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A CASE FOR SOCIAL LAW REFORM

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I. *Preliminaries.*

In this article I shall contrast two approaches to law reform. I shall call them "legal" law reform and "social" law reform respectively. Although the former broadly describes the traditional approach, and the latter the new approach I am arguing for, I realize that law reform in the past has ranged over a wide spectrum, and that this is likely to continue. I am proposing the above classification merely because I believe that it may strike a spark, awaken a response in many lawyers who are dissatisfied not just with the present state of the law, but with its role, and their own roles in society. If I disappoint them in my treatment of the problem and in my conclusions, let them say so! We suffer from too much false complacency in our profession. Not only do we let sleeping dogs lie; all too often, we fail to remove their bodies.

I am very conscious of having said both too little and too much in this article. "Social" law reform has no fixed boundaries; it must create its own homeland and yet it must never settle there. Many of the ideas expressed here, I have turned over for a

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long time; others are relatively new. All are the result of a continuing dialectical process. Hence, there are tensions and gaps everywhere. But this is as it should be. I have long ago ceased to believe in the manicured glossy theory which explains everything for all time.

I have said that I want to strike a spark, awaken some response, but what for, to what end? Not just to start a polemic with me. Social law reform must be oriented to action if it is to be worthy of its name; it must project into the "real world" about which lawyers speak so much, without realizing how out of touch with it they are. The "social" law reformer must not be an idle dreamer, but on the other hand he must not jump on the bandwagon of instant results. His aim must be to translate the right thoughts into the right actions, and he must do whatever he can in his position to hurry on the change.

The burden of this article is that legal change cannot guarantee social change,[†] and that law reform therefore should focus on the latter, not on the former. Professor Noel Lyon, in a recent article which I cannot commend too highly,¹ *seems* to differ from me on this crucial point insofar as he sounds a clarion call for *legal* action. However, I shall suggest that we are not as far apart as we seem, and that his article too expresses a dialectical process rather than a clear-cut solution. It is for this reason that I shall comment on it in some depth, and use it as a means of pulling my own ideas together.

II. *Law Reform and Lawyers.*

Traditionally, the function of law reform has been left to Parliament and the courts, but of late it has become increasingly associated with a new type of institution, the "law reform commission".² Since the lawyer has little to fear from these new bodies, he has come to accept them just as he has come to accept law schools in the knowledge that they are in the safe hands of his own kind. It only seems natural to him that law reform should be his prerogative. In his eyes, only a lawyer can know what is wrong with the law because only a lawyer can understand it, and consequently reform it. Although today lawyers are

¹ J. N. Lyon, *Law Reform Needs Reform* (1974), 12 Osgoode Hall L.J. 422.

² I feel bound to disclose at this point that I have been a consultant to the Law Reform Commission of Canada, but it will become apparent that the views I express in this article are my own.

generally no longer trained by the profession, and an increasing proportion of those who qualify do not go into practice, it is still the profession which provides the institutional backbone for the whole class. The judiciary is appointed from its ranks, and it shares its philosophy and economic interests. The same is broadly true of academic lawyers, whose principal function is still to train the new cadres.

A little reflection should show that the lawyer's conception of his role in law reform is mistaken. The adequacy of a law cannot be evaluated with reference to purely legal criteria, for its legal value does not guarantee its social utility. A law is all too often a cloud that obscures the real social problems. We assume that they have the same shape as the cloud, and that if we change the cloud we thereby change reality. For the lawyer, there is the standing danger of surveying the social scene through legal blinkers. His legal training is so strong that he imposes the legal framework with its special concepts, classifications, procedures and institutions, on the world. The law reformer must avoid this kind of grid like the plague, for it forces him back into the very system which it is his job to change.

The traditional conception of law reform is merely an extension of the traditional conception of law. If law is a package of rules stamped out by Parliament and the courts, then, it is assumed, law reform must have for its object a change in these rules. A new set of rules must be stamped out in essentially the same way and covering essentially the same ground. The fact that law is more often than not a paper tiger, and that its teeth — if they bite — tend to bite the wrong victim is conveniently forgotten. The paper world of law is firmly drawn over our vision, so that we see only the reflection of the world through the letter of the law.

Law, in fact, does not operate in a straightforward manner as a package of rules. There are practices, conventions, discretions, expenses and delays — a host of countervailing forces, lurking like an iceberg below the surface. In practice, a lawyer knows this only too well. Where his bread and butter is concerned, he is not fooled by the legal paper world. But when he puts on his teaching or law reforming hat, he speaks and thinks *ex cathedra*. His client does not suffer from this split personality. To him, law is what it does. The same is true of the human subject of law reform. For him, the reform must project into his own life if it is to be of any use.

A programme of law reform which is cast in the image of the law that is to be reformed, can only add another distortion, another wrinkle to the present state of affairs, for such a programme attempts to draw the future into the present and suffocates any real hope for reform. As long as those who are charged with the task of law reform, direct their minds to legal, not to social evils, their "reforms" will miss the heart of the mischief which they purport to cure. Genuine law reform *is* social reform. Changing the letter of the law does not of itself cure one social ill. It merely changes the scenery on the stage; the play goes on.

III. *"Legal" and "Social" Law Reform.*

The starting point of "legal" law reform is dissatisfaction with some technical, or with some non-political social aspect of the law. This dissatisfaction is usually voiced, and nearly always articulated by lawyers. Its object is to change the law to meet the complaint, if such a change is thought to be warranted. The matter is investigated by lawyers, and any proposed change—except in the case of judicial law reform—is implemented by legislation, which is drafted by, and for the use of lawyers.

