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LAW REFORM NEEDS REFORM

By J. N. Lyon

There is a tide in the affairs of men,
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and in miseries.
On such a full sea we are now afloat,
And we must take the current when it serves,
Or lose our ventures.

Julius Ceasar, Act IV, Scene III.

INTRODUCTION

The process of law reform needs to be given a broader conception if the public is to derive much benefit from the substantial amounts of public money being spent on law reform in Canada. Perhaps the best clue as to why we have not created an imaginative and dynamic law reform movement is found in the fact that our provincial law reform statutes tend to look like carbon copies of the English Law Commissions Act.1

As a result, we have not defined clearly the objectives of law reform, nor considered which are the most urgent problems, in what order of priority we should go at them, what resources are available to us for the task, and what alternative strategies are likely to achieve the most, given the resources and the realities we must deal with.

The law reform model that has developed in Canada is a direct product of our legal training. Lawyers are not trained to think in terms of the rational allocation of resources through selected strategies designed to achieve optimum results in terms of defined objectives. We are trained to follow precedent and established procedures, whatever the results. Consequences are the responsibility of someone else, usually the legislatures, in the dominant conception of the lawyer and his public responsibility. When law reform is forced into the conventional mold of legal thinking it becomes cut off from the valuable experience and techniques of other disciplines. We must find better ways.

This is not an attempt to condemn law reform to date as a failure. Much excellent work has been done by judges, practising lawyers and legal scholars. One need only cite the monumental McRuer Report on civil rights in Ontario,2 Reid’s Administrative Law and Practice,3 and Cumming and Micken-

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1 13 & 14 Eliz I c. 22 (1965).
3 Robert F. Reid, Administrative Law and Practice (Toronto: Butterworths, 1971).
berg's Native Rights in Canada to show that we are moving. But these are all at the level of scholarly treatment of problems. What is so lacking is the translation of such documents into results at the operational level of the legal order, and our lack of capacity for this part of the reform process may lead us to deflect all our resources into the writing of reports. We are expert at solving problems of the legal order in words, but rather inept at effecting real improvements at the human level.

The purpose of this study is to suggest how we might improve our performance in achieving reform at the operational level. It is based largely on the writer's experience of one year as the fulltime member of the Law Reform Commission of British Columbia.

1. What is Law Reform?

If law reform is to become measurable in terms of actual results and not just written reports, it must be concerned with the whole of legal process and not just written laws. I suggest that legal process consists of three main elements:

1) the written body of laws,
2) lawyers, taken in the broadest sense to include judges, practitioners and academics, and
3) legal institutions.

Why has law reform to date been defined almost exclusively in terms of revision of written laws, the first of the three categories above? The main reason seems to be the creation of specialized agencies like law reform commissions, whose personnel have simply proceeded with reform of written law because that is consistent with their training and experience and that is what the law reform statutes seem to contemplate. If this is the appropriate approach for such bodies, then there must be some other agency to clarify and coordinate the larger process of reform of the whole legal order (law, lawyers, and legal institutions) of which the written law is but a part. But even if such agencies existed, I suggest that law reform commissions should set performance standards for themselves in terms of results at the operational level, not just in terms of published reports, and to monitor their own performance continually in terms of those standards. The research function which now dominates the work of law reform commissions would become but one of the important functions of commissions. Such a shift in the approach to assessing performance would change dramatically our conception of law reform as a process and some rather different skills and experience would become necessary in law reform personnel, in addition to the basic legal skills and experience that will always be necessary.

This is the point at which many will question my thesis. Surely, they will say, the job of a law reform commission is to recommend changes after full study. Responsibility thereafter lies with the government and legislature.

My point is that this is only one way of looking at the matter and I am suggesting that experience has shown it to be an inadequate basis for constructing a model of law reform. Failure to solve real problems is always the fault of some other agency because the law reform agency is seen as having successfully fulfilled its responsibility with the publication of a report that passes academic muster.

It is obvious that much reform activity can and must be initiated and carried out within the legal order quite apart from specialized law reform agencies, whose function as presently conceived is narrow and limited. Indeed, in a perfect legal order there would be no need for a law reform agency because those in responsible positions, from attorney-general and chief justice to court clerks, would remove imperfections, faults or errors as they appeared. Sound administration combined with effective leadership are the basic ingredients of ongoing reform, and we would do well to keep this fact in mind lest we look too much to specialized agencies to bear the responsibilities of elected and appointed public leaders.

