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and Scholarship*

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Guest Editors: Jamie Cameron & Stephanie Ben-Ishai

Law Reform for Dummies (3rd Edition)

Roderick A. MacDonald

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Law Reform for Dummies (3rd Edition)

Abstract

Legal pluralist law reform engages citizens in dialogue through which they gain richer insight into their normative lives and learn to manage everyday interactions with each other. Noting that first- and second-generation law reform commissions have been critiqued for their narrow vision and goal of modifying individual legal rules, this article shifts the focus to the general public as a key player in the enterprise. This is how law reform responds to public concerns and engages the public's assumptions about the reform process. The true ambition of law reform is to find opportunities for Canadians to examine their assumptions about what they ask of their law, engage in dialogues about where and why their expectations of law might be unrealistic, and involve them in the hard work of building more just official and unofficial legal systems—wherever and by whatever means it is actually carried out.

Keywords

Law reform; Law reform--Citizen participation; Canada

LAW REFORM FOR DUMMIES (3RD EDITION)

RODERICK A MACDONALD*

Legal pluralist law reform engages citizens in dialogue through which they gain richer insight into their normative lives and learn to manage everyday interactions with each other. Noting that first- and second-generation law reform commissions have been critiqued for their narrow vision and goal of modifying individual legal rules, this article shifts the focus to the general public as a key player in the enterprise. This is how law reform responds to

* FR Scott Professor of Constitutional and Public Law, McGill University. This essay was originally delivered as the lunchtime keynote address at the Symposium honouring John McCamus held at Osgoode Hall Law School on February 7, 2013. I wish to thank the organizers of that celebration of John McCamus' work for giving me the opportunity to reflect on the scholarly paths we have walked together in pursuit of law reform. As far as possible, I have attempted to retain the conversational style of the conference presentation, relegating collateral arguments and qualifications to discursive footnotes. Harry Arthurs, Blaine Baker, and Nathalie Des Rosiers kindly offered comments on an earlier version of this essay.

** During the editing process we learned, sadly, of Professor Roderick Macdonald's death. Professor Macdonald had strong bonds with the Osgoode community and in 2011 was awarded an honorary doctorate by York University; in lieu of a speech to the graduating class, he strummed his guitar and sang to an enthralled audience. In February 2013 and with his illness gaining on him, Professor Macdonald made the difficult trip from Montreal to Toronto by car, braving snowstorms to take his place at the symposium to honour John McCamus. He delivered the symposium's keynote address with help from his longtime friend, Professor Emeritus Harry Arthurs, who read parts of the text for him. Professor Macdonald's heart and selflessness in participating fully at the symposium were inspiring and unforgettable. Despite his worsening illness, Professor Macdonald revised his paper after the symposium and responded to our requests with alacrity and good cheer. Regrettably, he did not see the proofs of this article and any errors or omissions are ours, not his. — The Editors

public concerns and engages the public's assumptions about the reform process. The true ambition of law reform is to find opportunities for Canadians to examine their assumptions about what they ask of their law, engage in dialogues about where and why their expectations of law might be unrealistic, and involve them in the hard work of building more just official and unofficial legal systems—wherever and by whatever means it is actually carried out.

La réforme législative pluraliste appelle les citoyens au dialogue afin qu'ils en retirent un plus grand discernement dans leur vie en société et apprennent à mieux gérer leurs interactions quotidiennes avec leurs semblables. Prenant note que les commissions de réforme législative de première et de seconde générations ont été la cible de critiques pour leur vision étriquée et leur objectif de modifier séparément les règles juridiques, cet article refocalise les projecteurs sur le grand public, qui joue un rôle clé dans cette entreprise. La réforme législative constitue une réaction aux craintes du public et procède des hypothèses du public quant aux mécanismes de la réforme. Le projet véritable de la réforme législative est de donner aux Canadiens l'occasion de reconsidérer ce à quoi ils s'attendent de leurs lois, de dialoguer avec eux afin de découvrir en quoi et pourquoi leurs attentes envers la loi pourraient à l'occasion manquer de réalisme et de les intéresser au travail difficile de l'élaboration d'un plus juste système juridique, officiel ou non – quelle qu'en soit la sphère ou les moyens utilisés pour y parvenir.

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I. A PERSONAL PROLOGUE

I HAVE BEEN GIVEN AN EXTRAORDINARILY DIFFICULT ASSIGNMENT in this essay. I am meant to honour John McCamus, to say something new and intelligent about law reform, and to do both in a manner that captures the humour and wit for which John is rightly celebrated. So there can be no illusions, let me begin by confessing my inadequacy to the task at hand. Indeed, there is something paradoxical in the fact that I should be thought to be an appropriate commentator on John's contributions to law reform. As a law reformer I stand in his shadow; whatever themes I develop in this essay others no doubt will see as mere extrapolations from his work. There are three specific reasons for my modesty in offering this tribute, which I rehearse as prologue to the substantive theses presented here.

First of all, John has a capacious understanding of law reform that humbles those who have worked with him. It is hard to think of a single contribution that he has made to the law that does not constitute, in multiple dimensions, an exercise of law reform. Consider the following achievements.

At the top of the list, of course, are his many and diverse involvements over more than a quarter of a century with the Ontario Law Reform Commission (OLRC)—as researcher, project director, Commissioner, and ultimately as Chair.¹

Then comes John's path-breaking doctrinal work in the law of restitution and contracts. Those essays and monographs are no mere restatement of the latest judicial decisions dressed up in the elegant prose that makes us all envious. For over thirty years, his writing has served to uncover basic themes, to point out and resolve normative incoherencies and, thereby, to move the law forward.²

Reflect next on his magnificent shepherding of commissions and Task Forces devoted to complex dossiers in the realms of freedom of information and privacy and of access to justice, including the civil justice review and the legal aid regime. The Reports, either written by him or issued over his signature, invariably served to reframe the manner in which policy-makers, politicians, and the public have come to perceive those subjects.³

John's yeoman service on the Board of the Canadian Civil Liberties Association (CCLA) reveals how committed citizen engagement with the legislative and administrative processes can be a powerful engine of law reform.⁴ Strategic deployment of the everyday tools of legal practice—writing briefs, giving speeches, issuing policy papers, building broad interest-group consensus and litigating—can make a substantial contribution to improving the law, incrementally but inexorably.

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1. From 1972–1979 he was a member of the Research Team for the OLRC Sale of Goods Project, and from 1980–1985 he was a Member of the Contract Law Amendment Project of the Commission. He was appointed as a Commissioner in 1990 and served as Chair from 1993 through 1996 when funding for the OLRC was terminated by the Ontario government.
 2. For notable examples of John's rich doctrinal writing, see John D McCamus & Peter D Maddaugh, *The Law of Restitution*, 2d ed (Toronto: Canada Law Book, 2004); John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012).
 3. Three significant instances of this type of policy work are his service as Research Director of the Ontario Commission on Freedom of Information and Individual Privacy (1977–1980), as Chair of the Fundamental Issues Group of the Ontario Civil Justice Review (established by The Ontario Court of Justice and the Ministry of The Attorney General of Ontario) (1994–1996), and as Chair of the Ontario Legal Aid Review (1996–1997).
 4. John joined the Board of Directors of the Canadian Civil Liberties Association in 1986 and has served as Chair of the Board since 1992.

Moreover, during John's stewardship of the Osgoode Hall Law Journal as Editor-in-Chief he raised the bar for academic legal writing beyond mere reportage. He accepted the challenge of the *Law and Learning* report⁵ to embrace empirical research, critical theory, and policy studies, all of which aimed at changing the manner in which law is analyzed and assessed.⁶

Complementing John's multiple activities on the domestic front has been his service to the cause of international law reform, since 1998 as a member of the Advisory Committee for the *Restatement of Restitution and Unjust Enrichment, Third*⁷ and since 2007, as a full member of the American Law Institute (ALI).

Finally, John's decades as a stimulating teacher and graduate supervisor, during which time he piqued the curiosity of his students and colleagues and provided them not just with the tools to recognize defects in the law but also with the desire to act—through the development of contract precedents, negotiation, lobbying and litigation—to remedy inadequacies and injustice in the law.⁸

That is a daunting record. It is clearly beyond my capacity to capture fully the enormous impact that John's activities in each of those dimensions have had on law reform in Canada and internationally. To do so would require nothing less than a bevy of authors addressing a bevy of topics, methodologies, and processes. At best I can point to common themes in his *oeuvre* and show how others have carried forward law reform methodologies and approaches that he pioneered.