For instance, a Bar Association may criticize the provisions of a statute or code, or certain rules of the common law because they require clarification, revision, or consolidation, *or* because they no longer reflect the current social values. A law reform commission may be asked to look into the matter. The commission may then publish a report setting out its recommendations. This is passed on to the legal department of the provincial government concerned, or in the case of the Law Reform Commission of Canada, to Parliament, for consideration. If the department, or Parliament, approves, the necessary legislation will be drafted to implement the recommendation.

The common lawyer has been brought up in the tradition that the common law is infinitely perfectible, and that by a process of gradual internal change it can be brought up to date with the occasional help of Parliament. Law reform, on this view, is concerned with housecleaning and with keeping the law up to date with gradual changes in social practices. Both these tasks are regarded as non-controversial. Law reform is seen as a rational, non-political activity; politics, which are controversial, must be left to Parliament.

The starting point of "social" law reform is dissatisfaction with a social practice which may raise doubts about the humanity,

justice or efficiency of the established legal system. This dissatisfaction may be with a "primary" or with a "secondary" social practice. "Primary" social practices are the things which people do for their own sake as distinguished from "secondary" social practices which are the things which some people do to control or affect what other people do. For instance, the starting point of "social" law reform may be dissatisfaction with certain negative "primary" social practices, such as dangerous driving, mugging, tax avoidance, patronage in public contracts, pollution, overfishing, price gouging, loan sharking, shoddy public housing, racial and sexist discrimination, and so on; or with certain positive "secondary" social practices controlling the primary practices.³

The "social" law reformer will look at these "primary" social practices not through legal eyes, that is, as characterized by legal dogma, but with an open mind, and consider their manifold implications. For instance, he will consider the very diverse social circumstances in which social "crimes" are committed, and not simply accept the conventional legal categories. Similarly, the "social" law reformer will look at the reality of "secondary" social practices, to which legal practices belong. He will not consider dissatisfaction with a legal practice as anything more than a symptom that may help to put him on the right track of its underlying social disease. For instance, dissatisfaction with the ineffectiveness of the criminal law will not lead him merely to resort to such expedients as lengthening prison sentences. Although the "legal" law reformer pays lip service to the need for resolving the social problems of criminality, when it comes to the point he falls back into the same old *legal* ruts of diagnosis and treatment.

Dissatisfaction with a social practice may be voiced by anybody, and articulated by such spokesmen as political parties, vested interest bodies, churches, and community associations of every kind and size. The object of "social" law reform is to change the "primary" or "secondary" social practice with which dissatisfaction is expressed, if the law reformer considers that such a change is warranted. The "social" law reformer need not

³ There may be several levels of "secondary" social practices. For instance, first, there may be an administrative practice designed to control immigration; secondly, counter-moves by the immigrants to get round the practice; thirdly, responses by the immigration officials designed to block the counter-moves; fourthly, complaints about these responses; fifthly, the setting up of an independent board to deal with the complaints.

have any institutional standing, let alone an institutional role in the process of law reform; he may simply be a concerned citizen who wants to take part in it. He may follow his own procedure of investigation, and he may choose what he considers to be the most appropriate method of implementing the proposed social change. The motivation for "social" law reform must be "human" in the sense that it must draw on the open potential of human beings, and not be merely conditioned by some closed secondary concerns, such as selfish, institutional, or ideological interests. Unless secondary motivation is controlled by primary "human" motivation, it will take over from it and distort reality in its own image.

Obviously, in a highly institutionalized society such as ours, a citizen law reformer is not likely to achieve much on his own. In order to bring about any significant kind of social change, he will have to organize a campaign; he will have to rally the support of other like-minded citizens, and of institutions which he considers sympathetic, or which he hopes he can win over to his cause. Even so, if his proposed reforms conflict with strong vested interests, the chances are that he will not be successful in the short term. Nevertheless, he must brace himself for the struggle, and he must have faith in the outcome. This is what "social" law reform is all about.

Another question which will be raised is how a "social" law reformer can take it upon himself to evaluate social practices. What right has he, it may be asked, to impose his subjective values on the rest of us? It should go without saying that he cannot *force* his values down other people's throats, and seeing that he has no power, he knows this only too well. On the other hand, if he is to draw on his "human" motivation, he cannot abdicate his own values; he can only put them in perspective. I shall suggest that in Canada, he should take as his perspective those communal values which are most consistently appealed to by the Canadian people.

The "legal" law reformer assumes that law reform can and must be socially neutral in the sense that it need not, and must not, go beyond the social values implicit in the law itself, unless they are non-political. A law may be brought up to date so that it can continue to fulfil its original social objective in a changed social climate, and its object may be improved in the light of what the community, or the dominant majority opinion, considers to be fair and just. According to the "legal" approach, however, law reform must stick to reforming the law;

it may sometimes take sides in *non-political* social or moral controversies in pursuing this object, as for instance on matters such as divorce, abortion and euthanasia, but it must not become involved in passing political value judgments on the law's social utility.

In my view, law reform can never be socially neutral; to assume from the start that our social system is fundamentally sound is to ignore the heart of the matter. The central issue is precisely whether this is so, whether the system is worth patching up, or whether it is not badly out of touch and out of joint. Tidying up of the law is at best only useful where the law in question is basically useful. Similarly, to make the law more certain is not necessarily to make it better; it may make a good law bad by depriving it of its flexibility, and a bad law worse by making it more rigid.

Every change in the law has some social effect, but there is no direct relation between the significance of the legal change, and the importance of the social change which is produced by it. A major piece of legal reform may produce a social mouse; a minor change in the wording of a statute, on the other hand, may have enormous social consequences. "Legal" law reform is necessarily a hit or miss affair, for social practices cannot be changed predictably without getting off the high horse of the law, and evaluating social reality on its own ground. Law is an unruly horse; it insists on going its own way, and on returning to its own stable.

