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Audrey Macklin*

Law Reform Error: Retry or Abort?**

I. *Introduction*

The void left by the demise of the Law Reform Commission of Canada (LRCC) in 1991 presents an opportunity to rethink the scope and legitimacy of law reform as it has been conceptualized and practised by academic lawyers. I am concerned that the dominant meaning ascribed to the term "federal law reform" under the tenure of the LRCC was partial, inadequate, and ultimately conservatizing in its influence. In reviewing past commentary on law reform in Canada, I have been struck by the recurring themes that emerged from the literature.[1] I was particularly impressed by an exceptional piece written by the late Dalhousie scholar, Professor Robert Samek, entitled "Social Law Reform."[2] What I hope to offer is a somewhat updated perspective on what ailed institutional law reform efforts in the past and what we might do differently in the future.

My thesis can be tersely stated: the Law Reform Commission of Canada presented itself as a disinterested independent agency promoting a neutral brand of reform for the common weal; on my analysis, the LRCC was, in large measure, a rational actor in the judicial/legislative political arena whose conception of law reform and its proper institutional role served to advance its own interests as a legal bureaucracy. This characterization of the former LRCC in turn grounds my proposals for innovations that deliberately destabilize the personnel, process and objects of federal law reform in order to render it a more inclusive, socially useful and self-conscious interest group.

My method is to disaggregate the three component parts of the phrase "federal law reform" and consider how the interpretation given each of these by the former LRCC advanced certain institutional and political interests. Before proceeding further, I wish to express two caveats: first,

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1. *See, e.g.*, Noel Lyon, "Law Reform Needs Reform" (1974), 12 Osgoode Hall L.J. 421.
2. (1977), 55 Can. B. Rev. 409.

I have never participated directly in any federal law reform activities. My comments are derived from an "outsider" perspective based on limited information about the LRCC's past policies and practices. Second, the examples I use to illustrate my points will be drawn from areas that are familiar to me, which does not suggest that they are the only or even the most urgent problems to be addressed.

II. *Federal*

As lawyers, our understanding of what is federal (as opposed to provincial) is derived from ss. 91 and 92 of the *Constitution Act, 1867*.[3] Our understanding of why the distinction matters for purposes of law reform is less clear. Social problems do not respect the constitutional division of powers. My impression however, is that law reform agendas were set by the LRCC not only in terms of the urgency of a given legal or social problem, but also by reference to how tidily the problem would fit into the compartment labelled "federal" under s. 91 of the the *Constitution Act, 1867*. Two instrumental reasons come to mind: the Commission may have worried that the federal government would have looked askance at expending its resources on thinking about how to make provincial laws better; by the same token, some provinces may have resented the intervention of a federal agency into the domain of its jurisdiction.

This obsession about jurisdiction can generate at least three distortions in the range of inquiry. First, the agenda may be dominated by issues that are uncontroversially within the federal power, such as general principles of criminal law and procedure. While I do not mean to diminish the importance of criminal law, its representation on the list of reports and working papers is utterly disproportionate according to any standard against which one measures priority social concerns. According to a survey conducted by Professor Teresa Scassa, over 70% of the LRCC publications concerned criminal law.[4] It is also notable that criminal law was the only subject area that garnered the sustained attention of the LRCC over the course of its history. The obverse proposition is simply that important issues never get tackled at all, or only addressed in a desultory manner because they slop over too obviously into non-federal arenas. Another disappointing feature of the LRCC agenda was its unresponsiveness to public expressions of priority. In its *First Annual*

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3. R.S.C. 1985, Appendix II, No. 5.

4. Teresa Scassa, "A Critical Overview of the Work of the Law Reform Commission of Canada: Learning from the Past", *Federal Law Reform Conference Final Report* (Halifax: Atlantic Institute of Criminology Occasional Paper Series, 1993), Appendix C at 4.

Report, the LRCC disclosed that public consultations revealed that "family law warranted a greater emphasis than we had originally expected to give it."[5] In the ensuing years, the LRCC devoted minimal time (1974-76) and minimal resources (5% of all reports and working papers) to family law. As Professor Scassa trenchantly observes, "[o]ne wonders whose 'widespread expectations' focussed on criminal law, and why the 'we' of the law reform commission underestimated or undervalued public concern with family law reform."[6]

A second distortion arises when problems that do not comfortably fit within s. 91 are crammed into it anyway, thus truncating and narrowing the focus of the inquiry. For example, the *Working Paper* evocatively entitled *Crimes Against the Foetus*,[7] proceeded with hardly a moment's hesitation to the conclusion that the criminal law was the optimal means of dealing with the pressing social issue of abortion. Part of this orientation may be explained by the predilections of individual Commission members and/or their collective failure to think of another federal head of power under which non-criminal federal legislation could be justified.[8] More importantly, it may also have signalled an institutional inability or unwillingness to even contemplate a resolution that was not clearly within federal power, even if such a proposal was otherwise meritorious. In a similar vein, the *Working Paper* came up with its recommendations about time limits within which abortions should be obtainable without any attention whatsoever to factors outside the federal domain that might account for delay in seeking an abortion, such as provincial refusal in such places as Newfoundland and Prince Edward Island to provide abortion services or lack of health care services in remote areas across the country. The tenor of the *Working Paper* simply assumes that the problem to be addressed is that women wilfully and capriciously delay obtaining safe, timely abortions, a course of conduct that warranted criminalization rather than, say, a co-ordinated strategy of recommendations that addressed access problems at the provincial level. In the end, the LRCC's proposals on abortion not only reaffirmed the primacy of federal law in the area of abortion, they also had the indirect effect of validating the choice of a federal agency to address the issue.