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5. *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Education in Law (Social Sciences and Humanities Research Council, Minister of Supply and Services, Canada, 1983) (Chair, HW Arthurs).
 6. As Editor-in-Chief between 1989 and 1996, he was responsible for positioning the journal as one of the leading forums for progressive legal scholarship in Canada. In addition, the journal published three outstanding symposia during his editorial tenure: "Impact of the Charter on the Public Policy Process: A Symposium" (1992) 30:3 Osgoode Hall LJ 499-652; "Symposium Towards the 21st Century: Canadian/Australian Legal Perspectives" (1993) 31:2 Osgoode Hall LJ 1-471; "Symposium: Michael J Trebilcock's the Limits of Freedom of Contract" (1995) 33:2 Osgoode Hall LJ 209-352.
 7. *Restatement of Restitution and Unjust Enrichment, Third* (2 vols) (2011). John is one of a very few non-Americans to serve on American Law Institute (ALI) advisory panels, let alone achieve election as full members as he did in 2007. The law reform methodology of the ALI as a private legislature is significantly different than that found in governmental law reform agencies in Canada. It would be interesting to assess the extent to which his recent US experience has influenced his views of and approach to law reform over the past five years.
 8. John's teaching was informed by consulting work in his fields of interest, for government (for example, as Chair of Legal Aid Ontario since 2007), for Non-Governmental Organizations, and for the private sector legal practice (since 2000 he has been an Associated Scholar with Davies Ward Phillips & Vineberg LLP).

There is a second reason that my effort in this essay to celebrate John's career as law reformer sounds in paradox. Anyone familiar with our respective contributions to one kind of law reform—that reflected in consultation documents, studies and reports emanating from an official state agency charged with examining the current state of the law and making recommendations for its modification or repeal—would know my debt to him.

The three years that I served as President of the reconstituted Law Commission of Canada (LCC) (1997–2000) immediately followed John's tenure as Chair of the OLRC (1993–96). Although I had thrice contributed to OLRC projects in the 1980s and early-1990s, my real apprenticeship in institutional law reform came when I had the good fortune to participate in a major undertaking of the OLRC during John's period of leadership.⁹ Not surprisingly, much of what was accomplished by the federal law reform agency while I was President could be recast as the continuing pursuit of themes, ideas, approaches, and processes that had been uncovered, promoted, or honed by John.¹⁰

A third paradox in my celebration of John's contributions to law reform has a more personal dimension. Ten years ago, I authored a short book entitled *Lessons of Everyday Law*,¹¹ which was a revised collection of President's Messages published on the website of the LCC from 1998–2000. One of the most popular of those Messages was a story comparing the travails of maintaining the dock at a summer cottage against the ravages of winter ice floes to the business of proposing reforms to legal rules that seemed constantly to bump up against countervailing

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9. In 1995, I was invited to participate in the work of the Ontario Civil Justice Review. The Fundamental Issues Group of the Review, in collaboration with the OLRC, commissioned me to write an essay on various dimensions of access to civil justice. This paper was ultimately published as Roderick A Macdonald, "Prospects for Civil Justice," in the Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1996) at 1.
 10. A close reading of the 1998 *Strategic Agenda* of the LCC in conjunction with the OLRC *Final Report* will reveal the extent of John's impact on how the federal commission came to understand its mandate. The connections between the two commissions ran deep, involving both ideas and personnel. For example, the first Vice-President and second President of the Law Commission of Canada was Professor Nathalie Des Rosiers, who was serving as a Commissioner of the Ontario Law Reform Commission under John's leadership when the OLRC was defunded in 1996. See Law Commission of Canada, *Strategic Agenda* (Ottawa: Supply and Services Canada, 1998) [LCC, *Strategic Agenda* 1998]; Ontario Law Reform Commission [LCC, *Strategic Agenda* 1998]; Ontario Law Reform Commission, *Final Report* (Toronto: Queen's Printer, 1996) [OLRC, *Final Report*].
 11. Roderick A Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queens University Press, 2002) [Macdonald, *Lessons of Everyday Law*].

social practices and behaviours. That little essay was entitled “Sometimes it’s better just to fix the dock ...”¹²

What, until now, only John and I know is that I got the idea and the metaphor directly from him. In an informal setting a few years earlier he was patiently explaining to a group of younger law professors the opportunities and constraints on law reform by reference to a quotidian issue of home ownership about which he had recently been puzzling. When should you be content simply to fix a dilapidated part of a driveway? And when should you do more, perhaps even going whole hog—resurface the entire driveway, rebuild the garage, change the side door of the house to give better access, fix the roof and eavestroughs so that storm water was not constantly hollowing out the ground under the driveway, and so on? My own little story was a pale reflection of the richness of John’s original anecdote. In John’s version, the tale was not simply about the goals (or ends) of law reform; he also drew out the richness of the methods and modalities (the means) of law reform with careful allusion to the problems of institutional design and instrument choice.

With that confession of academic sin out of the way, I now feel less guilty (although just as inadequate) about offering this tribute to John McCamus as law reformer. For the over thirty-five years that I have known John, I have marvelled at his scholarship and his commitment to the law and its betterment. But my admiration goes deeper than mere passive observation. If you were to lay our curriculum vitae side-by-side you would observe that almost every role I have played in law—as professor, as Dean, as President of a Law Reform Commission, as Chair of a Task Force on Access to Justice, as Editor-in-Chief of a Law Journal, as Board Member of a Non-Governmental Organization (NGO), as participant in foreign and international law reform bodies—I have done in John’s footsteps. I can only hope that as he reads this recitation he will resist the urge to take offence at me being a copycat. After all, everybody knows that imitation—whether conscious or inadvertent—is the sincerest form of flattery.

II. INTRODUCTION

I have entitled this essay “Law Reform for Dummies (3rd edition).” So as to avoid any misinterpretation suggesting disrespect of citizens, and to provide an overview of the essay’s basic theses, let me briefly explain that choice of title.

12. *Ibid* at 55.

To begin, I focus in this essay on the law reform endeavour as seen from the perspective of citizens—that is, those people who experts in any given field delight in erroneously dismissing as ‘dummies.’ Over the past four decades, there has been a vast corpus of writing about law reform, by professionals (most often law professors), aimed at other professionals,¹³ and far too little writing about law reform either by non-professionals or aimed at the general public.¹⁴ But, as the popular “XYZ for Dummies” series of guidebooks reminds us, most fields of knowledge apparently dominated by ‘experts’ or ‘professionals’ are fully capable of being understood by the lay public. Law in particular need not, and should not, be the preserve of the knowledgeable (of the so-called *cognoscenti*). Because *law* itself is the affair of all citizens, ‘dummies’ must be key players in the *law reform* enterprise.

The growth of the public legal education (PLE) movement evidences the appetite of citizens for information about law and legal processes. Until now, PLE bodies have focused on producing publications that, like the “XYZ for

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13. I confess to having contributed inordinately to this literature set. See *e.g.* Roderick A Macdonald, “Access to Justice and Law Reform” (1990) 10 Windsor YB Access Just 287; Roderick A Macdonald, “Recommissioning Law Reform” (1997) 35:4 Alta L Rev 831; Roderick A Macdonald, “Triangulating Social Law Reform” in Y Gendreau, *Dessiner la société par le droit* (Montreal: Editions Thémis, 2004) at 119 [Macdonald, “Triangulating”]; Roderick A Macdonald & Hoi Kong, “Patchwork Law Reform: Your Idea is Good in Practice but it Won’t Work in Theory” (2006) 44:1 Osgoode Hall LJ 11 [Macdonald & Kong, “Patchwork Law Reform”]; Roderick A Macdonald, “Unitary Law Reform, Pluralistic Law Re-Substance: Illuminating Legal Change (2007) 67:4 La L Rev 1114. [Macdonald, “Unitary Law Reform”].
14. At the outset of its mandate, the Law Commission of Canada explicitly sought to change the register of law reform work and the target of its products. The *Act Respecting the Law Commission of Canada* mandated the Commission to constitute an Advisory Council. See RSC 1998, c L-6.7, s 18 [*LCC Act*]. Of the twenty appointed members of the Advisory Council, fourteen were not legally trained. Moreover, the LCC’s 1997 *Strategic Agenda* made clear the significant role that the LCC foresaw for citizens in the law reform process. Law Commission of Canada, *Strategic Agenda* (Ottawa: Supply and Services Canada, 1997) [LCC, *Strategic Agenda* 1997]. Under the leadership of Vice-President Nathalie Des Rosiers, extensive public consultation became a key feature of the Commission’s work. In developing its strategic agenda and its first five-year work plan the Commission canvassed the extant literature on law reform. The search turned up almost nothing aimed at citizens, either in the outputs of law reform commissions or in the critical literature about law reform produced by lawyers and law professors. For a discussion of the aims and ambitions of the Law Commission of Canada, see Roderick A Macdonald, “Law Reform and its Agencies” (2000) 79:1 Can Bar Rev 99 [Macdonald, “Agencies”]; Roderick A Macdonald, “La réforme du droit et ses organismes” in *Actes de la XIV Conférence des juristes de l’État* (Montreal: Éditions Yvon Blais, 2000).