There is no substitute for sound administration, and if basic housekeeping is neglected in the legal order there will be a demand that scarce and valuable resources of specialized agencies be diverted into an attempt to overcome such neglect. If we are to avoid this kind of waste, we must begin with two basic tasks:

1) developing a full descriptive model of the process of law reform that includes objectives, strategies, resources, and the full range of participants, building into the model performance criteria in terms of actual results at the operational level;

2) defining the responsibilities of each of the participants in the process.

Before we can develop an adequate conception of law reform, we must turn to the most basic question of jurisprudence: what is the nature and purpose of law? In general terms, law is the ordering force that maintains a community in which security and freedom are balanced in order to secure and promote a high quality of life in a stable, continuing society. Law is a dynamic process, constantly adjusting to changing circumstances, so that there is no clear, fixed set of criteria for measuring its performance. Nevertheless, some standards must be identified and made as clear as possible if law is to serve human ends. The balance between security and freedom in any community depends upon the basic value preferences of that community as expressed in its constitution. Freedom can be traded for security and security can be traded for freedom, but over the long term a lack of balance in either direction is likely to undermine community itself.

A general statement of the basic value preferences of the Canadian people might be found in the preamble and section 1 of the Canadian Bill of Rights: 5

"The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity

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5 S.C. 1960 c. 44. Also reprinted in R.S.C. 1970 Appendix III.
and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

Bill of Rights.

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.”

Because of these provisions, it may no longer be necessary to debate about the basic value preferences of our legal order. They may thus have been authoritatively described by the Parliament of Canada. The fact that the Canadian Bill of Rights was not incorporated into the Revised statutes of Canada of 1970 but rather left as a public statute of 1960 indicates a recognition by Parliament itself of the special character of the Bill of Rights. The real debate may therefore be about the best ways to give those value preferences expression in the daily life of the country. One of the best ways could be to persuade every person in public office, whether federal or provincial, to take the Bill of Rights seriously and to check every proposed decision or action to ensure it will not violate either the spirit or the letter of the Bill. While the Bill may not provide answers to hard questions involving the balancing of one right or freedom against another, it does provide broad guidance to decision and action, and legislators, judges and government officers alike should be persuaded to consider undergoing a conscious process of building the values of the Bill of Rights into their thinking processes.

The Bill of Rights confers on the courts a great opportunity for effective
law reform through judicial decision. The preamble to the Bill recites the
desire of Parliament that the Bill shall ensure the protection of the rights
and freedoms therein declared, and section I gives courts of law a general
authority very similar to the jurisdiction in equity which our judges have
long exercised. This does not mean that courts of law are expected to create
independent legal rights out of the Bill. That is for the legislatures. What
the courts can and should do, however, is develop the general terms of the
Bill into a coherent and philosophically consistent framework of interpreta-
tion for laws of Canada. The courts should not wait for Parliament to pro-
vide full particulars of each declared right and freedom, for that is pre-
cisely the function Parliament has conferred on the courts.

From this excursion into the Canadian Bill of Rights, a basic source
of guidance for law reform in Canada, we can describe a general model of
law reform. Law reform is the process of identifying and clarifying standards
of performance for the legal order and of finding and implementing ways of
optimizing achievement of those standards. Any person who is in a position
to do these things can be a participant in the process of law reform. While
special resources may be necessary for particular reform activities, the one
essential ingredient is the will to make the legal order work more effectively.
This requires a commitment to values such as those set out in section 1 of the
Canadian Bill of Rights, and it requires initiative.

If this model is to develop into a working model, our primary emphasis
must shift from institutions to functions. We have a fixation with formal
authority and visible institutions. We neglect the informal network of action
and change that is a nice blend of personal commitment, formal authority
and a sense of the dynamics of the situation at any given time and place.
It is this larger, informal, network that generates significant reform. Formal
institutions are merely vehicles through which the reform activities are
channeled.

In this perspective, law reform becomes as much a state of mind as a
process, and participation is open to virtually all those who work within the
legal order, if they want it. Furthermore, participation is required of those who
occupy key positions in the legal order, such as attorneys-general, chief
judges, benchers, and legal academics, whether they want it or not, and no
amount of reform activity by specialized agencies will overcome a failure on
the part of these key participants to take up the challenge of reform.