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5. Law Reform Commission of Canada, *First Annual Report, 1971-72* (Ottawa: LRCC, 1972) at 5, quoted in Scassa, *supra*, note 4.

6. *Ibid.*, at 2.

7. Law Reform Commission of Canada, *Crimes Against the Foetus* (*Working Paper 58*) (Ottawa: LRCC, 1989) at 45-47. All references are to English text only.

8. *See* Moira McConnell & Lorenne Clark, "Abortion Law in Canada: A Matter of National Concern" (1991), 14 Dalhousie L.J. 81.

Third, the understanding of "federal" as that which is contained in s. 91 of the *Constitution Act, 1867,* ignores another important function of the central government in a federal state, which is the co-ordination of provincial and federal laws in areas of overlapping jurisdiction. Family law (broadly construed) is one example where the federal government has jurisdiction over certain areas (solemnization of marriage, divorce, custody maintenance upon divorce), while the provinces legislate in matters relating to division of property. In its *First Annual Report,* the Commissioners emphasized the "need for close co-operation between the federal Law Reform Commission and the provincial commissions"[9] in areas of concurrent or complementary jurisdiction, especially family and criminal law. Indeed, the Report contains references to meetings between the federal LRCC and the provincial counterparts where there was apparently "unanimous accord that the law reform bodies in Canada should work closely together."[10] Subsequent working papers and reports on such matters of joint concern as spousal maintenance upon marriage breakdown[11] are notable for their failure to indicate any co-operative effort between federal and provincial commissions. Indeed, the authors of these reports inevitably begin or end with a disclaimer (expressed with varying degrees of frustration) to the effect that the efficacy of federal reform is limited without reform at the provincial level.[12] Talk about understatement. It is all the more ironic because family law cries out for both co-ordination between the federal and provincial governments and co-ordination between provinces to reduce the conflicts-of-laws problems that plague parents, ex-spouses and children. It seems entirely appropriate for a federal law reform body to act as facilitator between provincial commissions for purposes of minimizing interprovincial conflicts (if not harmonizing substantive legal rules), yet this does not appear to be a role that the LRCC wished to undertake. Facilitating co-operation and harmony in respect of other people's laws is certainly less glamorous for a reformer than dreaming up new and better laws, but I suggest it might have been more productive to the women, children and men who find themselves enmeshed in the destructive machinery that is family law. I am not privy to the reasons behind the deterioration of the relationship between the federal and provincial law reform bodies; my point is that a

9. *First Annual Report, supra,* note 5 at 17.
10. *Ibid.,* at 18.
11. e.g. *Maintenance on Divorce (Working Paper 12)* (Ottawa: LRCC, 1975); *Divorce* (Working Paper 13) (Ottawa: LRCC, 1975); *Enforcement of Maintenance Orders (Study Paper No. 8)* n.d.
12. *See, e.g., Enforcement of Maintenance Orders, ibid.,* at 2; *Maintenance on Divorce, ibid.,* at 40.

pre-requisite to any future success requires the various actors to co-operate, or for the federal body to go it alone if necessary and approach issues holistically, instead of hiving them off into artificial "water-tight" compartments.

III. *Law*

The purpose of the Law Reform Commission of Canada, as described in its enabling statute, was "to study and keep under review on a continuing and systematic basis the statutes and other laws comprising the laws of Canada."[13] A review of the Commission's work over the years suggests that the evil to be remedied is either flawed legislation, inconsistent common law doctrine or the lack of legislation. The cure invariably prescribed is more legislation. While I think this is a defensible position in some or many instances, it also represents a shallow understanding of what "law" is. To put it another way, lawyers think that law is what it says. For everyone else, "law is what it does."[14] The chasm between the legalistic and pragmatic conception of law is most graphically represented by feminist analyses of such phenomena as sexual assault and woman abuse. If one takes into account the barriers to charging, prosecution, conviction and sentencing confronting survivors of these offences, it seems clear that many women do not experience the benefit of formal legal prohibition of abuse by those closest to them. To the extent that law is only animated through the agency of police, the judiciary, lawyers and correctional officials, there is no "law" to speak of when the actors in the system fail or refuse to activate the rule on paper. I appreciate that we as lawyers are accustomed to distinguishing between "law" and "enforcement". I am suggesting here that the distinction is overstated if we understand "law" from the perspective of those subject to it and who seek its protection.