Admittedly, the "social" approach to law reform which I am advocating, is a departure from the traditional "legal" approach. Why then, it may be asked, do I insist on calling it *law* reform? One reason one might give is that in our politico-legal system, any social change, however brought about, must eventually be hooked on to the legal framework in order to be socially (not just legally) effective; but this is not the reason I have in mind. My purpose is to take law reform out of its cramped legal ghetto, and put it fairly and squarely in the open field of social reform to which it belongs.

IV. *The Role of Legislation.*

Although today there is widespread disenchantment with our legal system, the status of legislation both as *the* legal method of law reform and as *the* democratic method of effecting political change remains essentially unimpaired. If we adopt the "legal" approach to law reform, that is, if we take as our

starting point dissatisfaction with some technical, or with some non-political social aspect of the law, legislation fulfils an exclusively "legal" role. From this perspective, the job of Parliament is limited to ratifying what the law reformer has done by passing the necessary implementing legislation. This contrasts with the "political" role of legislation which is passed by Parliament at the behest of the government after a political debate and division.

We can easily think of extreme cases on either side of the line. Compare, for instance, the recent anti-inflation legislation with a mere consolidating statute which contains no new provisions. But once we get away from these extremes, the line between lawyer's law reform and political law reform becomes increasingly blurred. On the one hand, every piece of "legal" legislation, by its very refusal to be political, endorses the political *status quo*. On the other hand, every piece of political legislation is "legal" in the sense that it is tied hand and foot to a legal system that interprets and enforces it.

Legislation is the product of law, and the product of legislation is more law. It may change the law, but it can only do so on the law's terms. Law has a way of slipping through the politicians' fingers and taking on a life of its own. This is so because it is not simply a body of rules that can be changed by changing their content; it is part and parcel of an institutional system that survives changes in its rules. True, legal institutions may themselves be legally changed by legislation, but, as entrenched social institutions, they are highly resistant to social change. We must not confuse legal change by legislation with genuine social change.

The most serious drawback of legislation is that it is locked within the politico-legal framework of the established system; it tends to be based on the vested interests of its sponsors, and on its political sex appeal, rather than on social need. Hence, it cannot solve the crucial social problems which are neglected, or which are created or accentuated by the system. The "legal" law reformer simply assumes that legislation is a universally appropriate method for curing any and every kind of social ill. So convinced is he of this "truth" that he makes no attempt to monitor its social effectiveness. Once it is drafted and passed, he fancies he has dealt with the problem and turns to other things.

Legislation is the *legal* method *par excellence* of law reform, that is, it generally relies on the standard procedures of sanctions

through which the legal system enforces its norms. The social utility of this method is limited by the social disutility of its coercive nature. Not only does a system of sanctions lead to an infinite regress; external motivation conditioned by fear is always inferior to internal motivation which rests on the free choice of human beings. For this reason, I have based "social" law reform on "human" motivation. Although it may be directed and reinforced by legislation where this is considered to be appropriate, "social" law reform may use a host of other methods, such as political action, moral suasion, economic measures, psychological treatment, education, and community planning, to achieve its object.

Another drawback of legislation is its incremental approach to law reform. Being by its nature a one shot affair, it assumes an essentially static social matrix on which a steady line of reforms can be grafted. But social practices are part and parcel of a social system that will seek to perpetuate itself by neutralizing the changes which threaten it. Since legislation exhausts itself in one legislative act, it may never catch up with the social evils it seeks to control. Similarly, its piecemeal, sporadic nature, and the limited time available to Parliament, do not lend themselves to systematic, well-founded and sustained social reform.

The most common criticism of legislation is that it is inaccessible to the citizen by reason of its technical form and language. Professor Friedland, in a recent study,⁴ emphasizes the need for readable language; he also suggests a variety of improvements, such as a better visual layout for statutes, comments and examples after each section, official marginal notes, tables of contents, and brief introductions. In addition, he recommends that statutes contain explanatory memoranda as part of the legislation, and that the present system of indexing and arranging statutes be improved.

All these things would no doubt be helpful, but in my view the root of the problem goes much deeper. It springs from the false assumption that the social objectives of a statute can be expressed exhaustively in a precise verbal formulation. As long as the aim of the legislator is to reduce them to an authorized text, he will miss their dynamic dimension; to grasp it, he must be prepared to abandon the illusory quest for verbal certainty, and the notion that a statute is a command which comes down from above. Instead, he must look at legislation as a

⁴ M. L. Friedland, *Access to the Law* (1975).

vehicle for social change which can only be achieved with the co-operation of judges and other legal officials, and of the citizen. By all means let us have certainty, but let it be the certainty of an enterprise bent on justice rather than the veneer of verbal certainty.

If we want to make law more accessible, we must remove from it the dead weight of verbiage, and rationalize its operation. We must improve its quality and reduce its quantity. Inflation has not only hit our currency; it has hit our laws. Just as our economic difficulties are not solved by printing more and more paper money, so our social problems are not solved by passing more and more paper laws. On the contrary, the "false" laws, like the "false" coinage, tend to drive out the good. The result is frustration, anger, despair, and apathy. It seems as if law did not work any more. Yet, this conclusion is too sweeping. The reason why so many laws do not work is not because they are law, but because law is misused.

The time has come for us to realize that law is not infinitely expandable, that legislation may be counter-productive. Indeed, there is something paradoxical in the assumption that legislation can make law work better. Before it can qualify as a useful method of law reform, it must first mend its own ways. Similarly, codification must first free itself of its legislative mould before it can advance the cause of law reform. It cannot provide a panacea, but properly used, it may play a useful role.