2. A Critique of the Law Reform Movement in Canada

In a situation where many of our problems stem from organizational
and mental rigidities, one would expect to find, as the fundamental principle
of reform, an unstructured network of functional activities built around the
best available minds, supported by flexible administrative services manned by
result-oriented “doers” operating free of hierarchical principles and bureau-
cratic restraints.

Unfortunately, this is not generally the case. Law reform has largely
become an industry, in which academics are contracted to man the assembly
line from which emerges the stereotyped “report” which justifies the agency's
existence. The explanation of why this has happened is very simple: nobody sat down to think through the process of law reform and to design a model for the purpose. In Canada we simply copied the English model and then set up research institutions to carry on the same kind of word processes as have apparently proved a failure in England. The Law Reform Commission of Canada should be excepted from this comment, but it remains to be seen whether that Commission will succeed in designing and implementing an effective model of law reform. The appointment of an experienced sociologist as a full-time member of the Commission is perhaps the most hopeful sign in the field of law reform in Canada to date.

Another costly error in the development of law reform in Canada has been our commitment to the myth of the expert. One can simply challenge as nonsense the notion that law professors, superior court judges and senior lawyers are expert in matters of law reform. No one would question their expertise in legal doctrine and analytical and research skills, but this relates to just one part of legal process, so that to force all reform activities into a model designed by this group of experts is to ensure failure by neglecting systematic development and treatment of the rest of the process.

It is an interesting fact that it seems never to have occurred to a law reform commission in Canada that it might exert its influence in some systematic manner other than through written reports. Lawyers are fascinated by words, and are long conditioned to believe that the world began with an Act of Parliament. A written report is an attempt to capture in a word picture a segment of life. The written report has its uses and at times is indispensable, but to try to reform a legal order entirely through written reports, many of them prepared by persons with little or no experience in the dynamics of bringing words to bear on the real world, is folly.

We have developed no system for tapping the tremendous pool of experience and energy that exists within the legal system. There are people in the system whose experience and judgment tells them what needs to be done. They do not need the report of an expert to tell them what is wrong and how to go about improving things, nor do they always have the time to record their experience and conclusions in writing. Yet we stifle this potential by superimposing the myth of the expert, telling these people, in effect, that their working experience and judgment are not enough to qualify them for the reform process.

The truth is that there are no experts when it comes to reform. There are various complementary skills and experience that are necessary to the reform process, and the important question is how and where we should fuse them in order to get the best return in actual results. So far our answer has been almost exclusively in an organization like a law reform commission. It is suggested that a major alternative lies in the concept of working or operational reform, in which the flow of experience and skills is reversed and reform projects are located right within the legal system, to be pursued through action rather than words.

One great advantage of this proposed approach is that it virtually ensures consultation with those affected by the legal system, since operational
personnel are in daily contact with those people. We have entered the age of public consultation by government, but too often form triumphs over substance, resulting in various forms of pseudo-democracy such as “hot line” appearances by members of government and other forms of political grandstanding. Real consultation takes place in the context of real problems and is done by experienced personnel who understand the problems. Effective public leaders reach the public through the most effective people who work under them, and in the administration of justice this route begins with the ordinary judge, administrator, counsel or clerk who spends his days on the firing line of the legal system.

Law and Policy

An important consideration which must be recognized as underlying the existing model of law reform is the attempt to concentrate the process on matters of a “legal” character, which therefore call for the concentrated application of legal expertise. Other matters are usually described as matters of “policy” about which lawyers have no claim to expertise and which should not, therefore, be studied or commented on by law reform commissions. If such commissions did concern themselves with such matters, it is thought, they would be trespassing on the exclusive domain of the executive and legislative branches of government.