Dummies” series, aim at providing how-to manuals in substantive fields of law: consumer law, wills and estates, landlord tenant, family law, personal income taxation, employment law, access to justice and courts, and so on. But there is clear evidence that citizens want more than simple information about law; they seek to understand, and they want to have a voice in, the law reform process.¹⁵ Yet, despite this public interest, to my knowledge no one, including the most dedicated PLE organizations, has yet produced a book or pamphlet on how to be an effective participant in the official law reform process.¹⁶

My title is meant to signal, in addition, that much law reform (even much official law reform) is directly generated by the actions of the general public. In this sense, the concept of “Law Reform *for* Dummies” also means “Law Reform *by* Dummies.” Ideally, citizens in a democracy should be active participants in the process by which parliaments manage the legislative process. That participation does not consist only in the quadrennial election of their representatives. Democratic theory imagines that citizens will be afforded opportunities to contribute directly to law-making through personal engagement in legislative consultative processes, just as the jury represents recognition of the important participatory role of citizens in the criminal justice process. Moreover, and more importantly, by contrast with totalitarian states, in a liberal democracy there will always be significant social space where the state leaves to citizens some responsibility for elaborating the normative regimes governing their daily lives in interaction with each other. That is, the absence of direct regulation through official law does not imply the absence of law *per se*. Rather, the assumption

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15. Today there are many groups that support active citizen involvement in political affairs. For example, Citizens Academy has a mission to teach ratepayers how to talk to municipal councils. Online: <<http://www.citizensacademy.ca/>>. Other groups provide assistance to citizens making complaints about the police or offer support for those launching access to information requests. At one level these actions can be seen as participating in law reform but, unlike citizen interest groups that seek to change official law, law reform is not the primary agenda of most of these organizations.
16. One of the longstanding and most successful PLE programmes in Canada is the Community Law Programme at the University of Windsor. Beginning in the early 1970s, it undertook projects using a variety of different communication formats—videos, pamphlets, seminars, radio spots, a travelling Community Law Caravan, et cetera—on almost all the substantive topics noted in the text. It also produced a litigation resource compendium on the court system, small claims court, the framework of civil procedure and evidence. Yet, despite the broad scope of the Programme’s activities, it did not publish materials explaining the role of the public in law reform; nor did it undertake activities meant to provide citizens with the resources and skills to participate effectively in the law reform process.

is that citizens themselves can and should be co-equal participants, in multiple normative sites, in the enterprise of law-making and dispute resolution.¹⁷

While this essay does not ignore the most visible specialized institutions for making proposals and recommendations to modify official law—namely, law reform commissions and analogous agencies—its concern is also with informal, unofficial law and unofficial agents of law reform. Over the past decade, and following the lead of the OLRC in the early 1990s, many commissions sought to involve the general population in their work through advisory councils, community forums, town-hall meetings, and on-line consultations. Some, like the LCC, even published materials and consultative documents that could well have been sub-titled “Law Reform Commissions for Dummies (1st edition).”¹⁸ Those initiatives represented a new and important departure for institutionalized law reform because they were grounded in the assumption that, ultimately, ownership of law reform resides with citizens and not with Parliament or its delegated agencies. The point of opening up processes of law reform in that way was to explore how the idea of law reform could be more responsive to public concerns. At the same time, the goal was to bring to consciousness the assumptions that the public holds about the law reform process, and to show how those assumptions play out in the reform of the law, wherever it is found.

Finally, the modifier “(3rd edition)” in the title reminds us that the theory and practice of law reform today is different from that which sustained the initial explosion of independent, expert law reform commissions in the 1960s. The past half-century has witnessed a constant evolution in the manner in which institutionalized law reform has been pursued.¹⁹ One might identify three different

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17. I do not claim that this characterization of quotidian citizen interaction as lawmaking holds for all theoretical approaches to law. Many legal positivists, for example, might well acknowledge multiple non-state normative orders but would classify them as regimes of social (not legal) norms. Compare Lon L Fuller, “Human Interaction and the Law” (1969) 14 *Am J Juris* 1 (an early elaboration of the law-making role of everyday citizen interaction).
 18. A brief review of activities of this type undertaken by the Law Commission of Canada in its first few years is contained in Roderick A Macdonald, “The Changing Dynamics of Law Reform” (Paper delivered at the Conference of Canadian Law Reform Agencies, 28-29 March 1998) [unpublished].
 19. The essays collected in the *Promise of Law Reform* by Brian Opeskin and David Weisbrot offer a compendious review of the origins and evolution of law reform agencies in the Commonwealth. See Brian Opeskin & David Weisbrot, eds, *The Promise of Law Reform* (Sydney: Federation Press, 2005) [Opeskin & Weisbrot, *Promise of Law Reform*].

models, each with a particular preoccupation, of the law reform endeavour.²⁰ In a first round of reflection, attention was focused on the concept of reform. The ambition then was to create a mechanism for coordinating and structuring the great burst of energy aimed at the technical improvement of law. Whether the field was property, contract, torts, family law, successions, consumer law, landlord and tenant, real estate, or labour standards, it seemed that longstanding common law and statutory rules were in need of revision and updating.²¹ The main focus was black-letter private law and the primary research methodology was doctrinal comparison of the law of cognate jurisdictions. Although more and more fields of human activity became subject to regulation by governmental agencies over the next two decades, until the 1980s only rarely did commissions devote attention to the regulatory process, and even more rarely were there calls for policy analysis, empirical studies, and social law reform.²²

In a subsequent round of institutional law reform, reflected especially but not exclusively in the work of a trio of second generation commissions—the

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20. For an elaboration of three models of law reform commissions in Canada written shortly following the demise of the LCC, see Roderick A Macdonald, “Jamais deux sans trois... Once Reform, Twice Commission, Thrice law” (2007) 22:2 CJLS 117 [Macdonald, “Jamais deux”]. In proposing these three models, I acknowledge that I may be emphasizing disjunctures that may be more differences of degree than differences in kind. The point, however, is to suggest that the preoccupations of institutional law reform agencies are not completely insulated from broader political tendencies in society and that only recently has a concern for, among other things, public consultation and input become a central theme in law reform commission work.
21. The reports of the OLRC over its first two decades reflect this orientation and are representative of the activities of other provincial law reform agencies. A complete listing of Commission Reports and Study Papers may be found in Appendix A of OLRC, *Final Report*, *supra* note 10 at 43-47.
22. A significant exception to this general orientation in the work of Canadian law reform commissions could be found in the projects undertaken by the Law Reform Commission of Canada (LRCC). From the outset of its operations in 1971, this commission engaged in major projects of public law, commissioned important empirical studies, and explored legal questions with significant social policy implications. See JW Mohr, “Comment” (1974) 12:2 Osgoode Hall LJ 421 (commenting on the article by JN Lyon entitled “Law Reform Needs Reform” published in the same issue); Edward F Ryan & The Honourable Mr. Justice Antonio Lamer, “The Path of Law Reform” (1977) 23:3 McGill LJ 519, Comment. Paradoxically, the work of the LRCC was subjected to greater scrutiny and more critique than other commissions, mainly because it was thought not to be sufficiently imaginative in pursuing this broader mandate. See *e.g.* Ross Hastings & RP Saunders, “Ideology in the Work of the Law Reform Commission of Canada: The Case of the Working Paper in the General Part” (1983) 25:2 Crim LQ 206; Teresa Scassa, “A Critical Overview of the Work of the Law Reform Commission of Canada: Learning from the Past” in *Federal Law Reform Conference: Final Report* (Halifax, NS: Atlantic Institute of Criminology, 1993).

(LCC) (1997), the British Columbia Law Institute (BCLI) (1998), and the Law Commission of Ontario (LCO) (2007)—much more attention was placed on issues of public law and institutional design: What are the various agencies of law reform? How many varieties of law reform “commission” are there? What, if anything, are the specific strengths of the commission model of law reform?²³ That change in orientation occurred in part because promoters of second-generation commissions were required to find novel ways to organize and finance law reform.²⁴ Some first generation commissions also became more interested in and responsive to interdisciplinary approaches, such as law and economics during that period, but analytical positivism continued to be the dominant intellectual framework for most law reformers.²⁵

Today, it may be argued, the practice of institutional law reform is entering a third iteration. Most significantly, at some commissions recent developments in legal theory are now informing how projects are conceived and conducted. In addition, the choice and framing of projects now shows the impact of increased socio-demographic diversity in Canada. For example, with the recognition of the importance of transnational law, religious law, indigenous law, and locally-generated non-official law, sociologists and anthropologists have begun

23. For analysis and discussion of the anatomy of law commissions, see David Weisbrot, “The Future for Institutional Law Reform” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 18.

24. All three were resurrections of law reform commissions that had been closed by governments in the 1990s. The Law Commission of Canada was reconstituted as a departmental corporation accountable to Parliament through the Minister of Justice. *LCC Act*, *supra* note 14. It replaced the LRCC, which was closed by the government of Canada in 1992. The British Columbia Law Institute was created as an NGO in 1997 as a successor to the British Columbia Law Reform Commission, which was closed in March 1997. Its sixteen members include nine appointed by its sponsors, the Ministry of the Attorney General, the Law Society of British Columbia, the British Columbia Branch of the Canadian Bar Association, the three law faculties in British Columbia, and the British Columbia Society of Notaries Public. The LCO was established in 2007, ten years after the OLRC was defunded by the Ontario government. It is a partnership among the Ministry of the Attorney General of Ontario, the Law Society of Upper Canada, Osgoode Hall Law School, and the Law Foundation of Ontario. It also receives funding and in-kind support from York University. The other law faculties in Ontario are “supporters” of the LCO and, along with the current funders of the commission other than York University, were parties to the agreement to establish the LCO.