The "social" law reformer does not deny that law reform has a legal dimension. He recognizes that in a legalistic society such as ours, almost all social change is tied in some way or other to the apron-strings of legislation. But there is an enormous difference between using legislation because it is considered to be the most appropriate method for bringing about a particular social change, and using it merely for the purpose of ratifying a social change which is brought about in some other way. Even where enabling legislation is not required to authorize the proposed change, legislation may still be necessary to bring the legal system into line with it.

V. *The Practical Limits of Law Reform.*

The "legal" law reformer only thinks in terms of reforming the *status quo*. The *status quo* is merely imperfect; all that is needed is a wash and brush up. (The "image man" demands even less. According to him, all that law requires is the projection of a new image — a face-lift with a come-on smile.) He

considers himself to be a realist, a practical man of the world. For him this means that the *status quo* is here to stay because it is the best of all *practically* possible worlds, provided it is kept up to date by incremental adjustments. Change is possible only within the system and therefore necessarily marginal. Anybody who advocates radical changes of the system is denounced as a revolutionary or as a muddleheaded Utopian. For the practical man of the world, the potential is limited to the actual; the actual provides the horizon which limits his vision. The future must be stabilized in terms of the present and must bow to its yoke.

By denying the possibility of real change, the practical man of the world defines everything in terms of the *status quo*. He is convinced that any change in it is only possible at the risk of anarchy, and that to believe anything else is to indulge in illusion. Yet, the greatest illusion of all is to think of the present as fixed, as a piece of machinery which can be kept going forever by replacing a few parts here and there, and patching up the rest. Any social fabric can only take so much patchwork. Beneath every reforming patch yawns a tear. The Copernican revolution overthrew the ramshackle Ptolemaic Empire.

The practical man of the world (as I have caricatured him) should be distinguished from the pragmatist. The pragmatist is, at least theoretically, prepared to test the value of his beliefs by evaluating their consequences. He must have an open mind. The practical man of the world, on the other hand, has a mind closed by his world-view of the present. Both his framework of evaluation, and the range of phenomena to be evaluated, are fixed.

The lawyer considers himself to be a practical man of the world, and therefore as doubly competent to pronounce on law reform — as a lawyer dealing with law, and as a practical man of the world. He has no doubt that “legal” law reform alone is practical, and that “social” law reform is a pipe-dream. He is unaware that his “practical” view of law reform is in fact the stereotype image propagated by the prevailing ideology. The worst enemy of genuine law reform is this stereotype image of what it is all about. Downright opposition to it will sooner or later strengthen its case, as the evils which cry out for cure bite deeper and deeper; but the devaluation of “social” to “legal” law reform will numb the will to reform, and open the door to despair.

The traditional concept of "reform" is incremental; it is conceived as something grafted on to the existing system without changing the system itself. In point of fact, "reform" should mean what it says, namely "re-form". Suppose that the law reformer concludes that the mischief does not lie in this or that law, or even in this or that social practice, but in the ideological foundations of the whole system? Should he limit himself to recommending palliatives? Should he, in the name of practicality, remain within the framework of the ideology which caused the problem? Should he be content to be a conformist, a bureaucrat of the established system, or has he the right, nay the duty, to re-form it? I suggest that the answer cannot be in doubt. A genuine reformer can never afford to sweep anything under the carpet; he can never afford to put a definitional stop to his reforms. A law reform problem cannot be artificially delimited. If it is, nothing will be solved; the untreated part of the problem will spread its tentacles over the pseudo-solution. A law reformer must not only be allowed to look at social reality through his own eyes, but to reform it if necessary.

VI. *Law Reform and Social Change.*

We generally think of progress in terms of a linear progression from good to better, and from better to best, which is Utopia. But what is best is, like what is better and what is good, relative to a point in time. Thus, we must never think of any piece of law reform as taking us into the promised land. Not only must we think of law reform dynamically, we must be prepared to stretch the concept of law as an instrument of social control to the vanishing point. No idealist presumably would want a system of *enforcement* to be perpetuated. Everybody would be happier to do without force what is now being done through it.

Those who believe that law will always be necessary invoke pragmatic considerations of human nature. The argument is that there will always be people who will refuse to comply with the law, however just it might be, and that there will always be disputes as to who has the law on his side. But even if it were necessary to maintain such a system in marginal cases, the gradual elimination of law as the most telling instrument of social control would change the nature of the concept. Instead of being invoked for anything and everything, law would acquire something of the odd flavour of a strait-jacket. Social intercourse would no longer flow through the channels of law, but would only be affected by it marginally at the

extremities. The ultimate achievement of law reform then would be to reduce law to the vanishing point.

Law, today, is the handmaiden of a materialist, possessive and competitive society. If we lost our high regard for property and material possessions, the demand for law would be drastically reduced. We have tamed the natural giant of need only to unloose a whole host of artificial evils. To say that things would even be worse without law, is to beg the real question; for law is not as is presupposed by the statement, an antidote to these evils, but a concurrent condition of their existence. Lawyers are unduly insensitive to the complaint that law, just as much as its abuses, is part of the established system.

The lawyer regards law as intrinsically stable, and formally this is so. Law follows its own course; it regulates its own creation, it obeys its own authorities, and it sets its own pace for change. Change is either legal or extra-legal. Political revolution causes a break in the legal continuity, but once it is over, a new body of law comes into being which is as stable as the old one.