While this proposition does contain a valid concern, I suggest that the problem is not as simple as it is thought to be, so that the law-versus-policy dichotomy does not lead to a satisfactory definition of law reform. What has happened is that the narrow and specialized conception of law that is quite properly imposed on lawyers for purposes of judicial decision and its attendant counsel function, based on the theory of positive law, has been applied in law reform to the larger legal process that is an integral part of the whole system of government. Legal process in this larger sense is, unlike judicial decision, loaded with policy matters, and they are matters on which the experience of lawyers is vital to good government and effective reform. In any case, one could easily demonstrate that almost every law reform commission report ever published has at its heart the recommendation of one policy in preference to another, the legal research function having served to identify the key policy questions, to show which of the alternative policies is presently expressed in the law, and how well it is working. The key function of the commission is to recommend one policy over another or to indicate the relative merits of feasible alternatives, and to defend its recommendations. As long as the final choice remains with governments and legislatures, it is inaccurate to assert that commissions trespass or usurp when they consider policy matters.

Perhaps the real concern is that the legal resources of a commission are best used by being directed into areas where the problems involve a maximum of law and a minimum of policy. This is no doubt true as long as law reform commissions are constituted and function as they do, but it begs the more basic question of what the role of such bodies ought to be. Here we encounter the question of priorities, and we may have crippled the law reform movement by entering it backwards. We have set up commissions
in a particular pattern, using legal personnel and procedures, and having done that we find ourselves defining their functions and ordering their priorities in response to these organizational factors rather than the real problems of the legal order. The role so defined may condemn law reform commissions to work the sterile fields of legal doctrine, bringing forth mice after monumental efforts, while the more serious problems of the legal order go unattended and become more serious. The most important policy decision in law reform is the choice of matters for study and the approach to be taken to each. These choices, I suggest, are today made more in response to lawyers' dissatisfaction with the law and its processes than to the injustices felt by citizens, and the two are far from coincidental. Indeed, some of our more serious failures result from the conception many lawyers have of themselves and of their professional responsibility. As long as these matters are left to lawyers they are unlikely to change.

If the law-versus-policy distinction is to continue as the basis for defining the role and ordering the priorities of law reform agencies, then we should recognize that those agencies are specialized legal research bodies, concerned with only one part of the legal order — written law — and we must decide where the real center of gravity of the law reform movement is going to reside and how to plug this one satellite, the law reform commission, into the larger network of reform of law, lawyers, and legal institutions.

The Need for Facts

Lawyers pride themselves in their respect for facts and in their special skills at finding, assembling and presenting facts before tribunals. Yet we have no base of judicial statistics in Canada on which to base assessments of the performance of the legal system. Our factual orientation and skills seem to be directed at particular controversies rather than functioning systems.

Until we develop a reliable base of facts about what is going on in the courts and in the rest of the legal order we must rely on the educated guesses of experienced people. Sometimes these are as good as statistics, and sometimes they are even better, where both facts and their interpretation are needed. But we require solid statistics before we can make an over-all assessment of how the machinery of justice is functioning.

On this score, Diogenes asserted that the greatest good is knowledge, the greatest evil ignorance. We tend to live in ignorance of the human consequences of what the law does, substituting myth for what is often unpleasant fact. More recently, Gunnar Myrdal has given this explanation of our resistance to knowledge:

The hypothesis is that we almost never face a random lack of knowledge. Ignorance, like knowledge, is purposefully directed. An emotional load of valuation conflicts presses for rationalization, creating blindness at some spots, stimulating an urge for knowledge at others, and, in general, causing conceptions of reality to deviate from truth in determined directions.6

Translated into law reform terms, this suggests that lawyers share a

need to believe that the legal order is functioning fairly well, and that if there are injustices in the community they exist in spite of the great beauty and symmetry of the law and are attributable to someone other than lawyers. This need shows itself in a general ignorance of, or callousness to, the many injustices we live with daily, and a general retreat into the clean world of corporate law practice, conveyancing, and superior court counsel work, where the lawyer will not be upset by continuous exposure to the things the law in fact does to people, which are there to be seen every day in the criminal, family, and small claims divisions of those courts that constitute the backbone of our judicial system and which are generally known among lawyers as “inferior courts.”

3. Elements of Law Reform

   If law reform is to be viewed as a process, what are the elements of that process? The descriptive model offered earlier is as follows:

   Law reform is the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of maximizing achievement of those standards.

   The elaboration of this model should not lead to a stereotype but should rather seek to comprehend all direct participants who share common goals of performance for the legal system, whether they are part of formal law reform machinery or not. Only by a broad conception of this kind can we bring to bear the best resources available and develop a sufficient variety of strategies to deal with the many “people” problems and “systems” failures that create injustices. The exercise will be sterile, however, unless we are prepared to measure performance of both the legal system and the reform process in terms of the full range of actual effects on people, using as criteria the fundamental values of our constitutional heritage, such as those which have been given authoritative expression in the Canadian Bill of Rights.