25. For discussion of the central themes in the theory of law reform at this time see Roderick Macdonald, “Continuity, Discontinuity, Stasis and Innovation” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 87.

to play a larger role in shaping inquiry into law reform.²⁶ Surprisingly, however, few law commissions have sought to theorize their new practices. The question of how one would undertake the endeavour of law reform from a socio-legal point of view remains largely unexplored.²⁷ This is an issue I take up in the substantive sections of this essay.

I have organized my reflections as a contrarian take on conventional wisdom about processes of law reform and law reform commissions. I explicitly adopt a legal pluralist perspective so as to highlight the multiple roles that citizens play in the reform of official and unofficial law in Canada.²⁸ In so doing, I also aim to illustrate two collateral points: Neither is there anything necessary about official law reform commissions as agents of law reform, nor are those commissions always the optimal vehicle for engaging citizens actively in law reform processes.²⁹

I now turn to my first theme.

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26. See Audrey Macklin, "Law Reform Error: Retry or Abort?" (1993) 16:2 Dal LJ 395; Don Chalmers, "Science, Medicine and Health and the Work of the Australian Law Reform Commission" in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 374.
27. For a rare recent attempt to grapple with the theoretical challenges, see Marcia Neave "Law Reform and Social Justice" in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 358. For earlier efforts, see RA Samek, "A Case for Social Law Reform" (1977) 55:3 Can Bar Rev 409; Macdonald, "Triangulating," *supra* note 13.
28. I acknowledge that there are many hypotheses of legal pluralism. For present purposes, I shall take my own perspective as an example. See Roderick A Macdonald, "Custom Made—For a Non-chirographic Critical Legal Pluralism" (2011) 26:2 CJLS 301. For two essays about law reform that adopt this conception of legal pluralism, see Macdonald & Kong, "Patchwork Law Reform," *supra* note 13; Macdonald, "Unitary Law Reform," *supra* note 13.
29. There is, admittedly, something of a paradox in entitling this essay as "Law Reform for Dummies (3rd edition)." Its goals seem at odds with its form. That is, this is another theoretical article written by a legal expert intended to be read by other legal experts and published in a venue read by legal experts. Yet its primary message is that more law reform needs to acknowledge the role that citizens play in law reform and that if we examine law reform from a legal pluralist perspective we will see how much contemporary law reform is in fact effectuated by citizens and not parliaments and courts. Should not, therefore, this essay be written in more accessible language and published in a popular, non-professional venue? Of course, the general public should be informed of its law reform role and should be conscripted overtly into formal law reform processes. Many of the conferences and public speeches of the LCC took this approach to promoting law reform. See *e.g.* Macdonald, *Lessons of Everyday Law*, *supra* note 11. At the same time, the LCC also directed its message at educating legal professionals to this reality. See Roderick A Macdonald, "Law Reform and its Agencies" (2000) 79:1 Can Bar Rev 99. Given that this article is intended as a tribute to John McCamus' professional career, it has been purposely cast in the latter mode.

III. LEGAL CHANGE AND LAW REFORM THROUGH THE LENS OF LEGAL PLURALISM

One of John McCamus' singular contributions to law reform has been his clear but subtle sense of what the enterprise of law comprises. As a result, he has rarely been dogmatic about the goals of law reform, about how it should be pursued, in what fora, and by whom.³⁰

For John, one of the central aspirations of law reform must be to engage the general public in the process of reconceiving the law to ensure that it is relevant, responsive, effective, equally accessible to all, and just. Law is not brute fact, but is a fragile human accomplishment, which is at once a powerful and dynamic human institution. It reflects, at the same time as it helps to shape, the character of a society. Law is a powerful lens through which citizens are able to view and judge their society. Over time, it comes to express citizens' beliefs and convictions as well as their prejudices and pathologies.

While contemporary states have established numerous legal institutions like legislatures, courts, and regulatory agencies to identify and promote the values to which they aspire, John understood law in modern society to comprise more than the norms produced and administered by those official bodies. Some of the most fundamental coordinating rules by which Canadians organize their lives together are neither enacted by Parliament and provincial legislatures nor formally recognized and applied by courts and administrative agencies. These unofficial rules arise in multiple sites of daily human interaction.

Many people—most especially legal professionals—do not consider the informal law of everyday practice and usage as real law. They hold that only statutes and judicial decisions are a true *legal* reflection of a society's quest for justice. On that view, because law is an official institutional product, law reform also must be an official institutional product; just as there can be no informal law, there can be no informal (or unofficial) law reform. By contrast, scholars who, like John, have toiled in the manifold vineyards of law reform know that all legal artefacts—both formal and informal—are in constant evolution. Institutional

30. The following three paragraphs are adapted from the LCC's 1997 *Strategic Agenda* and the first *Annual Report* of the LCC, which were themselves inspired by conversations between John McCamus and the author at the Law Reform 2000 Conference of the Federation of Law Reform Agencies of Canada, held in Edmonton, Alberta on March 28-29, 1998. See LCC, *Strategic Agenda* 1997, *supra* note 14; Law Commission of Canada, *Annual Report* (Ottawa: Supply and Services Canada, 1998).

law reform occupies an important, but modest, place in the ongoing endeavour of legal change.

Some fifteen years ago, as President of the LCC, I visited junior elementary schools across Canada to make presentations about law and law reform. On one memorable trip to Charles Webster School I ended my talk with the following question: “So then, where do we find law?”³¹ A young girl was the first to respond and offered an unusual answer: “Under the bed.” *Under the bed?* I had been expecting a response like “in law books” or possibly, “in Parliament” or “in courts,” or even “in the police station” or “in prison” or “in lawyers’ offices.” Her evocation of the gremlins and other unspeakables that hide themselves under the beds of children caught me short.

Not surprisingly, I was unable to formulate an intelligent follow-up on the spot. The response of that student was so far beyond what I was anticipating that I could not quickly find a way to link it with the theme of my presentation. But some weeks later, as I was preparing the introductory section of the LCC’s second *Annual Report*, I realized that her answer was not so off the mark—although perhaps not in the way she intended. Her answer was another way of asking why we should think that law is found only in the official organs of the state that interpret and enforce the norms enacted by legislatures. After all, we have long recognized that health and disease are not just found in hospitals, clinics, medical laboratories, doctor’s offices, ambulances, and morgues.³² Indeed, the whole field of scholarly inquiry called public health engages holistic reflection about well being and disease. By contrast, however, such general reflection about the scope of inquiry has not acquired pride of place in scholarly writing about law and justice. Very few scholars have taken up Lon Fuller’s challenge to see law as the quest for good and workable arrangements for facilitating human interaction.³³

31. Charles E Webster Junior Public School is located at 1900 Keele Street in Toronto, a few blocks above Eglinton Avenue. It was opened in 1952 as the Charles E Webster Elementary School. I was a pupil there from 1953-1960, where I passed successively from K to grade 8. In the 1950s, it served a mixed population ranging from welfare families to the children of doctors, pharmacists, and lawyers. Today, however, the school caters primarily to a lower socio-economic stratum. Ontario Ministry of Education, Elementary School Profile, *Charles E Webster Public School*, online: <http://www.edu.gov.on.ca/eng/sift/schoolProfile.asp?SCH_NUMBER=101605#demo>.

32. For an indirect reflection on the differences, see Chalmers, *supra* note 26. I do not go so far as to say that official law is like a nosocomial infection the way the hospital diseases are nosocomial infections.

33. Fuller first elaborated this challenge, which he labeled economics. See Lon L Fuller, “American Legal Philosophy at Mid-Century,” Book Review of *Jurisprudence: Men and Ideas of the Law* by Edwin W Patterson, (1954) 6:4 J Legal Educ 457. For a thorough study of Fuller’s work on economics, see Kristen Rundle, *Forms Liberate* (Oxford: Hart, 2012).

Regardless of what my young respondent may have intended, I took the phrase “under the bed” to mean “any place that we would not normally consider looking ... *or might even be afraid to look.*” In that insight she was revealing herself to be a thoughtful legal pluralist and at the same time an unlikely candidate for success as a law student. After all, most activity in law faculties assumes that law is about creating and using officially-enacted rules either to avoid having state power visited upon oneself or to conscript state power to coerce others into doing what one desires. But her unusual answer set me thinking about how one might one go about “reforming” the law that is found “under the bed.” Does “under the bed law” even have a form that could be reformed?

