected in the composition of these groups.[165] As for other types of representativity,

---

163 The distinction between these two ideas is nicely drawn in J. McCamus & R. Simeon, *Options Paper: Ontario Law Reform Commission* [unpublished internal memorandum, July 1994].

164 On the general theme of internormativity between official and unofficial law see R.A. Macdonald, "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada," *supra* note 101.

165 The experience of Karl Llewellyn in managing and diffusing conflicts between the National Conference of Commissioners on Uniform State Laws, the American Law Institute and the American Association of Law Schools over the twenty-year period of drafting the Uniform Commercial Code is illustrative of the compromises needed to accommodate different professional interests. See, for a brief review of these compromises, Gilmore, *supra* note 17 at 81-86.

one has to be careful to be at the same time, responsive to the principal socio-demographic components of identity that are present in today's world — notably ethnicity, gender, race, physical status — without at the same time forgetting those that may be (temporarily?) less in favour — notably class, geography, religion, and language.[166] In combination with a consciously sought diversity through the Advisory Committee, these advisory panels for particular projects can ensure that neither unconscious partiality of perspective nor inadvertent partiality of recommendations afflict the work of the Commission.

The second dimension of any recommissioning of law reform relates to *process*. Given the manifold processes by which law itself is generated and apprehended, one would imagine an equal plurality of processes and outcomes of law reform. Except where it accepts references from the Attorney General, an expert Law Reform Commission need not feel the obligation to produce draft legislation. Even then, moreover, a specific recommendation about how legislation can be wielded to expropriate normative discourse over a range of human interaction is infrequently an optimal outcome. Genuine felt necessities are the product of uncertainty, an absence of information, or a lack of perspective. For this reason, a thoughtful non-instrumental discussion of a particular issue can serve a valuable educational role both for the Minister at the origin of the reference, and (just as importantly) for the constituency which lies behind the Minister's felt necessity.

Once an expert Law Reform Commission frees itself from the obligation to produce draft statutes, it can begin to explore issues for which it might not even envision the need for a legislative result. The expression "if all you have is a hammer, every problem looks like a nail" is a truism; its corollary, "if you have to use a nail, the only problems you are able to see as problems are those where hammering can be an effective activity" is less appreciated. Many law reform projects that have no prospect of generating a statute urgently need to be undertaken, if only to broaden processes of consultation with members of the relevant community and to recast approaches to legal regulation in identified areas. The pedagogic and therapeutic roles of law reform are precisely to change the manner in which a problem is presented; by contrast, a draft statute often acts as a "why-stopper" in respect of the very question being addressed.[167] The point is not to imagine statutes as providing solutions; it is to imagine statutes as asking questions. Law reform is about asking better questions.

Conceiving of research projects organized around themes that do not directly track the doctrinal categories of law has a further benefit. The scope of the inquiry will not be limited by existing conceptions of legal knowledge and existing conceptions of law's

---

166 On the complexity of self-identities and multiple-identities in organizational construction, see C. Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989).

167 Of course, a Working Paper can also be a "why-stopper." If it concludes with specific policy recommendations it will tend to control the future discussion of any given topic. But it can also be a "why-stopper" if it pretends to have established an inventory of the issues in question, or if it claims to have exhausted the possible ways of perceiving the problem. For this reason, my objection to draft statutes must be understood as being more than just formal. It goes to the content of any Law Reform Commission publication as well.

raw material. No longer will it be necessary to sponsor projects on the law of wills, or matrimonial property, or contracts, or mortgages, or intellectual property, or criminal law, understood as such. Projects may well involve themes such as: the City; or the Homeless; or the Automobile; or Working Careers.[168] The seminar titles on the syllabus of any law faculty alone would offer dozens of themes for research projects. Breaking free of posited sources of law and enacted doctrinal categories is a key task for any recommissioned law reform agency.[169]

A law reform process also compels reflection about the official product disseminated by expert Law Reform Commissions. If ownership of legal knowledge is indeed dispersed across the entire population, it would follow that reports and recommendations should be issued in a form digestible by the full range of law reform agents. Put bluntly, it is far from obvious that an expert Law Reform Commission ought exclusively to produce written documentation for consumption by jurists, in preference to documents intended for other members of society. More to the point, it is far from obvious that an expert Law Reform Commission ought exclusively to produce written documentation at all.