   This is an awesome challenge, and it would be folly to attempt elaboration of the proposed model of law reform in a static word picture. Ongoing consultation and collaboration are needed if the process is to respond to the dynamics of living law. However, the development of a working model by those in positions to do it may be aided by the identification of some major dimensions of the process.

Priorities

   What are priorities? In a world where time and resources are never unlimited, choices must be made between competing claims for attention. Such choices are conditioned by a system of values, and it is as good a measure as any of the integrity and effectiveness of public leadership to examine the extent to which the values applied are the long-term, stable values of the community as articulated in authoritative constitutional sources such as the Canadian Bill of Rights.

   “Limited resources”, as used here, is not the same thing as “insufficient funds.” Indeed, it is possible to cripple a law reform agency by giving it too much money, thus inflicting on it the inevitable demand for an organization
and visible activity, foreclosing any real possibility of engaging in the pro-
cesses of inquiry, consultation, reflection and experiment that tap the real
resources of law reform: competent and experienced people committed to
operational results.

In examining how priorities are set for the limited resources available
for law reform, it is revealing to ask who sets them. The answer is lawyers,
almost without exception, and as if this is not distorting enough of the
reform process, one must add that this is a group whose mental set includes
a strong conditioned attitude of eschewing any matter that is controversial
and raises strong value conflicts in the community. These matters are
designated as "policy" matters, not appropriate for "legal" treatment. Law-
yers' concern is with "law" and "legal" matters. They do not take positions
on fundamental value questions. They do not speculate. They apply expertise
in an objective area of decision where logic applied to settled doctrine
produces legal answers.

It should come as no surprise, then, that the process of law reform
tends to be an exercise in replacing existing words with more or different
words. The dynamics of legal process gain accidental entry at best to a
model of law reform designed with the analytical tools fashioned for judicial
decision-making.

Certainly no one would advocate public opinion polls to determine
which laws should be reformed. But laws and legal problems do not exist in a
vacuum; they are reflections of community values and objectives and of social
problems respectively. By inquiring where the values of the community and
of its members are being damaged most one might proceed to identify the
causes of harm and to determine whether the application of public resources,
directly or indirectly, would alleviate the problem. Since this broad descrip-
tion probably covers the legislative domain, the focus of law reform as a
special process should be limited to law, lawyers, and legal institutions, but
viewed always in the larger context of public decision-making of which they
form integral parts. This means a middle position between the two extremes
of obsession with statutes and legal doctrine on the one hand, and a too-
broad concern with social policies and priorities that would make a super-
legislature of a law reform commission on the other.

It is the capacity to see legal process as an integral part of the whole
process of government founded on the Constitution that is so lacking in
law reform today, resulting in a curious belief that the failures and de-
ciciencies of the legal system can be understood and attacked in isolation.
Social processes are subtle and complex. A large measure of intellectual
security rewards the choice of technical areas of legal doctrine as the prime
targets for reform. But accountability for these choices must be defined in
terms of the impact on the community and its members resulting from the
resources allocated to reform. It would be hard to imagine a less responsive
measure than the currently fashionable lists of published reports. It is no
answer to assert that implementation is a separate process that is the respon-
sibility of others. A model of law reform that neglects systematic treatment
of implementation and declines accountability in terms of actual results felt
by people in the real world is a model that requires serious re-thinking. It may just be that lawyers lack the intellectual tools needed for designing process models, so that others with different skills and experience may have to be called in to assist in this task.

Realistic and responsive priorities cannot be established in isolation from the major points of contact between the legal order and the people. Inevitably, the process of reform must plant its feet firmly on the ground in the community, where all the messy, insoluble problems are found, if it is ever going to realize its potential. Those who claim the right to set priorities must go out into the slums, the welfare offices, prisons, criminal court, family court, small claims court, children’s aid societies and elsewhere to experience how the legal system can be used to subvert community and destroy human values, and to get a sense of where and how the law might serve to alleviate and possibly overcome some of these injustices.