A timely illustration of my point concerns the passage of the recent "anti-stalking" legislation, now s. 264 of the *Criminal Code.*[15] The social problem that inspired the new law was the practice by certain men of following, harassing and otherwise menacing women who had once been intimate partners. Critics of the *status quo* were right to complain that there was no law protecting women from being terrorized by their boyfriends and husbands, but wrong to blame the putative absence of

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13. *Law Reform Commission Act*, R.S.C. 1985, c.23 (1st Supp), s.11.
14. Samek, *supra*, note 2 at 411.
15. *Criminal Code*, R.S.C. 1985, c. C-46, as amended by Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act.*

legislation forbidding it. Section 423 of the *Criminal Code* creates the offence of intimidation which, though imperfect,[16] offers the potential of offering substantive protection. Section 372 (conveying harassing or indecent telephone calls) also has application. There are, of course, restraining orders and peace bonds which are supposed to protect women (if they can obtain them), but these are also notoriously ineffective at all stages from police response to prosecution to sentencing to monitoring.[17]

If one seriously wants to reform the "law" regarding stalking of women, formulating a new law would only comprise a small part of the task and would, in my view, be a futile and counterproductive exercise if taken in isolation. It is futile because it would not do a damn bit of good and it is also counterproductive because it would create a false sense in the mind of the public (minus the women affected by it) that something had actually been done. To an extent, the problem I have identified here overlaps with the federalism concerns identified earlier.

This self-induced myopia of conventional "law reformers" also manifests in other ways. I noted earlier the preponderance of criminal law and procedure as the law du jour on the LRCC menu. Why not unemployment insurance? Why not substantive immigration law, or labour law, or environmental law, or competition law? It is certainly the case that the Commission has historically been comprised of people with a criminal law slant, which quite naturally results in the identification of criminal law as the area most urgently in need of reform. Moreover, my hunch is that the Commission considered that resolution of the competing interests and concerns in these areas to belong more to the realm of "politics" than "hard law". Nothing supports such a distinction, except the self-interest of Commissioners in appearing to be non-partisan and non-political by

16. Flaws include the following: it is only a summary conviction offence, it is contained in Part X ("Fraudulent Transactions Relating to Contracts and Trade") rather than Part VIII ("Offences Against the Person and Reputation"), and it requires proof that the accused had the purpose of compelling another person to do or abstain from doing anything the other person had a legal right to do or not do. The apparent origins of the provision seem to be related to restricting union activity, but at least one court has found that the provision is not confined to industrial disputes: *R. v. Basaraba* (1975), 24 C.C.C. (2d) 296 (Man.CA).

17. Andre Picard, "Justice System Fails Stalked Women", *Globe & Mail*, March 9, 1993, A4. After a year of violence, Marjolaine Landry pressed charges against her mate after he pulled her around the apartment by the hair and nearly choked her to death. J.R. Lepage pleaded guilty to assault, was fined $200 and put on probation for a year. The couple reconciled, he eventually recommenced beating her, she fled. He stalked her, threatened her, smashed the windshield of her car. She had him charged, the court issued a peace bond against him and ordered him to turn in any weapons, but the police actually *refused* to take his pistol because the computer said he had no record. He continued to terrorize her, and police claimed they could do nothing to protect her. A few days later, Lepage emptied his .38 calibre revolver into Ms. Landry's car at an intersection, killing Landry's sister and injuring a friend.

confining themselves to a subject area where political choices can be buried in the abstraction of "general principles", precedent and hoary doctrines that have been around so long that they are treated as having spontaneously generated out of the word "justice".

A few years ago, Professor Christine Boyle challenged this very pretence of neutrality that the LRCC endeavoured to convey through the articulation of abstract principles of criminal liability either in respect of specific offences or the "General Part."[18] I share and adopt her position that "analytical clarity is a problematic value, especially when presented as something worth pursuing in a vacuum."[19] Selecting the *Report on Contempt of Court*[20] as one of a myriad of possible examples, she notes the utter failure of the *Report* to consider gender bias among the judiciary and the impact of the *Report's* recommendations with respect to it. Commenting on *Working Paper 29, The General Part — Liability and Defences,*[21] Boyle observes how "mistake of fact, self-defence and necessity are all discussed as if reality were gender neutral and no concern need be expressed about the impact on women of the abstractions discussed and proposed."[22] Similarly, rules for the intoxication defence are assessed and proposed without any reference to the real costs imposed by the preferred rule on, say, women who are sexually assaulted by drunken assailants. To the extent that the LRCC was able to pursue a goal of uniformity and consistency and represent its views as a consensus, it did so by by creating an institutional legal ethos that exalted internal purity, formal equality and uniformity over other values, such as the responsiveness of law to the social context from which law emerges and into which it speaks. In the process, it silenced all other perspectives.