Unfortunately, however, the very label Law Reform Commission suggests a particular audience: namely, those who are professionally committed to official law. Commissions are expected to produce doctrinal syntheses; any material that is directed at social scientists or at the general non-professional public is delegitimated as a literary exercise. To the vast bulk of the authority-oriented legal profession, judiciary and policy audience, unenactable or unenacted law reform proposals are nothing more than proto-law to be relegated to the discard shelf.[170] That a text might be "law" even if not "a law" is a proposition so disconcerting in its truth that many jurists devote enormous energy to repressing the heresy.[171] How much better, as an adjective to characterize such a body, the term Restatement, if only because its mission could then

---

168 None of these suggestions are offered as rhetorical exaggerations. The broader epistemological point is not difficult to grasp. If legal knowledge is owned exclusively by those who practice law, it is not surprising that their views of what is or is not law, and of what is or is not relevant to the solution of legal problems, will dominate the reform agenda. The point is that categories of relevance depend on larger structures on knowing. A Law Reform Commission that seeks to see things fresh is advised to begin with facts and events, not larger concepts. This, of course, is not a new point, and it lay behind much of the realist critique of U.S. law in the 1930s. See, for example, K.N. Llewellyn, "A Realistic Jurisprudence — The Next Step" (1930) 30 Columbia L. Rev. 431.

169 Some critiques of the former Law Reform Commission of Canada hinted at the latter need. See, for example, Macklin, *supra* note 28; Hastings & Saunders, *supra* note 68; and T. Scassa, "A Critical Overview of the Work of the Law Reform Commission of Canada: Learning From the Past" in *Federal Law Reform Conference*, *supra* note 4. To my knowledge, only Robert Samek explicitly argued for the former. See Samek, *The Objects and Limits of Law Reform*, *supra* note 4.

170 Here again the former Law Reform Commission of Canada was unfavourably compared to Commissions in British Columbia, Alberta and Ontario on the basis that few of its Reports ever resulted in legislative reform. See, for example, the summary set out in O'Reilly, *supra* note 4 at 8-10.

171 See N. Kasirer, "'Values,' Law Reform and Law's Conscience" preface in P.-A. Crépeau, *The Unidroit Principles and the Civil Code of Québec: Shared Values* (Cowansville: Yvon Blais, 1997).

be understood as involving alternate formulations of legal rules, and even alternative formulations of law.[172] The wisdom of Quebec's recodification commission choosing the title Civil Code *Revision* Office (*révision* = *revoir* = look at afresh, anew) was often commented upon when draft articles offered as better formulations of existing law found their way into judicial decisions.[173]

Presenting its proposals in forms other than draft legislation also permits an expert Law Reform Commission to speak directly to various audiences in their customary vernacular. Draft judgments are intended to reveal the immanent possibilities of doctrinal evolution of the common law or of the interpretation of a legislative text. So too with the idea of producing memoranda and draft contracts for lawyers. So, finally, with producing non-normative narratives or mimicking Hilaire Belloc in order that even non-initiates are invited to participate in the "official" process of law reform. To engage as many constituencies, and as many persons within these constituencies, as possible in the law reform dialogue — through consultation, through literary endeavour, and through co-optation — is a high-order value for any expert Law Reform Commission.[174]

This line of inquiry raises the question whether it is necessary for an expert Law Reform Commission to write anything at all. If one accepts that much normativity is not explicitly rendered by texts, ought the process of law reform not also to acknowledge this implicit normativity? The various forms of popular media must be used to engage all of the agents of law reform previously identified in the project of subjecting their own normative practices to examination. Most often this recourse to mass media will be linguistic — newspapers, magazines, radio phone-in programmes and television, for example. But an expert Law Reform Commission ought also to reach out beyond the print culture by using music, art, movies and videos — key resources of popular culture.[175]

Two different ideas are in issue here. First, popular and other forms of culture are themselves normative;[176] the social context into which official law projects is itself directly a part of the customary component of official law. Second, just because an

---

172 I do not hold a brief for the U.S. Restatement projects or for restatements *per se*. The point is simply that many different audiences may be envisioned if the attempt is a restatement, rather than reform of the law by means of a new statute. For a discussion see Hull, *supra* note 21; Crystal, *supra* note 63; Yntema, *supra* note 26; and Friedman, *supra* note 17.