This is not to suggest that only the poor or criminals merit attention, but rather that these tend to be the critical areas where enormous social cost is being heaped onto the community by our preference for clean, well-defined problems with technical solutions. In any case, one could hazard a guess that seventy to eighty percent of the legal resources available in Canada are already engaged full time in the promotion and protection of the interests of those who have already achieved a standard of living high enough to support the highest quality of life imaginable. It is our obsession with standard of living, with economics, at the expense of concern for quality of life, for a broader range of values than wealth, that has got us where we are and that deprives us of the vision to apply our limited reform resources wisely. A sound sense of priorities can come only from a sound sense of values.

**Pressure Points and Timing**

Pressure points follow from priorities. If resources are limited, as they always are, we must use our sense of priorities to identify points in the legal system where the timely concentration of resources, if sustained, will yield results. Too often we engage in throwing money at problems, *pro rata* according to pressures of political log-rolling, and excuse failures by stating that the real problems are beyond our limited reach. We seem to lack the basic intelligence and will to select objectives and pursue them until we succeed.

Law reform resources, carefully used, could become a kind of “seed money” or catalytic agent, triggering a much larger reform process that draws systematically and spontaneously on the vast reservoir of potential that lies largely dormant in the legal system today. Law reform may be essentially an educational process, having as its prime objective the release and direction of human potential.

The selection of pressure points involves nice judgments about the best people, about timing, and about strategies. Persons capable of making these judgments well are not common, and in their absence at the helm of the law reform movement we will have a kind of blind man’s bluff in which we will grope for solutions by pumping massive resources into an indiscriminate, unidimensional assault on symptoms of problems rather than problems them-
At enormous cost we will succeed in making the situation a good deal worse.

We must also remember that 'to every thing there is a season', and in human affairs there is a rhythm such that the choice of time to apply resources and the coordination of the various elements of the process of reform belong to the same art as governs the setting of priorities and identification of pressure points. Like these other aspects it is not something that can be achieved through organizations and procedures.

Perhaps an example will help. The reform of a particular court could be attempted through a global study of every aspect of the court, leading to a definitive report setting out findings and recommendations to be implemented from the top of the hierarchy down, starting with legislative and executive action, then implementation through the office of chief judge downward to the base of the pyramid where ordinary judges, registrars and clerks interact with citizens. Such an approach would probably fail because it would be in conflict with the natural dynamics of the processes of the court, especially with the constantly changing patterns of personnel and their relationships.

A sounder approach, I suggest, is through the appointment of a reform-minded chief judge with the capacity to lead, who would be in a position to respond to the natural rhythm of events, establish priorities, identify pressure points, then pursue a manageable and flexible program of initiatives and interventions, responding to the developing situation within the framework of that program, supported by the necessary resources to ensure those initiatives and interventions are pursued until they achieve their minimum objectives.

This approach requires that we organize law reform activities around key people in the system, bringing to them the information and resources they need. This, in turn, calls for new conceptions of law reform strategies and personnel, and the ideas of working groups and field workers will be developed later for this purpose.

When a person with working experience assesses information or ideas he does not simply pull related data from pigeon-holes in his mind. Rather, he runs the material through a complex screening process that draws on the whole synthesis of his working experience. An experienced judge, legal counsel or court official is thus able to spot quickly an important operational factor to which a research worker would have been oblivious even after exhausting written sources and possibly even after consultation. Only the direct involvement of experienced people in the reform process can give that process the benefit of the complex synthesis in that person's mind and enable it to respond to the dynamics of an ongoing system.

4. Proposals

Reforming the Machinery

It is in the administration of justice that law, lawyers, and legal institutions meld into a working system, and it is here where the center of gravity of the law reform process ought to be located. However, wise use of limited resources depends on recognizing that the administration of justice needs
reform at two levels. The first involves a thorough housecleaning at the working level, to make the present system function effectively and in accordance with established principles. The second involves a re-examination of how the machinery of justice is organized and how it functions, with a view to introducing changes. Both are essential but each calls for a different approach. The two cannot be mixed if effective results are to be achieved at both levels. Only the second level involves reform in the proper sense of the word, but so accustomed are we to an archaic system of justice that we tend to think of housecleaning when reform is mentioned. The result is a confusion of good administration with reform.