These questions suggest a key theme in contemporary approaches to law reform. Assuming that law is understood as “the enterprise of subjecting human conduct to the governance of rules,” what would legal pluralistic law reform look like?³⁴

To pursue this inquiry, I realized, would require jettisoning three postulates of orthodox approaches to organized law reform. First, it would be necessary to accept that law reform, like law itself, *need not be institutionalized in a particular way.* A specialized, independent, expert agency would be only one site of law reform, and official law would be only one of its research targets. Interestingly enough, the mandate of some law reform agencies was and is sufficiently broad to encompass “under the bed” law.³⁵ But despite this license to think broadly

34. The phrase in quotations is from Lon Fuller, *The Morality of Law*, 2d ed (New Haven: Yale University Press, 1969) at 106.

35. Consider, for example, the legislative mandate of the former LCC:

... to study and keep under systematic review, in a manner that reflects the concepts and institutions of the common law and the civil law systems, the law of Canada and its effects, with a view to providing independent advice on improvements, modernization and reform that will ensure a just legal system that meets the changing need of Canadian society and individuals in that society.

LCC Act, *supra* note 14, s 3. The earlier *Law Reform Commission of Canada Act* framed an equally broad mandate that included: “(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 of individual members of that society.” RSC 1985, c L-7, s 11. The current LCO has a mandate to: “(a) make the legal system more relevant, accessible and efficient; (b) simplify or clarify the law; (c) use technology to increase access to justice; (d) stimulate critical debate about law, and (e) promote scholarly legal research.” Law Commission of Ontario, “The LCO’s Mandate and Underlying Values,” online: <<http://lco-cdo.org/en/strategic-plan-2008-2012-sectionIII>>. By contrast, section 2(1)(a) of the original *Ontario Law Reform Commission Act* cast the primary mission of the OLRC somewhat more narrowly, focusing on “reform of the law having regard to the statute law, the common law and judicial decisions.” SO 1964, c 78.

about law reform, the projects taken on by many tend to be similar to those one would expect from a Department of Justice; law reform is the business of proposing technical improvements to the official law of Canada.³⁶ Moreover, even in jurisdictions where a substantial policy development branch is attached to the Department of Justice, law reform initiatives for the most part aim at simple tinkering with existing conceptual categories and structures of official law.³⁷

Second, the methodologies and expected outputs of the law reform process would have to be broadened and pluralized. For the past fifty years projects typically privileged input from official legal actors and reports routinely concluded with proposals for *legislative change*.³⁸ The idea that there is a canonical type of norm by which law reform is to be pursued is consistent with the idea that there is a canonical institution meant to handle the task. Where a statute is being modified in whole or in part, it is reasonable to assume that the form of the proposed modification should be a standard-issue statute. But need this be the case with respect to other forms of official normativity like custom and judicially-declared law (the common law)?³⁹

Imagine that the entire field of official law being examined were to consist of common law rules, and assume that the proposed reform is to modify one or more specific legal principles. Instead of including a draft statute in an appendix, why could the report of a law reform agency not conclude with one or more

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36. This observation does not, however, apply to the LCC. Especially under the leadership of my successors as President, the Commission's reports sought to empower other actors to recognize their own law reform potential and responsibility. See the review of the LCC's work in Nathalie Des Rosiers, "In Memoriam: La Commission du droit du Canada / the Law Commission of Canada, 1997-2006" (2007) 22:2 CJLS 145 [Des Rosiers, "In Memoriam"]. Since 2007, the LCO also seems to be pursuing a similar agenda.
37. Even when the suggested improvements aim at deregulation, or the withdrawal of official law from a given field of human conduct, there is rarely a concomitant attempt to discuss what the unofficial replacement norms would look like. The assumption appears to be that once a field is opened for citizen norm-generation, there is nothing that a law commission should or could contribute to that informal norm-creation process.
38. Once again, especially in the period after 2000, the LCC took an innovative approach to outputs. It produced materials other than printed reports, consulted broadly among Canadians and sought to explore the living law in official sites such as the workplace. See Yves Le Bouthillier, "Introduction: The Law Commission of Canada / La Commission du droit du Canada" (2007) 22:2 CJLS 113.
39. For an elaboration of this point see Lani Blackman, "Products of Law Reform Agencies" in Opeksin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 102.

discursive judgments of the type delivered by a court?⁴⁰ These judgments would then be presented to a legislature to be enacted as common law rules deemed to emanate from the highest court of competent jurisdiction.⁴¹ Alternatively, might not the report of an agency recommend modifying the common law by means of a legislative overruling of one or more particular judicial decisions? Such an enactment might simply provide, for example, “the rule in *Rylands v Fletcher* is abolished.”⁴² Of course, “under the bed law reform” would not only have to embrace the enactment of norms in non-statutory form, it would also have to incorporate non-legislative strategies for legal change that reflect the same informal practices and processes by which the norms of “under the bed law” come into existence.

Third, an approach that embraced “under the bed law” would contest the postulate that law reform is *episodic and discontinuous*. Notwithstanding that the mission of contemporary law reform commissions is frequently stated in open-ended language, the expected deliverables are typically a series of specific recommendations to improve particular legal doctrines, concepts and rules, and to eliminate obsolescence and anomalies in official law that can be implemented by a legislature.⁴³ Behind this conception of the enterprise lies the belief that official law can only be changed by a discrete and explicit act of legislative or judicial will. The idea that law reform might consist of an ongoing process of

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40. During the 1990s, the OLRC did publish reports that suggested the need for legal change to be effected not by legislation but by judicial action. See *e.g.* the Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto: Ontario Law Reform Commission, 1991). Nonetheless, the form of these recommendations was classical and did not reflect the suggestion set out in the text.
41. The idea that a body of unenacted law may be enacted by incorporation is not unknown to the common law. Indeed orthodox reception statutes such as the *Property and Civil Rights Act* of Upper Canada enacted in 1792 do exactly that. For the current statute, see *Property and Civil Rights Act*, RSO 1990, c P-29.
42. Some provincial legislatures in Canada acted in this way with statutes purporting to abolish the rule in *Purefoy v Rogers*, but such approaches have rarely been advanced by law reform commissions. One of the most interesting attempts to modify the common law without actually stating the new rule in positive language can be seen in the United Kingdom’s *Animals Act*, which was enacted specifically to overrule a decision of the House of Lords in the following terms: “(1) So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by animals straying on to a highway is hereby abolished.” See *Animals Act* (UK), c 22, s 8.
43. See Brian Opeskin, “Measuring Success” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 202; John Hannaford, “Implementation,” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 222.

implicit legal change has no place in the official model of law reform. But “under the bed law” in all its permutations is in constant flux since its constituting practices are themselves constantly in flux; and this normative flux is every bit as much law reform as a *ukase* issued by a legislature or a court.⁴⁴

Together these three assumptions paint a picture of law reform as a particular type of legal change that finds its justification in the hypothesis that, absent such change, the law remains static and quickly becomes out of date: Legal change is held to be the exception, and legal stability is the norm.⁴⁵ As noted, the legal pluralist approach contests all three orthodoxies. Not surprisingly, in the manner of Heraclitus, legal pluralists hypothesize “change” not “stasis” as the foundational legal condition—even of official law.⁴⁶

Legal pluralists acknowledge that the text of a statute can change only when the authorized constitutional procedure is followed. So too they acknowledge that the specific language of a judicial decision, once rendered, is immutable. Certainly the linguistic “support” through which the legal norm is expressed has a formalistic character. But this does not mean that the norm to which the words of a statute or a judgment point itself remains fixed. For example, courts have been known to make decisions on the basis of legislation not yet proclaimed in force, especially ameliorative penal legislation. Occasionally, they simply interpret statutes contrary to the express text of a statute or code. Again, imagine a longstanding statutory rule the textual meaning of which is so encrusted with barnacles of judicial interpretation that the actual text of the statute is no longer litigated. Orthodox theory now holds that courts may reverse their earlier decisions about the meaning of a legislative rule. Because the mere act of application is an act of normative reshaping, every judicial decision affects the normative imprint of a statutory rule. So even where a court does not explicitly announce a reversal or modification of an interpretation of a statutory norm, we can see evidence of legal change.

44. One of the most prolific scholars to argue for the inherent movement of law and legal ideas has been the Scottish comparativist, Alan Watson. See especially Alan Watson, *Society and Legal Change*, 2d ed (Philadelphia: Temple University Press, 2001); Alan Watson, *Sources of Law, Legal Change, and Ambiguity*, 2d ed (Philadelphia: University of Pennsylvania Press, 1998); Alan Watson, *The Evolution of Western Private Law* (Baltimore: Johns Hopkins University Press, 2001).

45. For a provocative discussion that offers a powerful challenge to this idea, see Robert Samek, “Beyond the Stable State of Law” (1976) 8:3 *Ottawa L Rev* 549.

46. For the full implications of the pluralist approach to legal change, see Emmanuel Melissaris, *Ubiquitous Law* (London, UK: Ashgate, 2009).