Now, reasonable people may hold quite different visions of law's purpose and, by extension, the standard against one measures its quality. The fact is, however, that the LRCC embraced a single, totalizing theory to the exclusion of virtually all others. This perspective on law is manifested most clearly in its work on the *General Part.*[23] I believe it is

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18. Christine Boyle, "Criminal Law and Procedure: Who Needs Tenure?" (1985), 23 Osgoode Hall L.J. 427.
19. *Ibid.*, at 433.
20. *Contempt of Court: Offences Against the Administration of Justice* (*Working Paper 20*) (Ottawa: LRCC, 1977).
21. (Ottawa: LRCC, 1982). The subject eventually evolved into *Recodifying Criminal Law (Report 30)* (Ottawa: LRCC, 1986) and *Recodifying Criminal Law: Revised and Enlarged Edition* (*Report 31*) (Ottawa: LRCC, 1987).
22. Boyle, *supra*, note 18 at 436.
23. *See* documents cited *supra*, note 21.

fair to say that the Commission believed they would be formulating general principles of liability for which exceptions could be made for specific offences. Returning to the topic of defences in criminal law, for example, it is possible that they *may* have eventually countenanced a reconsideration of the role of intoxication defence in sexual assault, but only if absolutely necessary, and only as an exceptional measure. The problem with this approach is that if one requires an independent justification for departing from a set of general rules that facilitate the abuse of large numbers of women and children, who in turn comprise more than half the population, then I want to know what and who law reformers were thinking about and not thinking about when they settled on the "general" rule. Alternatively, I would challenge the privileging of generality and consistency across offences as a virtue that presumptively prevails over other competing values.

I would be remiss if I did not temper my criticism with a recognition of the last report issued by the LRCC, *Aboriginal Peoples and Criminal Justice.*[24] In many ways, it represents a bold and commendable attempt to depart from the strictures of past reform efforts. It genuinely attempts to wrestle with the specificity of aboriginal people's encounters with the criminal justice system. It should not escape notice, however, that the Law Reform Commission had to be pushed into this project through a Minister's Reference.[25] The *Report* indicates that the LRCC was demonstrably lukewarm to a methodology that challenged their adherence to a view of law as a set of abstract neutral principles subject only to the principle of formal equality:

> Throughout our work we have extolled the virtues of a uniform, consistent and comprehensive approach to law reform. This Reference calls for us to examine, in specific detail, one group of persons and its interaction and unique difficulties with the criminal justice system.... While we remain committed to the principles of uniformity and consistency, distinct treatment might be constitutionally justified on the basis of sections 25 and 35 of the *Canadian Charter of Rights and Freedoms*, which put Aboriginal peoples in a unique constitutional position with pre-existing legal rights, or else under the affirmative action clause of the *Charter's* equality provision.[26]

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24. *Report 34* (Ottawa: LRCC, 1991).
25. Mr. Stan Cohen, formerly of the LRCC, assured me that the Commission had wanted to embark on a project of this nature much earlier, but restrained itself because of uncertainty about whether their statutory mandate would permit such an inquiry absent governmental sanction. While this may vindicate the Law Reform Commission's inaction, it raises equally serious and troubling questions about the independence of the Commission from government.
26. *Supra*, note 24 at 1.

One would think that one had to seek permission under the Constitution to use a real group of people and their real life experience as the organizing principle for inquiry as opposed to an ostensibly genderless, raceless, faceless doctrine. Nobody, but the Commission itself, imposed that constraint on the scope of inquiry, and I can only guess that it did so to vindicate its own long-standing ideological commitment to a particular vision of law.

IV. *Reform*

In its *Second Annual Report*, the Commission described its mandate as follows:

> "Bad laws", said Burke, "are the worst form of tyranny". They are a tyranny every freedom-loving nation must fight to prevent. And they are a tyranny the Law Reform Commission of Canada was expressly designed to combat."[27]

Accepting for the moment the narrow definition of law at work here, various questions come to mind: are bad laws *always* the worst form of tyranny? Are they *invariably* worse than the tyranny of good (or at least adequate) laws ignored? Or good laws in the hands of bad decision makers? Is more law the best response to bad law? If you want to change the "law", changing the words on paper is only one way, and not necessarily the optimal way. Where the injustice experienced by a particular group is related to systemic oppression, it is reasonable to suppose that that status of disadvantage permeates all elements of the system, and altering words on paper typically produces little change, or else, generates new counter-strategies to neutralize any positive effects and maintain the *status quo*. That is why introducing a new and improved stalking law may well turn out to be a waste of time. Police officers will still have latitude to decide whether to arrest, prosecutors will still exercise discretion about whether to prosecute,[28] and judges will still bring whatever gender biases they possessed prior to passage of the legislation, to bear on statutory interpretation, fact finding and the sentencing process.

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27. Law Reform Commission of Canada, *Second Annual Report, 1972-73* (Ottawa: LRCC, 1973) at 7.