Sound administration of the existing system of justice need not and cannot await studies and reports of the kind that law reform commissions are geared to produce. It is a matter of proper attention being paid and resources being provided by those who are responsible for the administration of justice. This means primarily attorneys-general and heads of the various courts. Conversely, law reform, properly understood, need not await administrative housecleaning, but law reform projects relative to the administration of justice cannot be formulated without some knowledge of the housecleaning projects that are currently in progress, being prepared, or being proposed, including the objects and timetables of those projects. This calls for continuous consultation between those responsible for the two tasks and clear definition of the responsibilities of each.

Let us consider first the housekeeping function. There exist throughout the system competent and experienced people who know what needs to be done to improve the system in many ways. In some cases these people have gathered data and prepared reports on their own initiative, only to find an absence of response when they have tried to get action. It is futile to engage another person to duplicate this kind of effort in the name of law reform. What is needed is greater responsiveness to this kind of initiative so that it will be encouraged as well as exploited. We are simply failing to use the built-in capacity for improvement that exists in any organization that contains good people.

In order to tap this potential we must first recognize that the first level of reform, or what I would call administrative reform, is an integral and important part of the normal functioning of the system. Time and resources must be allocated for the purpose, and this is usually possible through picking up the slack that is bound to exist if the system enjoys good leadership and healthy morale.

One approach to tapping this source of reform is the working group of experienced people. Instead of drawing data and experience from the working level into a research organization such as a law reform commission, this approach reverses the flow of expertise by injecting into working groups specialists from government, the practising profession and the academic community. The effect is dramatic. The dormant energy and enthusiasm of the best people in the system produces fast, workable results. The depth of knowledge and range of ideas of the academic is invaluable in providing alternatives and in expanding thinking. The participation of persons in gov-
ernment provides direct access to the source of both resources and legislative and executive action.

It might be useful to consider as a separate function of law reform the development of specialists who would work with groups of this kind for the purpose of injecting ideas and providing ready access to the best available literature on the particular problems being dealt with. The term “resource person” has been used to describe this kind of function, which might be systematically developed. The premise underlying this suggestion is that bibliographies and exhaustive analyses do not meet the needs of those engaged in administrative reform. A written report is a monologue that indiscriminately treats all aspects of a problem without regard to the priorities of the working people and the dynamics and timing of the working system. Written reports we need, but not where other forms of communication and action are called for. A pooling of all the necessary experience in a working group may be the most effective approach to administrative reform. There is really nothing new in this, but the growth of specialized law reform agencies may lull us into neglect of the housekeeping function, leading to a misuse of limited and valuable law reform resources for a function they are not designed to perform. At the same time, we may conclude that law reform agencies can play a part in the development of some of the resource people needed for administrative reform.

This leaves for consideration the second level of law reform. Should a law reform commission spend its time on studies directed at the enactment, amendment or repeal of legislation or should it probe deeper in search of the root causes of injustice? The advantages of the former are that the problems are fairly easily defined and there are established ground-rules for the process of reform. Really serious issues of philosophy and methodology in the law do not arise once a decision is made to contain the process of reform within the established framework of legal thinking. The process is incremental, and one can expect to double productivity in this kind of reform process by a simple doubling of resources. This will perhaps satisfy the urge to reform as long as we do not ask “productivity of what?”

The disadvantage of this approach is that it leaves undisturbed the root causes of failure and inadequacy. If we are serious about reform, the first step is to re-educate ourselves in order to escape the orthodoxies of existing legal thinking and technique. If our problems are rooted in those orthodoxies, as I suggest some of them are, then we will not even come to grips with them as long as the process of reform is built on existing thinking and technique. We may want to come back to use these, but not until we have used more radical approaches to break out of the closed intellectual world of the conventional legal mind. We all like to believe we are open-minded, but any lawyer who stands back for a long, hard look at how he functions and who then considers the conclusions stated by Myrdal in Objectivity in Social Research7 will begin to doubt his capacity to grasp fresh ideas and approaches, let alone consider them in an open manner.