I have suggested elsewhere that the stable state of law is an illusion; it is formally true but substantially false.⁵ Law is only as stable as the society which it serves. The illusion of stability springs from the lawyer's stable legal apprehension of social reality. For him, the stability of law is a necessary and usually a sufficient condition of the stability of any society, and essential to the survival and welfare of the individuals composing it. That the stability of law may be a myth to cloak the instability of society is a thought which does not normally cross his mind, for he has been taught that law is the cement which holds society together, and this dogma is enshrined in the prevailing ideology and reinforced, consciously or not, by his self-interest. Being so conditioned, he cannot begin to grasp that fundamental social ills may not be amenable to legal cures, that legal reform does not entail social reform, and that what may be wrong with society is an underlying ideology which cannot be changed on its own terms. Looked at in this light, the formal stability of law is an evil rather than a good, inasmuch as it marks social instability and postpones the day of reckoning.

The myth that law is stable has its roots in the false belief that the world changes only incrementally, and that therefore

⁵ R. A. Samek, *Beyond the Stable State of Law* (1976), 8 Ottawa L.J. 549, at p. 558.

our conceptual apparatus is good for all time, provided we learn to adjust to incremental changes. Man, like all living organisms, craves for stability, and since he cannot deny change he seeks to stabilize it. In truth, I suggest, change is discontinuous; to use a concept developed by Thomas Kuhn for the history of science, we may say that it proceeds in jumps from "paradigm" to "paradigm".⁶

VII. *Paradigms.*

Kuhn distinguishes two senses of "paradigm". "On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solution which, employed as models or examples, can replace explicit rules as a basis for the remaining puzzles of normal science."⁷ The second sense of paradigm, Kuhn says, is the deeper of the two, and the main source of the controversies and misunderstandings that have arisen.

A paradigm in the first sense is always shared by the members of a scientific community,⁸ but not a paradigm in the second sense. Only with the acquisition of a paradigm in the second sense does a scientific community reach a state of maturity in which normal puzzle-solving research becomes possible. Before that, the community is in the "pre-paradigm" period. The concentrated convergent research of the paradigm period brings to light anomalies which cannot be handled by the established paradigm. Gradually, "normal science" under that paradigm comes to an end in the chaos of the "post-paradigm" period. Although the members of the scientific community are reluctant to let go of the old paradigm, they are forced to relinquish it under the pressure of their divergent findings. A scientific revolution is a sort of *gestalt* switch which finally topples the old paradigm and ushers in the new.

⁶ T. S. Kuhn, *The Structure of Scientific Revolutions* (2nd ed., 1970).

⁷ *Op. cit.*, *ibid.*, p. 175.

⁸ Kuhn defines a scientific community as consisting of the practitioners of a scientific specialty. To an extent unparalleled in most other fields, they have undergone a similar education, and similar professional initiations. Professional communication across specialty lines is arduous and may provoke previously unsuspected disagreement. *Op. cit.*, *ibid.*, p. 177.

The above is, of course, an extremely rough account of Kuhn's concept of "paradigm", but, I hope, it will be sufficient to show that this concept can be adapted to give us a new appreciation of law reform. Its normative corollary is that if a paradigm (in Kuhn's second sense) is no longer useful, it should be replaced by a new one. We can substitute "legal doctrine" for "science" and say that the early stages of legal doctrine correspond to the period of the pre-paradigm, the period of maturity to that of the paradigm, and the period of decay to that of the post-paradigm. We may then say that in the paradigm period of maturity, concrete problem-solutions, employed as models or examples, can replace rules as the basis for the remaining problems of normal legal doctrine; but we can say this only, I suggest, on the assumption that in the maturity period legal doctrine has a living relation with moral and social phenomena which corresponds to the meaningful relation between Kuhn's paradigm and the phenomena of nature.

The period of the paradigm passes into that of the post-paradigm precisely when this relation is eroded by a growing number of anomalies which are brought to light by the concentrated convergent research stimulated by the paradigm. Similarly, we may say that the period of maturity of legal doctrine passes into that of decay when its living relation with moral and social phenomena is eroded by a growing number of anomalies which are brought to light by the concentrated convergent development of legal doctrine.⁹

But here the analogy breaks down. Unlike basic natural phenomena, which are assumed to be immutable, moral and social phenomena do not stand still; sooner or later they call for different normative responses. Hence, the anomalies which erode a legal paradigm do not all, or even predominantly, result from the internal development of legal doctrine, but are mainly the result of changes in the world outside. Consequently, what is required of the new paradigm is that it meets both the internal and the external anomalies of the post-paradigm period. It should be remembered that Kuhn's scientific revolution is a *gestalt* switch which wholly changes the previous "world-view", not merely a change within the ambit of normal science. Similarly, a legal revolution is not merely a change within the ambit of normal legal doctrine; it is a truly revolutionary change which transforms the very foundations of legal doctrine. I have claimed

⁹ *Op. cit.*, footnote 5, at p. 558.

that such a change is what the situation demands now, but that a legal revolution would not be worth its salt if it merely adjusted legal doctrine to the prevailing ideology without evaluating it.¹⁰

Law reform, in my view, is most called for in the unsettled state of affairs of the post-paradigm era when the contradictions of the old paradigm are taking their toll. Its task there is to achieve a breakthrough from one paradigm to another by giving form to what is already inchoately present. If it were limited to prolonging the life of the old paradigm, it would cease to fulfil a useful function once this had reached a certain state of senility. One must hope, therefore, that law reform cannot only maximize the potential of the old paradigm, but at least show the way for the new.

In science, cross-analogies between various branches, and the enormous innovative potential of mathematics, have counteracted the tendency to paradigmatic stagnation. The dynamic image of science contrasts with the static image of law. Legal change is regarded as merely necessary at the margin when it should hold the centre of the stage. The picture of a stable society kept in place by its laws has stultified progress on every front. Law cannot prevent social change; it can only lose touch with what is going on. Deep down we know this, but our fear of radical change is so great that we will put our faith in magic rather than sacrifice the illusion of security.