173 On the significance of this etymology see P.-A. Crépeau, "Foreword" in *Report on the Québec Civil Code, Volume I* (Québec: Éditeur officiel, 1978) xxiii. For a discussion of how an unofficial restatement can reform the law see, in respect of the *Civil Code of Québec*, D. Jutras, "Book Review of P. Roubier, *Le droit transitoire*" (1994) 39 McGill L.J. 936 at 942-44.

174 The importance of non-traditional forms of communication was recognized by the Royal Commission on Aboriginal Peoples, who resorted to town hall meetings, videotapes, pamphlets and so on to publicize their mandate and recommendations. In the nineteenth century the intended audience was the newly enfranchised yeoman class and the vehicle was codification (see Gordon, *supra* note 13; Postema, *supra* note 40; and Alfange, *supra* note 40). In the late twentieth century, the intended audience is both much more diverse and much less persuaded by traditional literary forms. Hence the need to pluralize vehicles of communication.

175 For a general theoretical analysis of non-traditional normativity see "Symposium: Law and Popular Culture" (1995) 10 Can. J. L. & Soc. 1-184.

176 See Kasirer, *supra* note 96.

expert Law Reform Commission has no official role in proposing reforms to the myriad of unofficial legal systems that engage ordinary citizens on an everyday basis, ought not to mean that the Commission should pretend they do not exist;[177] these other normative systems are part of Canadian law and negotiating them is as much a part of the mandate of an expert Law Reform Commission as considering official law. An expert Law Reform Commission must be arrogant as to its jurisdiction, but humble as to its authority to make or re-make law. Its processes must be embrasive, but its ambitions must be modest.

Finally, the success of recommissioned law reform depends mightily on the choice of substantive *projects* to be undertaken.[178] In the decades since their establishment in Canada, and regardless of the specific content of individual projects they have undertaken, expert Law Reform Commissions have typically pursued their mandate by following recognizable intellectual currents. Three may be discerned:[179] (1) the view that understands the law as simply a manifestation of *state* power, and the task of lawyers and judges as nothing other than predicting and influencing the ways in which that power will be exercised; (2) the view of law as a *science* which mandates a limited number of methodological and procedural inquiries, and which requires a pre-determined type of research outcome; and (3) the severence of *means and ends*, with a concentration on either one or the other in particular projects. All three, I believe, need to be cast aside in the conception and design of future research projects.

If I had to trace an agenda for expert Law Reform Commission research over the next decade, I would signal two broad areas of inquiry that track the two areas of theorizing about law least explored both in traditional legal education and in traditional legal research. The contemporary overemphasis in law reform research on what might be called analytical or doctrinal jurisprudence must give way to a focus on ideas of justice and the relation of law and society.[180] In exploring questions of justice expert Law Reform Commissions should primarily be concerned with the diverse ways of imagining and generating just institutions; in exploring questions of law and society expert Law Reform Commissions should primarily be concerned with processes of social ordering by and through which law is deployed in everyday life. Together these

---

177 On the interaction of these "unofficial" systems with official law, see S. Van Praagh, "The Chutzpah of Chasidism" (1996) 11 Can. J. L. & Soc. 193.

178 Of course, in any discussion of substance one begins to approach one's own preoccupations. Indeed, in the next few paragraphs I am reviewing themes that are closely related to my research agenda over the past twenty years. Nevertheless, I believe that much of our current malaise about expert Law Reform Commissions arises because of our scepticism about the directions which their research agendas have taken, and I offer this alternative perspective as much as a heuristic as a positive programme of action.

179 I have derived these from my understanding of concerns expressed in various articles by Lon Fuller. For a summary see "The Needs of American Legal Philosophy" and "The Lawyer as an Architect of Social Structure" in *Essays*, *supra* note 81, 249 and 264 respectively. I have, myself, tried to tease out the implications of these perspectives in "Images du Notariat et imagination du notaire" [1984] *Cours du perfectionnement du Notariat* 1.