7 Id.
Consider, for example, the question of whether the adversary system should be removed from part or all of the administration of family law. This may not be the real question; indeed an adversary framework is not in fact used in family court and in small claims court, in many cases. What we do not know, and what we have not yet asked, is whether legal minds that have been shaped around an adversary conception of the law and have become committed to it can be changed just by altering the rules. This raises the question of how legal minds are structured and the impact of legal training and theory on that structure, which in turn leads to a comparison of the common law mind and method with the civil law mind and method. It may be that, if the adversary system has proved inappropriate in certain areas, we need to examine more than just an alternative process. The search for an alternative may involve a consideration of codes and the mental formation required to administer them.

I see the question of codification as a key pressure point in the process of law reform. Many of our problems may flow from the legal theory on which our legal order is built and from the resulting mental set of lawyers and judges. A reform process that consists only of revision of areas of substantive law simply fails to confront these problems.

Changing our Minds

One meaning of the verb “to reform” offered by the Concise Oxford Dictionary is “to form again”, and this is the appropriate sense of the word when speaking of the reform of lawyers. Civilians often use the word “formation” when referring to legal education and training, recognizing that there is involved a process of shaping the intellect in accordance with certain attitudes and reasoning processes. There is no question that legal education and training involve a deliberate conditioning of the mind to the discipline of the law. The best minds come through the process whole, that is, still able to perceive systems, principles, and relationships between legal and non-legal phenomena. But too often the price of a legal mind is loss of judgment, loss of a sense of proportion, and an inability to step back from time to time from the narrow, technical frame of reference to view the law from the perspective of the jurist.

Reform of the law and of legal institutions will fail if we do not undertake simultaneous reform of lawyers. Whether we call it continuing legal education or something else is unimportant. What is important is that this activity should provide lawyers with continuing contact with law as an intellectual discipline, to offset the emphasis on practical results that inevitably dominates the lawyer's daily work. Continuing legal education has not followed this path to date, but has catered to the clearing-house need of lawyers for help in keeping track of a complex and rapidly changing body of laws. It has been a technological response to what has been seen as a quantitative problem. What we need is a balancing thrust towards the qualitative aspects of the law to provide a basis in the legal mind for increasing simplification and manageability, which, I suggest, are vanishing features of our legal heritage.
Equity provides a good illustration of this point. Equity grew out of the awareness of jurists that justice is what law is about. Law for its own sake, without regard for its human consequences, was becoming the conceit of the legal technicians, offering wealth and power without social responsibility, and the jurists developed equity in order to put law back on the track again. The greatest impact of equity, I suggest, was on the legal mind, where mathematics and ethical neutrality were forced to yield to art and humanity. Somehow the legal technicians have once again managed to restore the primacy of mathematics in much of legal process, aided by specialization and a naive faith in the power of legislation.

The reform of lawyers simply involves increasing their capacity to think in terms of principles and to make difficult judgments in terms of human consequences when choosing or advocating alternative legal outcomes. The Canadian Bill of Rights offered a clear and authoritative basis for a new equity in Canadian law but it has failed for want of the kind of intellectual formation necessary to weave its broad statements of values and principles into the positive law. There is little use in enacting more laws of this kind until the necessary intellectual foundation for their realization has been laid in the legal mind.

That judges and lawyers already have this formation to some degree is evidenced by the fact that equity still lives. Judges in Quebec continue to work with the broad formulations of a civil code. Yet what seems to have happened in Canada is that the theory of positive law has been taken literally as a description of legal process, resulting in the professional myth of a science of law that is value-free and purely objective. Legal process, when approached through this frame of reference, is reduced to an exercise in logic. Mathematics and ethical neutrality have resumed their primacy.

Codification may be a key to the future of Canadian law. The codification movement in the United States may have failed because the American legal mind cannot accommodate the processes of a code. If it is becoming apparent that fewer and simpler laws are required, this is the time to begin laying the foundation through that process of formation called legal education, whether initial or continuing.

We often speak of changing our minds. The French equivalent, "change d'idée" is more accurate, and in a revealing way. To change one's opinion is easy. To change one's mind in the sense of altering the structure to achieve a different "formation" is much more difficult and time-consuming. If the initial "formation" requires three years of law school, then the reform of lawyers may be a major undertaking whose desirability and feasibility we ought to be studying carefully right now.

The point being made here is basic and important. Laws are expressed in words, but the words are translated into action and reality only after they are processed through legal minds. If on examination of the reality around us we find disparities between that reality and the values that motivated the words that express our laws, then our problem may lie in part in the mechanism we call the legal mind. We may have to change our minds.