The legal institutions of a people are part of the myths which shroud reality for them. In the early days of a paradigm, the myths are still an outgrowth of social reality and help to structure life in a constructive way. The inevitable decay in the old institutions gives rise to increasing tensions between the old forms and the demands of new situations. The gap between the institutions and reality widens, and the myths which sustain their relations become increasingly hollow. The old guard seeks to protect them by bringing reality back to the golden days, while the young seek to replace them with myths of their own. Alas, the latter are all too often borrowed from an old repertoire. In science and in technology, man is always reaching out for the new; in his relations with other men and in his image of himself, he is forever resurrecting the myths of the past. This craving for absolutes compels him to draw a line somewhere. He is willing to have the universe turned upside down as long as he can retain his foothold.

¹⁰ *Ibid.*

Paradigmatic change is never clean; there is no revolution so radical and pure that it comes down from heaven. Qualitative change too is a matter of degree which must have some foundation in existing values and institutions. A mechanical change which has not been prepared from within the existing system, cannot transcend it. The new ideology must rise from the ashes of the old. We cannot expect this to happen immediately. Rome was not built in a day. There must be a period of transition. The old system cannot be tossed aside before the new is ready to take over. The revolution must not be handed over to chaos.

There are existing abuses which can be cleared up in conventional ways pending an overhaul of the system. But we must be constantly on guard against the danger of allowing these temporary adjustments to absorb the energies of law reformers which should be spent on genuine law reform. We do not want them to help us remain on the even keel of the existing system, or more correctly, to help us preserve the illusion of being on an even keel. Save for emergencies — and we must be careful not to be taken in by this term — adjustments should be directed to adjusting the present system out of existence, not to help it remain in being.

VIII. *Horizontal and Vertical Law Reform.*

Law reform for the bureaucrat is the establishment of a bureaucratic system of law reform. This system must be hooked on to the existing institutional system and work in step with it. On this view, which may be called the "horizontal" view, the task of law reform is to repair the legal superstructure over a wide field. The work will be done by specialist legal institutions which will be asked to come up with recommendations for legal repairs, and they will be implemented by legislation.

The "horizontal" view of law reform may be contrasted with the "vertical" view which I am advocating. On the latter, law reform is not concerned with the legal superstructure, but with the underlying social practices. Hence, we must always probe down vertically beneath the legal symptoms to reach the roots of the social ills, and we must follow them wherever they lead us. The "vertical" view is human, the "horizontal" is mechanical. The former is irreducibly complex, the latter inevitably oversimple.

The "horizontal" view is of course based on the "legal" approach to law reform. It looks to the strengthening of the established legal and social system through the development

of specialist institutions of law reform, such as our present law reform commissions. The "vertical" view is based on the "social" approach to law reform. According to it, law reform cannot be delegated to any institution. The "social" law reformer believes that social problems are basically human problems, and that they can only be resolved by human beings acting in a human way. Institutions may be used, but they must always remain under human control, and their efficiency must be judged in human terms and in regard to human ends. The "social" law reformer is convinced that if social problems are faced openly, allowing for differences in value, workable human solutions can be arrived at. He must have this faith, for without it, he would not be able to achieve anything.

Notwithstanding the overwhelming evidence of history which demonstrates the crucial importance of "human" motivation, we tend to regard our social problems as due to the malfunctioning of our institutional machinery; what is more, we have acquired such an exaggerated faith in our legal institutions that we believe that they can be solved by legislating them out of existence. But law, conceived as a repressive social mechanism, must fit into a broader framework of "human" motivation, or it will atrophy and die under its own weight. A chain of repression is no stronger than its last link. In the current atmosphere of moral degeneration, law is called into play more and more. It is seen in the role of a policeman, and the more law we have the greater is the appeal for policemen. Similarly, law reform is seen as an appeal for a better policing of the system. What is forgotten is that the use of the legal method leads to an infinite regress, that it can only work in a social context of certain shared values. Within limits, a legal system can tolerate dissent, and such dissent is healthy. Yet, obviously, beyond a certain point, disrespect for the law begins to destroy its effectiveness. Legal sanctions are only designed to be used in marginal cases.

The preliminary question of the appropriateness of the legal method for handling the social problem in question must never be lost sight of. So far from being a universal solvent of social conflict, it tends to cause and exacerbate friction. Being adversarial in nature, it divides people instead of bringing them together, and what is worse, it divides them over the wrong issues, and appeals to the wrong motives. The crucial legal issues, if they are not socially vacuous, follow the lines of vested interests and either ignore or distort the underlying social problems. By their very nature, they demand black and white solutions which sharpen natural differences to the breaking point. As a result, people tend

to get dug in on opposite sides of pseudo-problems. Instead of fighting useless legal battles, we should look for the lost social problems and attempt to solve them through conciliation and reconciliation wherever possible.

The legal method must be evaluated in action, in terms of what it does, not in terms of what it stands for in legal theory. Here the dearth of empirical knowledge is evident. We know a lot about fine legal theories of what law is supposed to be, but precious little about what it does. Until we are sure of our ground, we should use the legal method sparingly. Reduction should be the order of the day. Every distinction should serve a purpose, every category should have a use, everything non-essential should disappear. Substantive law should always be looked at in the light of procedure; it should always be deliverable and cashable. Procedure itself should be lithe and sinewy, and carry no excess weight. We should always ask ourselves what we want the legal process to deliver, and what the best way of delivering it is.