28. One of the complaints about the existing provision on intimidation is that is strictly a summary conviction offence. The new stalking offence is a hybrid offence, thus suggesting that it has the potential to result in more serious penalties. While this is true in theory, given the practice of plea bargaining and the general trivialization of harms done to women, it is far from clear that actual sentencing for convictions obtained under the new stalking law will reflect the allegedly greater severity of the crime.

The identity of decision makers who interpret and apply law is of course crucial to the concrete meaning of law in the real world. One route to changing law is to change the personnel who interpret and apply it. In one of my research areas (immigration), the correlation between the method of appointment (patronage) and the quality of decision making by the Immigration and Refugee Board is widely seen to be very strong and very negative. Consider this: I recently spoke to an immigration lawyer about the new guidelines regarding the admission of women refugees on grounds of gender persecution.[29] He was uncharacteristically optimistic about the impact of the new guidelines, but when asked whether he really believed that the guidelines would be followed by decision makers, he readily conceded that he anticipated strong resistance among Immigration and Refugee Board members. His optimism was based on his assessment that he would be able to take one of the negative decisions from a Board and successfully challenge it before the Federal Court. He had little confidence in the quality of the front line people appointed to make decisions even when confronted with guidelines instructing them on why and how to take women refugee claims seriously. Of course, it is also the case that he was compelled to put his faith in another group of appointees.

I was startled to discover that the LRCC had never undertaken any project looking into judicial and administrative appointments with a view to promoting integrity in the selection process and equity in the outcome. Upon reflection, it occurred to me that acknowledging the role these actors make in law-creation implicitly decentres legislative reform as the *sine qua non* of legal change, which in turn undermines the long run legitimacy of the Commission itself as an agent of legislative reform.[30]

Events in recent years around abortion in Canada also raise interesting questions about reform. For the last couple of years, Canada has had no federal law regulating abortion.[31] It seems to me that there have been no significant problems arising out of the failure of the state to regulate women's choice to seek an abortion. Compared to anything else I've seen that might arguably meet the constitutional pre-requisites of *Morgentaler*,[32]

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29. "Women Refugee Claimants Fearing Gender-Related Persecution", *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Ottawa: Immigration and Refugee Board, March 9, 1993).
30. I say this with awareness that the LRCC is generally perceived to have actually had little effect on legislative reform to any significant degree.
31. The attempt by the Nova Scotia government to restrict access to abortion services through provincial legislation was recently declared *ultra vires* by the Supreme Court of Canada: *R. v. Morgentaler*, File No. 22578, September 30, 1993 (unreported).
32. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

no law seems to be the best abortion law around. At no point did the LRCC entertain this possibility. Perhaps it simply distrusted women too much to permit such "lawlessness". Perhaps it could not afford to confront the humbling reality that law *per se* can be more of an obstacle than a path toward social change.[33] On the other hand, I believe that the *Report on Aboriginal Peoples and Criminal Justice* discloses a nascent ambivalence about the virtues of expanding rather than contracting the domain of law. The Commission begins its series of recommendations with the following finding:

> The criminal justice system must provide the same minimum level of service to all people and must treat Aboriginal persons equitably and with respect. To achieve these objectives, the cultural distinctiveness of Aboriginal peoples should be recognized, respected and, where appropriate, incorporated into the criminal justice system.[34]

The Commission's second recommendation states as follows:

> Aboriginal communities identified by the legitimate representatives of Aboriginal peoples as being willing and capable should have the authority to establish Aboriginal justice systems. The federal and provincial governments should enter into negotiations to transfer that authority to those Aboriginal communities.[35]

The *Report* then goes on to make thoughtful and useful recommendations touching on virtually all aspects of the criminal justice system from policing to trial to corrections, in a mission that might loosely be described as institutional (as opposed to doctrinal) reform. All of these are in furtherance of the first recommendation, which I would label "reformist". Few of them are entirely novel. Inquiries from Nova Scotia to Alberta have traversed similar terrain, as have various academics, researchers and advocates.[36]

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33. Samek expressed a similar point in terms of the lawyerly mind: "For him [sic], the stability of law is a necessary and usually a sufficient condition of the stability of any society, and essential to the survival of the individual's 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." Samek, *supra,* note 2 at 421.

34. *Supra*, note 24 at 95.

35. *Ibid.*

36. For a survey of the various commissions of inquiry, task forces and other studies into Aboriginal justice issues conducted up to the end of 1991, *see* H. Archibald Kaiser, "The *Criminal Code* of Canada: A Review Based on the Minister's Reference", [1992] *U.B.C. Law Rev.* (Special Edition) 41 at 65-76.