Where a common law rule is concerned, the fact of constant normative change is even more obvious. Despite the doctrine of *stare decisis*, lower courts routinely depart from appellate decisions, either through overt or clandestine judicial extension, limitation or overruling of a precedent.⁴⁷ Yet the theory remains entrenched. Some years ago the Kelly Commission in Ontario was struck to deal with the backlog of cases in the Court of Appeal.⁴⁸ It proposed the creation of two divisions of the court: a law-applying division and a law reform division that had explicit authority to modify existing precedents. Not only was the proposed distinction in appellate functions untenable, it rested on the assumption that there can be pure adjudication that does not modify the meaning and scope of the norm ostensibly being applied. The Kelly Commission's recommendations were never adopted, in part because critics were successful in convincing the government that even were such a formal division of appellate function to be legislated, implicit change to common law rules through constant judicial interpretation would continue unabated.⁴⁹

Of course, it is not just courts and professional legal practice that effect changes to official law. Legal rules are meant as guides to human behaviour. As long as everyday practices seem to track these rules we see official law as unchanged. But what if they do not? Imagine that a group of businesspeople in a particular industry interact in conformity with a certain understanding of what performance of a contract requires. When an outsider contests that understanding in court on the grounds that the practice does not conform to the accepted judicial interpretation of the relevant common law or statutory rule, the question arises whether the law has changed. Only rarely will courts accept that a change in practice can change the textual expression of judicially or legislatively announced law. Rather, they will use an array of procedural doctrines such as acquiescence, laches, estoppel, and so on, to prevent (in that case) the litigant from denying the normative change consequent on accepted practices within the industry in question.

47. Melvin Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1991); Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008).

48. Ontario Ministry of the Attorney General, *Speedy justice for the litigant; Sound jurisprudence for the province – Report of the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario* (Toronto: Ministry of the Attorney General, 1977) (Chair: The Honorable Arthur Kelly).

49. For an assessment of the Kelly Commission Report, see RA Macdonald, "Speedy Justice for the Litigant: Sound Jurisprudence for the Province" (1978) 16:3 Osgoode Hall LJ 603.

The point may be generalized beyond norm-creating practices in business interaction. The central insight of a legal pluralistic approach is to recognize that, however static the law in books, the living law is always in motion.⁵⁰ Citizens are always the most important law reformers, constantly changing the substance of official written law through their practices. Even more importantly, their normative efforts are directed not just to official law. Quotidian interaction in myriad situations is the generator of the everyday law that is constantly being made and remade by citizens. Together, citizens renew the law by living the law, often managing to redress the injustices of an official law that legislatures are unable or unwilling to change. The *unofficial* practices by which this everyday law is constituted, debated, followed, and ignored are the real engines of *official* law reform.

The most obvious reflection of direct citizen law reform can be seen in jury nullification, either of a criminal prohibition or, in states that still permit civil juries, of settled doctrines of private law. Only under the most dogmatic definition of law would it be possible to hold that the consistent refusal by juries to convict abortionist Dr. Henry Morgentaler did not constitute law reform.⁵¹ Inversely, sometimes law reform occurs by preventing legal action. Where a legislature is unable to pass new law (to overrule jury nullification, for example) as a result of public opinion, one sees legal change through the prevention of legislative action and the reliance on practice to establish relevant norms. In both examples, the story is one of law reform by citizens through changing judicial outcomes, not changing legislative inputs. For a legal pluralist, traditional legal theory notwithstanding, all modes of legal change comprise law reform.

Over four decades, John McCamus has been a powerful agent of law reform. Whatever classical understandings may prescribe as the optimal vehicles to achieve law reform—law reform commissions, task forces and public inquiries—John's most sustained law reform endeavours have occurred elsewhere; in practice, in NGOs, in his scholarship, and in the classroom. Moreover, while he has attended to the formal deposit of official law in his two treatises, his research, practice, and NGO service have also been directed to the multiple sites of informal normative

50. The point is not new and was thoughtfully theorized by Eugen Erlich a century ago. For recent appreciations, see Marc Hertogh, ed, *Living Law* (Oxford: Hart, 2008); Donald Fyson, *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada* (Montreal: Hurtubise, 2010).

51. *Morgentaler v The Queen*, [1976] 1 SCR 616, 53 DLR (3d) 161; *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 1. For early examples of jury nullification in Canada see R Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada* (Toronto: University of Toronto Press, 2009).

engagement where “under the bed law” is generated and developed. This is why, whether or not he would characterize his approach as that of a legal pluralist, legal pluralists would have no difficulty in characterizing him as one of theirs.

This brings me to my second theme.

IV. SITES AND MODES OF LEGAL PLURALISTIC LAW REFORM

Despite John’s extensive experience in provoking, recognizing, and managing legal change in a variety of sites, many observers see his impact on law reform as best exemplified in his years as Chair of the OLR. Still, even in that orthodox role he displayed creativity and a sense of the possible that was genuinely innovative.

Throughout his career, John has not been afraid to ask law reform’s hardest question of process: On a case-by-case basis, what is the optimal means, including a conscious decision not to propose explicit legal change, for achieving a particular policy goal? Embedded in this question are two inquiries. One aims at “instrument choice” or the “site” of law reform: In any given situation, what formal or informal institution is best placed to pursue the desired law reform agenda? The other is directed to “institutional design” or the “mode” of law reform: Once the appropriate site for managing reform has been determined, what are the most apposite methods by which law reform should be carried forward?⁵²

Much attention over the past three decades has focussed on the first of these questions, as we have witnessed the waxing and waning of one site—the independent law reform commission.⁵³ Interestingly, however, while the idea of such independent commissions now seems to be in decline among professional politicians, the mandate, mission, and methodologies of surviving commissions have evolved to reflect the richness of contemporary conceptions of law. For example, the strategic agendas of the resurrected, though later abolished, LCC⁵⁴ and the LCO have been oriented not just to the recognition and improvement

52. These two inquiries are inter-related. For example, if it is thought that a law reform commission force rather than the promotion of a body of innovative scholarship is optimal in a given situation, there is a strong likelihood that a legislative solution will be recommended. Conversely, if it is concluded that an evolution in common law is preferable to legislation, it is likely that a dedicated inquiry or task force will be chosen as the reform vehicle.

53. Macdonald, “Jamais deux,” *supra* note 20.

54. To simplify the syntax of presenting the work of the LCC and the LCO in parallel, I shall refer to the former throughout this part as if it were still in existence.

of law that can be found “under the bed”;⁵⁵ so too has their conception of the tools and outputs of law reform “where the wild things are.”⁵⁶ In their work one can find the intellectual legacy of John McCamus, masquerading as Maurice Sendak.⁵⁷

As second-generation law reform agencies, the LCC and the LCO have a pair of features that distinguish them from their predecessors. First, their work is more connected to the specific intellectual and research preoccupations of the contemporary legal academy. While earlier commissions were also closely connected to law faculties, the types of research they undertook reflected orientations of particular interest to the legal profession.⁵⁸ Second, much more than earlier law reform commissions, second-generation agencies’ studies and reports take cognizance of insights developed by different strands of critical legal theory.⁵⁹ Not surprisingly, the design of projects and research of these newer commissions has been focussed less on the analysis and critique of existing legal

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55. See *supra*, note 35 for the legislative mandates of these two commissions. The 1998 *Strategic Agenda* of the Law Commission of Canada set out its mission statement as follows: “The Mission of the Law Commission of Canada is to engage Canadians in the renewal of the law to ensure that it is relevant, responsive, equally accessible to all, and just.” LCC, *Strategic Agenda* 1998, *supra* note 10 at 1. According to its website, the mission of the LCO is: “Recommending law reform measures to make the law accessible to all Ontarians.” Online: <<http://www.lco-cdo.org/en/liaison-fall-2012>>.
56. Both commissions contemplate a variety of techniques for public consultation, and a variety of outputs in addition to published Reports. The *Annual Reports* of the Law Commission of Canada from 2001-2005 during the Presidency of Nathalie Des Rosiers display a remarkable variety of activities and law reform products. For the equally creative approach of the LCO, see online: <<http://www.lco-cdo.org/en/what-we-do>>. See also Des Rosiers, “In Memoriam,” *supra* note 37.
57. Maurice Sendak, *Where the Wild Things Are* (New York: Harper & Row, 1963).
58. For example, the Alberta Law Reform Institute has always been housed within a Faculty of Law, the OLRC and British Columbia Law Reform Commission routinely requested professors to undertake research studies or to act as project directors, and the Chairs of other commissions were often full-time law professors. In addition, these commissions also recruited legal academics as key researchers on their various projects. Today, the LCO is housed at Osgoode Hall Law School and counts the six Ontario law faculties among its founding partners.
59. Early in its existence, the LCC sponsored or co-sponsored several panels or symposia designed in part to familiarize its research staff not just with new developments in relevant areas of the law, but also with current debates in legal theory. The LCC also supported the attendance of its research staff at academic conferences devoted to emerging critical theoretical approaches.

categories and more on how social issues may be apprehended by law—what Hans Mohr and Robert Samek called “social law reform.”⁶⁰