IX. *Law Reform Needs Reform.*

At the beginning of his article,¹¹ Lyon points out that the model of law reform in Canada is an imitation of the English model, and a direct result 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; they are trained to follow precedent and established procedures. Consequences are the responsibility of someone else, usually the legislatures. "When law reform is forced into the conventional mould of legal thinking it becomes cut off from the valuable experience and techniques of other disciplines. We must find better ways."¹²

According to Lyon, the scholarly part of law reform has not been a failure. What is lacking is the translation of scholarly reports into results at the operational level of the legal order; we are experts at solving problems in words, but inept at effecting real improvements at the human level. The purpose of Lyon's study is to improve the performance of law reform at the *operational* level.¹³

¹¹ *Op. cit.*, footnote 1, at p. 421.

¹² *Ibid.*

¹³ *Ibid.*, at p. 422.

(1) *What Is Law Reform?*

If law reform is to become measurable in terms of actual results, Lyon says, it must be concerned with the whole legal process, and not just written laws. He suggests that the 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. The main reason why law reform has been defined almost exclusively in terms of revision of written laws is that specialized agencies, like law reform commissions, have relied on personnel which is familiar with this task. Lyon urges law reform commissions to set for themselves operational performance standards, and to monitor their own performance continually in terms of those standards.

Lyon recognizes that law reform cannot be hived off to specialist law reform commissions:

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.¹⁴

Lyon defines laws as the "ordering force that maintains a community in which security and freedom are balanced in order to secure 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."¹⁵

Lyon, I think, is unwise in attempting an essentialist definition of law, and his conception of law as a balancing force overlooks its consistent tilting of the balance in favour of the establishment. On the other hand, Lyon's emphasis on the dynamic aspect of law is important. He seeks to combine open value criteria to allow for changes in circumstances with certain basic value preferences which are expressed in the constitution of a community. He finds the basic value preferences of the

¹⁴ *Ibid.*, at p. 423.

¹⁵ *Ibid.*

Canadian people in the preamble and section 1 of the Canadian Bill of Rights.¹⁶ Legislators, judges and government officers alike should be persuaded to build the broad values of the Bill into their thinking processes.¹⁷

According to Lyon, 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".¹⁸ 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 commitment to the preferred value system, and 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.¹⁹

Law reformers cannot, I suggest, escape their own value standards and become mere administrators of conventional values. On the other hand, they cannot disregard the fact that they are operating in a community with certain values. Their own values must be related to them, and they must be sure of their ground before they depart from the communal values. The formula which I prefer is a little wider than Lyon's. "The values most consistently appealed to by the Canadian people" avoids to my mind any danger of coming up with a paper list, and substitutes moral estoppel for legal authority. On this view, our preferred values should be those which we purport to prefer, and as long as we pay lip-service to them, we should be estopped from going back on them. For instance, we should not on the one hand be allowed to boast of our respect for human life and dignity, and on the other hand to support capital punishment or inhuman forms of imprisonment. To speak of law reform in this context is to abuse the term.

It is true that in a pluralistic society such as ours there is no nation-wide consensus on values, unless we generalize them to such an extent that they become empty motherhood

¹⁶ S.C., 1960, c. 44.

¹⁷ *Op. cit.*, footnote 1, at p. 424.

¹⁸ *Ibid.*, at p. 425.

¹⁹ *Ibid.*

statements. We must therefore be prepared to face conflicts in value, and what is more to live with pluralism. In my view, we should avoid both the extremes of dividing up Canada into isolated value ghettos, and of turning it into a melting-pot. Instead, we should engage in a living dialogue of values which will result in a richer and more open mosaic. Only human beings, drawing on their "human" motivation, can bring this about.

Lyon, as we have seen, defines law reform as 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. In spite of what he says about our mistaken preference for institutions rather than for functions, he remains tied to a legal approach to law reform. Although he recognizes that it is not enough to change the written body of laws, and that we must reform the legal process in its actual working, his *declared* object of law reform is still to change *legal*, not social practices.

On the other hand, we must not judge Lyon's proposal on its face value. In actual fact, he is anxious to pierce the veil of legal appearances, and to get down to the social nitty-gritty of the legal process. But here we must expose an ambiguity. It is not good enough to evaluate the *legal* process as a social process, if we remain within the conceptual framework of the former; what we must do is to evaluate the "secondary" social practices with which we are dissatisfied, *as such practices*, without paying any attention to their legal status.

For instance, if we think of evaluating the criminal process, we are already on the wrong track; we are using a misleading *legal* paradigm to evaluate certain "primary" social practices (social "crimes", and certain "secondary" *social* practices (social "crime control")), with which we are dissatisfied. The social problem is misstated and mistreated as long as we confuse these normative social categories with the dogmatic legal categories with which both our legal and social reformers have become hypnotized.

(2) *A Critique of the Law Reform Movement in Canada.*

Lyon is keenly aware of the deficiencies of our existing law reform commissions. He says wryly:²⁰

In a situation where many of our problems stem from organizational and mental rigidities, one would expect to find, as the funda-

²⁰ *Ibid.*, at pp. 425-426.

mental 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 bureaucratic 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.

Lyon generously excepts the Law Reform Commission of Canada from his comment, and mentions with reason the appointment of an experienced sociologist as perhaps the most hopeful sign in the field of law reform in Canada to date. (Alas, the experienced sociologist has come and gone.) He is at his most trenchant when he challenges the myth of the legal expert:²¹

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.

Lawyers, Lyon says, are fascinated by words, and are conditioned to believe that the world began with an Act of Parliament. The written report has its uses, but to try and reform a legal order entirely through written reports, many of them prepared by persons with little or no experience in realizing them in the world, is folly. He suggests, as we have already seen, that we take advantage of the experience and judgment of the people who are charged with the day to day working of the legal system.