On the other hand, we hear absolutely nothing more about the implications of the second recommendation about handing over power to Aboriginal people, a proposal which I believe could be regarded as "transformative". The LRCC could not and did not ignore the voices of Aboriginal peoples themselves who "conveyed a deep sense of the futility in attempting to change the face of the criminal justice system when broader, more fundamental social change is necessary."[37] Elsewhere, the Commission acknowledged that "Aboriginal peoples have consistently voiced their desire to establish systems of justice that incorporate their own values, customs, traditions and beliefs but that permit the adaptation of these features to the realities of the modern age."[38] Yet the force of this recognition is effectively marginalized by orienting virtually all of the recommendations toward reform of the current system. The Commission's position appeared to go something like this: 'Aboriginal autonomy is the long term ideal, but in the short run, we should make the present system as responsive as possible.' A plausible enough position perhaps, except that Aboriginal people had categorically rejected it, and for compelling reasons based on long and bitter experience.

Had the LRCC devoted space to following through on its admission that Aboriginal control over criminal justice was the only viable resolution, it could have then arrogated to itself the important and useful role of designing legal strategies to mediate the interaction of Aboriginal and non-Aboriginal legal systems. In my limited experience, concerns about what might loosely be called "conflict of laws" between future aboriginal justice systems and the dominant system invariably emerge as an objection to aboriginal control over criminal justice. Exploration of this question by the LRCC could have been a very constructive step toward assuaging fears and debunking misconceptions in non-aboriginal sectors about the implications of self-government in the domain of criminal law. It would have preserved a function for the Commission consistent with its declared advocacy of Aboriginal autonomy, though it could only be accomplished at the expense of becoming a bit player in the larger drama of legal transformation.

In the end, the *Report on Aboriginal Peoples and Criminal Justice* steered away from the radical implications of its own endorsement of Aboriginal autonomy and focussed its energies on a series of modifications to the existing system. Whose interests were served by choosing the path of reform over transformation? It may have served the interests of the

37. Kaiser, *supra*, note 36 at 93.
38. *Ibid.*

government by effectively marginalizing the self-government option, though as an independent agency accommodation of government interests is putatively not the role of the Commission. It may have served the interests of unnamed parties, organizations and 'experts', but the identities and opinions of these players are never articulated in the Commission's *Report*. It is far from evident that it served the interests of Aboriginal peoples themselves, given that the *Report* records a virtually unanimous rejection of a reformist strategy and an insistence that Aboriginal autonomy is the only satisfactory response to the problem.[39]

From what I can see, the only unambiguous beneficiary of the proposals made in the *Report on Aboriginal Peoples and Criminal Justice* was the LRCC. The Commission openly resisted the call to abandon its belief in the perfectibility of the *Criminal Code* and related statutes, especially since "[w]e at the Commission have devoted much of the past twenty years to exploring many of these deficiencies."[40] Like some kind of obsessive legal alchemist driven mad by years of laboratory games, the Commission could not give up the job even as they conceded that the premise was false and the work futile. In so doing, the Commission revealed itself as aware of, yet imprisoned by, its own bureaucratic and legalistic impulses.

Perhaps the best indicator of the LRCC's narrow conception of reform is revealed in their own criteria for gauging success. Professor Teresa Scassa notes in her survey of the LRCC's final *Annual Report* in 1991[41] that the Commission identified the following four measures of its own influence: legislative achievements, judicial decisions, changing conduct of officials, and public education.[42] The first two categories require no elaboration here. Examples given by the LRCC of its effect on the conduct of officials were its projects on court unification in the family and criminal courts, use of videotaped confessions, and a relatively modest restructuring of the criminal prosecution division of the British Columbia

39. Members of the Commission who participated in the process have told me that the *Report* was favourably received by at least some Aboriginal participants. I have not conducted a systematic survey of the response in the Aboriginal communities to the *Report*, so I cannot comment either way.

40. *Supra*, note 24 at 3.

41. Law Reform Commission of Canada, *Twentieth Annual Report, 1990-91* (Ottawa: LRCC, 1991).

42. *Ibid.*, at Table of Contents.

Ministry of the Attorney General.[43] Achievements in public education mainly took the form of free distribution of reports and working papers to the public.[44] The Commission does devote considerable space to reviewing the results of a questionnaire it distributed to over 4,000 judges, lawyers, law professors, police and the public soliciting responses to proposals contained in its booklet *Police Powers: Highlights of Recommendations*. Curiously, the *Annual Report* does not indicate what, if any, changes were made in light of the feedback received. It does declare that "[t]he number of completed questionnaires ..., some with very thoughtful comments, reinforces the Commission's belief that Canadians are interested in reforming the laws of criminal procedure."[45] Given the constituency who were invited to participate, and the fact that they were not choosing criminal law from an array of possible priorities, the LRCC's conclusion on this point can best be described as somewhat self-serving. As Scassa concludes, "[t]he measures of success used by the LRCC in 1991 reflect a very narrow and limited conception of its [law reform] mandate."[46]