180 I take the trichotomy analytical jurisprudence, theories of justice and law and society from standard jurisprudential sources. See, for example, J. Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (Sydney: Associated General Publications, 1946).

two research endeavours ineluctably raise the challenges of legal pluralism and internormativity.[181]

As to the first point, an expert Law Reform Commission should consider the implications of Michael Walzer's concept of "spheres of justice."[182] Research should focus on the way in which benefit and burden are distributed and allocated within public institutions of legislation and adjudication according to the character of the human conduct involved. Complex equality in pluralistic societies requires us to distinguish between, to take Walzer's primary examples, Membership, Security and Welfare, Money and Commodities, Office, Hard Work, Free Time, Education, Kinship and Love, Divine Grace, Recognition, and Political Power. It also requires acknowledgement that what is "just" may vary in its detail even for each person depending on the social context of the decision being elaborated. Thus, justice in my life as a professor, as a resident of a particular neighbourhood, as a member of a family, as a Boy Scout, as a baseball coach, and as a friend makes a variety of demands. There is no necessary transferability of either the criteria or the procedures of justice across the whole range of semi-autonomous social fields which I inhabit.[183]

To understanding complex equality and the principled demands it makes is to understand the complexity of normativity in modern society. The quality of the justice we generate is inseverable from the quality of our normativity. If most of the normative lives of citizens is lived in situations where the writ of official law is only marginally present, then helping to educate each of us about the requirements of justice in these diverse situations, and developing official institutions responsive to this diversity must be a central task of contemporary reflection about law. Avoiding the temptation to universalistic and univocal claims of transcendent justice is the best guarantee that institutional arrangements and specific regimes of rules will be deployed to the benefit of society. Any successful effort at law reform will be at least bivocal, and will offer diametrically opposed conceptions of the just, each waiting to be called forth in support of adjudicative results depending on the temper of the times.

The complementary theme for future research projects may be characterized as inquiry into the principles of social ordering.[184] This theme, I acknowledge, has already made the rounds in an instrumentalist form through the vehicle of Alternative Dispute Resolution.[185] But the point of research projects into processes of social ordering is not to come up with an inventory of processes, or a check-list of when one would be better than another. Rather the point is to assist those involved in the legal

---

181 For a brief development of these themes see Griffiths, *supra* note 84; Merry, "Legal Pluralism," *supra* note 84; J. Carbonnier, "Les phénomènes d'inter-normativité" [1977] Eur. Y.B. in L. and Soc. 42; Belley, *supra* note 82.

182 See M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

183 For an analysis of contemporary conceptions of legal pluralism and their bearing on the construction of national law, see N. Rouland, "Les droits mixtes et les théories du pluralisme juridique" in *La formation du droit national dans les pays de droit mixte* (Aix-Marseille: Presses universitaires d'Aix-Marseille, 1989) at 41.

184 See generally *Essays*, *supra* note 81.

185 See F. Sander *et al.*, *Dispute Resolution: negotiation, mediation and other processes*, 2d ed. (Boston: Little Brown, 1992).

and law reform endeavours to understand the types of problems, and the kinds of resources necessary for their solution, which modern forms of law put at our disposal.[186] The ambition of law reform cannot be to solve problems. It can only be to trade in current conceptions of problems for a better class of problems. To take a very homey example, why do we believe that the technique of "eldest cuts, youngest gets first pick" (or some variant of it) is appropriate for handling disagreements between children about how to share a chocolate bar? Why do children in the playground already know that to begin the process of choosing up sides for baseball and soccer games, a deliberate resort to chance is necessary in order to decide which "captain" gets first pick?[187]

A fruitful beginning to any law reform research agenda is to ask what it is about contemporary legal mis-education that induces us to believe that legislation and adjudication are the key processes of social ordering. And this inquiry would continue through an assessment of how poorly we understand these processes as contributors to normativity. Much as the fashionable debate about the nature of legal indeterminacy is interesting, it does not really address the more important questions of why and how arguments in justification are marshalled by claimants, and how authority is legitimated in different types of social process.[188] After all, it is not just officially appointed judges who adjudicate. Trying to understand which institutions and which processes can be deployed in which settings, with which consequences, seems to me to be a most promising line of inquiry for expert Law Reform Commissions.[189]

VI. CONCLUSION: THE MANY FUTURES OF LAW REFORM COMMISSIONS

To bring this already overlong peroration on law reform and expert Law Reform Commissions to a conclusion I should like to return to the principal themes raised in the Introduction: the relationship of law to expertise; of knowledge to ideology; and especially, of reform to instrumentalism. Law precedes expertise. Knowledge informs ideology. True reform is the antithesis of instrumentalism.