In other words, these second-generation commissions have been willing to take their distance from mere tinkering with official law, leaving much of that doctrinal task to others. The past twenty years have witnessed the growth of a bevy of private contractors (including those who, but for a government research contract, would be called lobbyists for a particular interest group) and consultancies like accounting conglomerates that compete to undertake first-order analysis of particular legal rules and concepts. In addition, governments have shown greater inclination to establish ad hoc Royal Commissions, ministerial inquiries, and external task forces designed to address specific legally-constructed problems and to propose legislative reforms.⁶¹ Given the contemporary tendency towards economic globalization, it is also unsurprising that a more active law reform role is being assumed by international organizations like the United Nations Commission of International Trade Law,⁶² Unidroit,⁶³ the World Intellectual Property Organization,⁶⁴ the International Chamber of Commerce,⁶⁵ the International Maritime Organization,⁶⁶ the Hague Convention,⁶⁷ the World Bank,⁶⁸ and in the criminal law sphere by, for example, the International Criminal Court⁶⁹ and the International Criminal Tribunal for the former Yugoslavia.⁷⁰ The work of most of those bodies, especially in the private law domain, resembles that

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60. See, in particular, Mohr, *supra* note 22. Hans Mohr is a central figure in law reform in Canada, having been a Commissioner on the initial Law Reform Commission of Canada and later a key member of the Advisory Council of the Law Commission of Canada.
61. For a review of these other sites of law reform, see Ralph Simmonds, “Professional and Private Bodies” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 261; Ronald Sackville, “Law Reform Agencies and Royal Commissions: Toiling in the Same Field?” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 274; Laurie Glanfield, “Law Reform Through the Executive” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 288; Marise Payne, “Law Reform and the Legislature” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 302; Sir Anthony Mason, “Law Reform and the Courts” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 314; Michael Coper, “Law Reform and Legal Education: Uniting Separate Worlds” in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 388.
62. Online: <<http://www.uncitral.org/uncitral/en/index.html>>.
63. Online: <<http://www.unidroit.org/>>.
64. Online: <<http://www.wipo.int/portal/index.html.en>>.
65. Online: <<http://www.iccwbo.org/>>.
66. Online: <<http://www.imo.org/>>.
67. Online: <http://www.hcch.net/index_en.php>.
68. Online: <http://www.hcch.net/index_en.php>.
69. Online: <<http://www.icc-cpi.int>>.
70. Online: <<http://www.icty.org>>.

of first-generation law reform commissions, with their focus on conventions and protocols, model laws, and legislative guides.⁷¹

John McCamus has played a role in almost all these sites of law reform. But his most significant and lasting contribution has been to prepare the ground for twenty-first century law commissions to focus on the multiple unofficial legal regimes within which citizens live the norms of everyday law. In his final report as Chair of the OLRC, John reviewed the rationales for modern law reform commissions, suggesting future directions for both their mandates and methodologies.⁷² He pointed out the need for an agency that could: adopt a longer-term perspective, anticipating what kind of law will be needed in the future; take a multi-disciplinary approach; and genuinely engage the public in the formulation of projects and outputs. These observations, drawing on his work with the OLRC and with the Fundamental Issues Group of the Ontario Civil Justice Review,⁷³ constitute a prescient foreshadowing of the path of law reform down to the present.

A driving concern in John's conception of law reform was to enhance and to broaden processes of consultation at all phases of the endeavour. Where law reform is dominated by the political process, the choice of project topics and the manner of their formulation will be influenced, if not dictated, by the policy perspectives of the government of the day. Establishing an independent commission opens the door, at least in theory, to a much wider and less politicized reform agenda and invites engagement with the general public as to the projects that should be undertaken. John was a pioneer in reflecting on how consultations should take place.⁷⁴ Following his lead, the LCC developed an elaborate protocol that identified four distinct moments when public consultations would be organized.

71. See Terence Halliday & Gregory Shaffer, eds, *Transnational Legal Orders* (Cambridge, UK: Cambridge University Press) [forthcoming December 2014]; Graf-Peter Callies & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart, 2010).

72. OLRC, *Final Report*, *supra* note 10 at 18-23.

73. *Ibid* at 11, 27. John's introduction to the three volumes, published in connection with the Civil Justice Review, were an insightful elaboration of the aims and methodologies of law reform that have been pursued over the fifteen subsequent years. See Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vols 1 & 2 (Toronto: Queen's Printer, 1996) (Chair: John D McCamus); Ontario Law Reform Commission *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1996).

74. See OLRC, *Final Report*, *supra* note 10 at 19, 22-23, citing Ontario Law Reform Commission, *Annual Report*, (Toronto: Queen's Printer, 1967) at 7, 28.

A foundational theme is that commissions should engage the public as early as the development of a strategic agenda and work plan. Today, commissions typically establish multidisciplinary and socio-demographically diverse advisory committees to assist in this task.⁷⁵ Formalized consultation also should occur during the development phase of individual research projects. Multidisciplinary expertise and socio-demographic diversity are once again central goals that drive the design of project advisory committees. Occasionally, a complex project might be supported by more than one advisory committee. Throughout the life of projects, commissions now routinely organize scholarly workshops, information panels, and public forums to solicit feedback about the direction projects are taking.⁷⁶ This phase of consultation also deploys electronic media, including chat-rooms, on-line questionnaires, and video presentations to seek public input. And finally, the release of one or more study papers and public consultation papers (often accompanied with a survey instrument seeking input on specific questions) has become a key vehicle for developing and pre-testing the recommendations in reports.⁷⁷

Current experience with broadened public consultation suggests the value of such activities to improving the end product. In particular, frequent consultation at all stages of a project tends to keep the work more sensitive to the social impacts of proposals, and broadens recommendations beyond proposals of the black-letter law type. Such multi-dimensional consultations invite citizens to contemplate and articulate the normative structure of the community in which they wish to live, while avoiding polemical expressions of self-interest. Finally, continual attentiveness to public input changes the manner in which reports are presented and disseminated. Videos, CDs, websites, community forums,

75. The OLRC established an Advisory Board in 1989, and the LCC was given an Advisory Council by its constitutive legislation (*LCC Act*, *supra* note 14, ss 18, 19). On the LCC Advisory Council, see Macdonald, "Agencies," *supra* note 14 at 103-04. See generally, Ian Davis, "Targeted Consultations" in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19, 148 at 151-52.

76. The systematic deployment of these mechanisms of public consultation can be traced to the work of certain Royal Commissions of Inquiry such as the Rowell-Sirois Commission of the late 1930s. Perhaps the most ambitious contemporary inquiries in this regard have been the LeDain Commission, the Macdonald Commission and the Dussault-Erasmus Commission. For a discussion of the consultation methodology of the LeDain Commission, see M Green, "Gerald LeDain and the War against the War on Drugs" [forthcoming 2014].

77. See generally, Nathalie Des Rosiers, "Engaging Canadians in Law Reform" (Speech delivered at the Nova Scotia Legal Information Society, March 2001) [unpublished]; Davis, *supra* note 75 at 152-57; Roslyn Atkinson, "Law Reform and Community Participation" in Opeskin & Weisbrot, *Promise of Law Reform*, *supra* note 19 at 160.

and radio panel discussions expand the audience for law reform beyond legal professionals and legislators.⁷⁸

That is truly legal pluralistic law reform, involving input from and sensitivity to multiple constituencies reflecting multiple sites of informal law. Regrettably, however, despite the desire of today's commissions to avoid capture by special interests, it has proved difficult to temper the impact of organized industry groups that seek to shape projects to address their particular concerns.⁷⁹

There are two dangers attendant upon broad-based public consultations. Law reform romantics are wont to see unlimited public consultation as an unvarnished good, perhaps having the seventeenth-century "Levelers" in view as a model, while ignoring the twenty-first century "Tea-Partiers." Unless the consultation is carefully organized and managed, citizen responses can be sporadic, unrepresentative, and unfocused. More seriously, in such cases consultations tend to be dominated by citizens who have already adopted fixed (and often polemical) positions on the issues being discussed.⁸⁰ This is particularly the case with citizen participation in projects that have an avowedly social law reform dimension.⁸¹ Given the consultation imperative, contemporary law reform is increasingly beholden to narrowly-framed partisan—or NIMBY-DINK—lobbying.⁸² The acronym NIMBY (not in my back yard) draws our attention to the fact that in almost every law reform proposal, some sector of the population will bear a disproportionate burden of the reform; the acronym DINK (double income, no

78. See Blackman, *supra* note 39 at 187. See also, Macdonald, "Agencies," *supra* note 14 at 114-15.

79. For acknowledgements of the danger, see OLRC, *Final Report*, *supra* note 10 at 22; Simmonds, *supra* note 61 at 267-72.

80. Consultations are notoriously difficult to manage when public meetings are flooded with people who imagine that their rights and interests and beliefs are justified by and lodged in the constitution, holy writ, immutable custom or an historical balance sheet of rights and wrongs. Moreover, in these situations, participants will often read a prepared statement and leave the room when a different position is being defended. Occasionally, such participants will assert that they have not been consulted when, after all presentations have been concluded, their views are not adopted by decision-making body.