If there is any merit to my contention that the LRCC predominantly (though not exclusively) served its own interests, the question we must ask ourselves is how to avoid repeating the same mistakes in the future. Let me begin by trying to make a virtue of necessity. The LRCC is no longer. While I would not have called for its abolition, we now have the possibility of dispersing law reform initiatives to a constellation of relatively disconnected actors who share no common *institutional* interest in promoting a particular vision of law. It is important to say "possibility" and not "certainty" because much depends on how the participants are selected and who sets the agenda. If the powers that be decide to anoint a select group of "legal experts" as the core of a new unofficial law reform commission, I predict that a common institutional interest will eventually coalesce around the chosen participants and the pattern I have described above will reproduce itself. What follows are a few proposals which I hope will stunt the re-emergence of a self-

43. *Supra*, note 41 at 21-23. Interestingly, the LRCC cites as one of its accomplishments the establishment of a disclosure court in Vancouver, pursuant to recommendations made by the British Columbia Justice Reform Committee in 1988. The link between this project and the work of the LRCC seems to be that the Vancouver project was modelled on a similar pilot project undertaken in Montreal in 1975, which in turn was initiated as a result of proposals made in 1974 by the LRCC's *Working Paper 4, Discovery in Criminal Cases*.

44. *Supra*, note 41 at 24-25.

45. *Ibid.*, at 25.

46. *Supra*, note 4 at 6.

interested institutional vehicle for a few legal academics and facilitate the emergence of a more inclusive and socially responsible and responsive reform mechanism.

V. *Reforming Law Reform*

1. *Agenda*

I deliberately refrain here from supplying a list of subject areas that I think are ripe for law reform initiatives. This is not for lack of ideas, but rather because letting lawyers set the agenda for law reform is the first step toward entrenching the interests of lawyers in the direction of reform. In my view, subject areas of future investigation should be set by inviting submissions from public interest groups across Canada.[47] Preference should be given to proposals by groups which currently have few resources with which to command the attention of Parliament. My not-so-secret assumption (and hope) is that this will yield topics that are relevant to those who are relatively disadvantaged in Canada, and perhaps subjects that both challenge us to think creatively about the scope and utility (or disutility) of law.

A related advantage to a grassroots approach is that it provides a "reality check" on what the real problems are. Professor Mary Jane Mossman recently provided an insightful illustration of the dangers of relying on litigation to provide the cues for the future direction of reform in the family law context.[48] As Professor Mossman demonstrates, law reformers over the last twenty years frequently let case law generated by appellate courts determine where and how to target reform efforts. Many of the cases that reached the higher courts involved divorcing partners where significant property was potentially available for division. Public outcry over judicial decisions that refused to recognize women's unpaid economic contributions as capable of creating property entitlements[49] led reformers to focus attention on rectifying the laws of property division.

47. In fact, the LRCC's *First Annual Report* outlines a similar plan for using public consultation as a means of setting the agenda. It admits that their research into family law was prompted by public demand rather than through internal processes. It is also telling that the LRCC commitment to family law was short lived, and eventually discarded as criminal law took over the agenda. *First Annual Report, 1971-72, supra*, note 5 at 4.

48. Mary Jane Mossman, "Running Hard to Stand Still: The Paradox of Family Law Reform", the 1993 Read Lecture, Dalhousie Law School, October 28, 1993 (on file with author), at 10-17.

49. The most notorious case probably remains *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367 (S.C.C.).

Whatever benefits these reforms may have conferred on members of the propertied classes,[50] they did little to alleviate the hardship faced by women leaving marriages where there was little property to share. Had law reformers taken their cue from a more representative sampling of divorcing couples than simply those who litigate, they might have generated a rather different agenda for action.

As the foregoing discussion evinces, I do not envisage a law reform process that is non-partisan and disinterested. This is because I maintain that law reform has *never* been non-partisan and disinterested, though it has succeeded at various points in convincing others that the interests of the LRCC *are* the interests of Canadian society at large.

2. *Participants*

I am not so selfless as to suggest that lawyers be entirely excluded from the process, but I would, however, insist that legal academics be selected on the basis of experience and interest in the field, rather than because their ignorance of the area gives them the appearance of impartiality. I would expect lawyers to play a somewhat humbler role than they have in the past. In my world of reformed reform, lawyers would not merely consult affected parties en route to designing a solution, they would work *alongside* affected parties, take instruction and advice *from* them and negotiate *with* them about how best law can be fashioned to accomplish social goals. The way I see it, law reform is the occupation of everyone who agitates for social change, to the extent that change often contains a legal component. Those who go under the name "law reformers" hold themselves out as possessing unique expertise in the mechanics of translating political demands into legal form. In other words, law reformers are just a specialized group of lobbyists; why not allocate those skills to those most in need of advocacy? Yes, lawyers also have important contributions to make to the substance of the legal change, but I take exception to the notion that lawyers' substantive views occupy a privileged position simply because they come from the mouths of lawyers.