If legal house-cleaning were the answer, I would agree, but Lyon himself goes out of his way to deny that law reform is restricted to tidying up, and he categorically rejects the law-versus-policy dichotomy. What has happened, he says, is that the narrow conception of positive law, which is quite properly imposed on lawyers in the context of judicial decision-making, has been applied in law reform to the larger legal process that is an integral part of the whole system of government. Legal

²¹ *Ibid.*, at p. 426.

process in the larger sense is loaded with policy matters for which the experience of lawyers is vital.

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.²²

I agree with Lyon that many recommendations of law reform commissions involve policy decisions, but they are generally made within the legal cocoon, and do not deal directly with the social realities. Moreover, in defending such policy decisions on the ground that the final choice remains with governments and legislatures, he seems to be content to accept mere recommendations in these cases, though on his own showing their operational performance is doubtful.

Lyon sees through the false argument that law reform commissions are best fitted for problems which involve a maximum of law and a minimum of policy. This, he says, begs the basic question of what their role ought to be. 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.²³

Lyon points out that these choices are today made more in response to lawyers' dissatisfaction with the law than to the injustices felt by the citizen, and that as long as law reform is left to lawyers the situation is unlikely to change. Lawyers pride themselves on their respect for facts, and yet we have no base of judicial statistics in Canada on which to assess the performance of the legal system. We tend to live in ignorance of the human

²² *Ibid.*, at p. 427.

²³ *Ibid.*, at pp. 427-428.

consequences of what the law does, substituting myth for what is often unpleasant fact. Law reform, Lyon says, will be sterile unless we are prepared to measure performance of both the legal system and the reform process in terms of their effects on people, using as criteria the fundamental values of our constitutional heritage.²⁴

In my view, it is not enough to monitor the performance of any legal reforms of the system, since a legal approach to law reform necessarily distorts the reality of social practices. On the other hand, it is gratifying to see Lyon emphasize the crucial importance of investigating the *human* consequences of what the law does, and the need to measure performance of both the legal system and the reform process in terms of their effects on people.

(3) *Elements of Law Reform.*

Lyon recognizes the disastrous result of allowing lawyers to set the priorities for law reform.

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 identifying the causes of harm and to determine whether the application of public resources, directly or indirectly, would alleviate the problem. Since this broad description 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.²⁵

It now becomes clear that Lyon only draws a line between legal and social law reform as a matter of institutional convenience, and not because the former can in fact be separated from the latter. Indeed, he denies explicitly that the "failures and deficiencies of the legal system can be understood and attacked in isolation";²⁶ and he warns us against its destructiveness. "Those who claim the right to set priorities must go out into the slums, the welfare offices, prisons, criminal court, family

²⁴ *Ibid.*, at pp. 428-429.

²⁵ *Ibid.*, at p. 430.

²⁶ *Ibid.*

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."²⁷ One could hazard a guess, Lyon says, that seventy to eighty percent of our legal resources are used to protect those who have already reached a very high standard of living.

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 resource wisely. A sound sense of priorities can come only from a sound sense of values.²⁸

(4) *Proposals.*

In spite of his call for genuine empirical investigation, Lyon reverts to the wrong model of law reform. It is in the administration of justice, he says, that law, lawyers and legal institutions weld into a working system, and it is here where the centre of gravity of the law reforming process ought to be. 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.²⁹

According to Lyon, as we have seen, house-cleaning should be part of the normal working of the legal system. Law reform agencies should make their contribution through resource persons from government, the profession and the academic community. As regards the second level of law reform, law reform commissions should not limit themselves to studies directed to legislation, but should probe deeper in search of the root causes of injustice.

One of Lyon's most valuable insights is that it is the mistraining of lawyers which has made the "legal mind" an

²⁷ *Ibid.*, at p. 431.

²⁸ *Ibid.*

²⁹ *Ibid.*, at p. 433.

obstacle to law reform rather than a help. Hence, the need to change the legal mind, and not simply some conclusions drawn by it.³⁰ Yet, even on this vital point Lyon cannot entirely resist its temptations. For some reason, not explained, he points to codification as the possible key to the future of Canadian law reform. If only the common lawyer's mind could grasp it, is the suggestion, law might be reformed through it. Yet how can that possibly be so, even on Lyon's own showing? In any case, we only have to look at the civil law to see that the belief in codification is a snare and a delusion. Codification is codification of *doctrine*. Although legal doctrine should be consistent and perspicuous if it is to perform its optimal social role, these qualities cannot by themselves guarantee its social utility.

X. Conclusion.

"Social" law reform cannot be delegated to any institution, let alone to institutions dominated by lawyers. It is an ongoing process which involves all those human beings who seek to change social practices which may raise doubts about the humanity, justice or efficiency of the established legal system. In a highly institutionalized and legalized society, such as Canada, it will require the aid of legal institutions, but its primary motivation must remain "human". "Social" law reform may be pictured as a loose human network in which law reformers are linked not just with each other, but with all those who have a stake in the process; this will include those who voice dissatisfaction with social practices, those who receive the complaints, those who investigate them, those who make and implement the proposals for law reform, and those who are affected by them.

"Social" law reform is an ongoing process; it is the complement, the conscience of the law. Since it is based on the open potential of "human" motivation, it cannot be closed by any ideology; and since it acknowledges paradigmatic change, it cannot be locked into any paradigm. "Social" law reform is incurably relative both in space and in time; if there is an absolute solution, it lies beyond its grasp.

³⁰ *Ibid.*, at pp. 434-436.