81. For a discussion of the experience of the LCC in relation to its project on Close Personal Adult Relationships where the initial focus of the project on examining all manner of adult relationship of dependence and interdependence became, under sustained lobbying from interest groups, increasingly directed to examining the question of "same sex marriage," see RA Macdonald, "Perspectives on Personal Relationships" (Paper delivered at the Conference on Domestic Partnerships 21-23 October 1999) [unpublished].

82. See RA Macdonald, "All Law Reform is Local: Is Meaningful Law Reform Possible After NIMBY-DINKS (a.k.a. "Special Interest Groups") Have Had Their Say?" (Paper delivered at the Law Commission of Ontario Conference, 13 May 2009) [unpublished].

kids) draws attention to the fact that in almost every law reform proposal, those who have the resources to reshape the proposal to their benefit (or to minimize any negative impact it might have on their interests) are disproportionately able to influence the outcome.⁸³

Even when a project is designed under a legal pluralist hypothesis, and regardless of whether the cause is progressive or regressive, inequality in the distribution of social and economic power means that organized special interests are usually able to defeat the diffused general interest. As the LCC discovered with its project on off-reserve Aboriginal governance, opportunistic, organized, self-interested lobbies can re-orient even the best-conceived social law reform agenda. Given that the legislative and judicial enterprise tends to reflect the existing distributions of social power, one important challenge of the new law reform is to discover when and how inherited conceptions of legal regulation implicitly marginalize or exclude groups of Canadians from processes of public deliberation, and to uncover measures to overcome their exclusion.⁸⁴ That is the challenge John left us in the *Final Report* of the OLRC, and it remains a challenge to which participants in all sites of law reform are still imperfectly responding.

V. CONCLUSION

For John McCamus, the central aspiration of law reform must be to engage the general public in the process of reconceiving law to ensure that it is responsive, equally accessible, and just.⁸⁵ Long before it became fashionable, John set about to organize institutional law reform so as to recognize the importance of unofficial,

83. NIMBY-DINK domination of consultation processes arises because these groups are frequently able to aggregate their resources, focus their resentments, and enlist powerful supporters. The challenge for law commissions is to organize consultations to facilitate popular mobilization but at the same time ensure that all interests, and not just the most affluent, articulate and well-connected, are heard. To date it would seem that no law commission has explicitly investigated how to set the ground rules for popular participation so as to achieve these objectives. I owe this insight to Harry Arthurs.

84. It is a measure of the importance of this development of longer term, multidisciplinary, and pluralistic law reform that the LCO has published two outstanding framework reports, on persons with disabilities and on older adults that achieve exactly this objective. See Law Commission of Ontario, *A Framework for the Law as It Affects Persons with Disabilities: Advancing Substantive Equality for Persons with Disabilities Through Law, Policy and Practice—Final Report* (Toronto: Law Commission of Ontario, 2012); Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto: Law Commission of Ontario, 2012).

85. This sentence is adapted from the Mission Statement of the now-defunct LCC, as set out in LCC, *Strategic Agenda* 1998, *supra* note 10 at 1.

living law of everyday life in building a just and respectful society. John understood legal rules to be interwoven into and indistinguishable from the everyday activities of life and work, with those rules both shaping and being shaped by those activities. Human interaction is more than the encrustation of experiential barnacles upon official legal rules. This interaction, by giving form and context to debate about many of life's most fundamental questions, powerfully symbolizes how citizens conceive their relationships with each other.

Unfortunately, however, such a view of the endeavour now seems out of favour with those who control the instruments of public governance. As ideology has progressively displaced evidence as a ground of policy development, the hope that law reform could appeal to an ideal of justice has faded. This change is largely attributable to a pair of false assumptions about the relative efficiency of different modes and sites of law reform. First, there is an assumption that law reform is speedier and less costly when executed through lobbies, litigation, and the courts than when it is developed through broad public consultations, the commissioning of expert studies, the collection of meaningful empirical evidence, and the investment of energy in political negotiation of workable legislative outcomes. The second assumption is that legal change should only move on a spur, as a response to sharply articulated revendications made by those with no generalized interest in law reform. When the law reform process is entirely responsive to political exigency, its outcomes rarely achieve better *substantive* law; they only reflect a different *form* of law.

Today, some of Canada's most pressing social and economic problems do not lend themselves to legal resolution through orthodox research leading to legislative action. Appropriate policy responses require research into social, economic, and cultural contexts as well as into the full panoply of instruments available to facilitate cooperative action among governments and citizens. One of the principal critiques of first- and second-generation law reform commissions was the narrowness of their vision and their focus on modifying legal individual legal rules.⁸⁶ Not surprisingly, when governments establish law reform commissions with an ends-driven mandate, these commissions typically respond by identifying success by reference to the extent that their proposals and recommendations are implemented—statutes passed, regulations modified, and even judicial overruling

86. See JN Lyon, "Law Reform Needs Reform" (1974) 12:2 Osgoode Hall LJ 421; Macklin, *supra* note 26; HW Arthurs, "Social Issues and Law Reform—Research Program" [unpublished]; RA Samek, "The Objects and Limits of Law Reform" (Ottawa: Law Reform Commission of Canada, 1975).

of precedents.⁸⁷ Yet, if state action is to be the exclusive measure of success of law reform proposals, it is not obvious that an independent, expert agency is the optimal law reform vehicle. The policy development unit of a Department of Justice is much more likely to achieve implementation by advancing proposals that will meet the political objectives of the government of the day.

By contrast, those third-generation law commissions taking a legal pluralist approach aim foremost to tackle problems that do not immediately lend themselves to a statutory solution. They see their primary role as preparing the terrain for future legislation by increasing public understanding of various policy options and by lighting the pathway rather than paving the road.

Art critics speaking of the Group of Seven typically hold that the Group was not just painting the Canadian wilderness. The Group actually created a category of knowledge and understanding called the “Canadian wilderness.” Its paintings have taught us how to see that wilderness, how to interpret it, and how to live in harmony with it. In much the same way, jurists involved in law reform help us to see what law is and enrich our understanding of its promise and possibilities. Legal pluralist law reform is the exercise of engaging citizens in dialogue through which they gain richer insight into their normative lives and learn how to manage their everyday interaction with each other.

This is why a key mission of law reform agencies must be to improve processes of public consultation and engagement. It is to enhance the capacity of citizens to understand the real legal problem that needs to be addressed and to frame and reframe ways of giving effect to citizen understandings. In this respect, recasting the symbolic role that law plays in articulating the principles and processes of social justice is far more important than modifying any particular legal rule.

John’s *Final Report* of the OLRC captures that ambition. Let me paraphrase what I learned from it.⁸⁸ Law is a precious societal resource. Sometimes, however, our reflexes about the forms and purposes of law are misdirected. The overuse of formal, state law is one such example. Because we instinctively respond to an issue by proclaiming, “There ought to be a law”, we tend not to ask what the real problem we face is and how it arises. Regrettably, our societal diagnostic skills often leave much to be desired. Even more regrettably, law reform agencies have

87. For a defence of this tendency, see WH Hurlburt, “The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to ‘Recommissioning Law Reform’ by Professor R.A. Macdonald” (1997) 35:4 *Alta L Rev* 880.

88. The message of the next two paragraphs is adapted from the third report of LCC, which shows the impact of John’s reflections about institutional law reform. See Law Commission of Canada, *Annual Report 1999-2000* (Ottawa: Minister of Public Works and Government Services Canada, 2000) at 17.

not fully exploited the capacity of law to educate, to incite debate, to guide, and to empower.

It is often said that education is too important to be left to professional educators alone. If that is so, we might derive the corollary that law reform is too important to be left solely to professional law reformers. In a liberal democracy, citizens are always the most important law reformers. In the end, the success of law depends on finding in personal interactions a framework of norms to nurture meaningful interpersonal relationships. These relationships develop through the interplay of social, cultural, religious and economic forces, which also shape how official law acknowledges them. In turn, official law plays back into the diverse social-cultural understandings that ground multiple regimes of everyday, unofficial law.

Only if we have a reasonably well thought-out idea of the aspirations of law reform can we recognize the limited, but special virtues of independent, expert law reform agencies. These virtues can be summarized in a single sentence: “Finding opportunities that allow Canadians to examine their assumptions about what they ask of their law, engaging in dialogues about where and why their expectations of law might be unrealistic, and involving them in the hard work of building more just official and unofficial legal systems is the true ambition of law reform—wherever and by whatever means it is actually carried out.”

Such a perspective is the guiding light for contemporary reform of “under the bed law,” and is the guiding motif behind “Law Reform for Dummies (3rd edition).” It is also how John McCamus understands law and law reform. It captures how he led the OLRC. And it informs every law reform endeavour, in every different site and through every different vehicle that he has pursued or deployed for more than forty years.