Classical approaches to commissioned law reform can best be understood as an example of the meta-phenomenon: the displacement of the primary by the secondary;

---

[186] For a detailed discussion of this theme see Macdonald, *Prospects for Civil Justice*, *supra* note 3 at 86-141.

[187] There will, of course, be a tendency for an expert Law Reform Commission appointed and paid for by the state to make findings on processes of social ordering which can easily be appropriated by the state and transformed into recipes for the invocation of "official" law. But there is no necessary reason why this should be so. Indeed, I would think that one of the best measures of a successful Law Reform Commission is its ability to convince the state when *not* to act by way of "officializing civil disputes."

[188] I have tried to work through these issues in a preliminary way in R.A. Macdonald, "A Theory of Procedural Fairness" (1981) 1 Windsor Y.B. Access Just. 3; and Macdonald, "Les Vieilles Gardes" in Belley, *supra* note 82.

[189] Since this above section was first written I have come across a remarkable little book by Alan Reid entitled *Seeing Law Differently* (*supra* note 97). It seems to me that Reid also understands the themes of "legal pluralistic justice" and "processes of social ordering" in the way elaborated here.

the displacement of substance by form.[190] To focus only on official law reform managed by expert Law Reform Commissions is to displace the primary (the law as lived and generated, relived and regenerated, by those to whom it evidently speaks) by the secondary (the law as written and made, rewritten and remade, by those who claim a special authority to do so). It is also to focus on the most visible and explicit of existing legal artifacts without recognizing their artificiality.

The future of expert Law Reform Commissions, if there is to be one, must have a different *timbre*. Because law is more than a system of explicit rules, specialized offices and institutions, and determinate procedures which serve an instrumental purpose, reflection on its reform must be both wide ranging and non-instrumental. In other words, law at the same time a means to an end and an end in itself.[191] This is not to denigrate official law as epiphenomenal. Legal forms are among the most important lenses by which societies come to view themselves. Legal processes are attempts to give form to debate about life's most important questions. Official forms and processes are powerful symbols of how we imagine who we are, and how we conceive of our relationships with others. But law does not exclusively arise within the official institutions of the state. If we seek to avoid examining the law that arises in everyday interaction, we do so primarily because it challenges our myths of rationality, coherence and progress. Informal, inferential and implicit law is the ground within which formal, canonical and explicit law is rooted.[192]

Canada's twenty-five year love-affair with expert Law Reform Commissions is showing the wear and tear of any quarter-century relationship. It no longer burns with the passion of a new discovery, nor with the promise that energy, expertise and enthusiasm alone can recast social pathology. Law and its artifacts, we have come to discover (just as every generation comes to discover), are as much about hate, power, prejudice, poverty and alienation as they are about love, freedom, well-being, equality and justice.

Those who believe that the present forms and processes of law do no more than sharpen conflict and discord, and who, therefore, seek to reform law to blunt conflict and generate harmony fail to give due account to the complexities of social living. Law certainly does not create human conflict, but in turning human conflicts into legal disputes it provides us the means to apprehend the underlying causes of the disputes so created. Those who would ascribe to expert Law Reform Commissions the sole role of finding ways to avoid social conflict also fail to give due account to the complexities of social living. Of course, expert Law Reform Commissions must seek, as part of their mission, to reconceive law in the pursuit of harmony; but they must also seek to formulate the occasions for human conflict in a manner that does not exacerbate social pathology.

---

190 On the meta-phenomenon in law see R.A. Samek, *The Meta-Phenomenon* (New York: The Philosophical Library, 1981) at 206-209. On its application to law, see Samek, "A Case for Social Law Reform," *supra* note 27.

191 See L.L. Fuller, "Means and Ends" in *Essays*, *supra* note 81 at 47.

192 This idea is nicely framed in Kasirer, *supra* note 171.

Critics who believe that expert Law Reform Commissions have failed because they have not led us to a state of grace, and who therefore preach their demise misdiagnose the problem and misprescribe the remedy. Recognizing the maturity, the moderation, and the muddle of institutional middle age is a first step to recasting both our expectations of, and our faith in, expert Law Reform Commissions. Such a recognition argues, that is, for *re*commissioning rather than *de*commissioning law reform.