Part of the inspiration for this approach comes from my understanding of the coalition of national women's groups, legal activists and front line workers who worked together a couple of years ago to formulate a proposal on the new sexual assault legislation.[51] Professor Sheila McIntyre, a LEAF[52] participant on the working group, remarked afterwards how guaranteeing equal voice to each participant about the content of a new

50. Mossman, *supra*, note 46 at 14.
51. *See Criminal Code*, s. 273.1.
52. Legal Education and Action Fund.

law opened up possibilities that we lawyers alone, with our self-imposed (and self-validating) assumptions about what one can do with law, might never have arrived at. The key was in sharing power and authority to speak about what laws should say, and prying open the legal imagination to work out how it could be done.[53] This is a lesson from which we could all benefit.

3. *Objectives and Methods*

Success in law reform should not and cannot be measured by how many laws were passed, how many reports were passed out, how many times the LRCC was cited in a Supreme Court judgment, or in the reconfiguration of the sites of legal decision making. All of these indicia may or may not be interesting bits of information but they do not come close to answering the only question that matters when it comes to a law reform initiative: does it work? I endorse Samek's assertion that the efficacy of institutions such as law reform commissions "must be judged in human terms and in regard to human ends."[54]

Returning to a point raised earlier, it is naive in the extreme to believe that the complex array of forces that create and sustain social injustice can be resolved by the stroke of legislative pen. That is not to say that legislative intervention is not a necessary or important component of change, but rather that it is partial and must be constantly monitored against the backlash of forces that will inevitably (and with a greater or lesser degree of self-consciousness) operate to neutralize the potential effect of legislative reform. For example, in 1983 many feminists advocated relocating the *Criminal Code* offences of rape and indecent assault from the Part dealing with offences against public morals, to the Part dealing with offences against the person. A significant component of the amendments involved redefining the offences under the category of assault and renaming it "sexual assault". It was hoped that this transposition would de-emphasize the legal obsession with penetration as a measure of harm, and would also accentuate sexual assault as a crime of violence. Ten years later, the results are ambiguous at best. Anecdotal reports suggest that while the definition of sexual assault does not focus on penetration, courts still do in assessing the severity of the harm for sentencing purposes; patterns in sentencing also reveal that it is not necessarily being taken any more seriously now that it is labelled as

53. *See* Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49", in Julian Roberts and Renate Mohr, *Confronting Sexual Assault in Canada: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, forthcoming).
54. Samek, *supra*, note 2 at 426.

assault.[55] Instead of understanding that the violation cannot be measured simply by the distance travelled in vaginal penetration, some judges take the message that sexual assault as a whole is a less serious crime because it encompasses conduct that does not involve penetration. Finally, some feminists have challenged the theoretical legitimacy of characterizing sexual assault as a crime of violence *simpliciter*,[56] a move which implicitly calls into question the wisdom of lumping it in with the non-sexual assault provisions under the *Criminal Code*. None of this should be interpreted to mean that it was wrong to reclassify sexual offences in 1983, but rather to suggest that one cannot underestimate the ability of existing power structures to resist and subvert reformist measures.

What this means is that the targets of law reform will hardly ever be amenable to a "one shot" cure, be it a legislative amendment or a favourable mention in a Supreme Court of Canada judgment. If one is serious about achieving genuine reform, the approach must be multimodal and longitudinal. In other words, the problem must be tackled on a number of levels and monitored over time to see what works, what doesn't, and what responses become appropriate at later stages. In terms of reform modalities, at least three types merit attention:

a) doctrine;
b) pilot projects;
c) actors in the legal system.

As noted earlier, law reform efforts have almost exclusively focused on doctrinal analysis as the basis for legislative change. To the extent that doctrinal research is retained as an activity of law reform, I would argue for a pluralistic approach that encompasses gender, race, class, ability and other factors, in addition to the traditional positivistic perspective that has informed (if not defined) the LRCC's method in the past.

With respect to the second category, I suggest that pilot projects are a fine way of translating theory into practice. I believe that the Winnipeg Family Violence Court (FVC) project is a particularly noteworthy example of law reform in action. The idea of creating a specialized court to deal with issues of woman, child and elder abuse was developed in consultation with judges, the federal Department of Justice, provincial Family Services, the Minister of the Status of Women and thirty Winnipeg agencies operating in the field. The Court is staffed by self-selected prosecutors and judges who allocate a portion of their total work time to

55. On sentencing for sexual assault in Nova Scotia, *see Issues in Sexual Assault Sentencing in Nova Scotia* (Halifax: Nova Scotia Advisory Council on the Status of Women, June 1991).
56. *See, e.g.,* Catherine MacKinnon, "Sex and Violence: A Perspective", in *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 85-92.

the FVC. Under the regular system, the prosecution of family violence, and particularly woman assault, was a frustrating and largely futile experience for all concerned. Women felt victimized by the process; some were reluctant to testify out of fear and/or hope of reconciliation, which in turn led to prosecutors becoming jaded and withdrawing cases. Even when convictions were obtained, sentences were seen as inappropriate or too lenient.

In the two and half years since the creation of the FVC, the number of cases coming to court has increased, the average time for processing has dropped, the guilty plea and conviction rate has gone up, and a higher percent of assailants have received court mandated treatment as part of their sentence.[57] Victims appear to be more willing to engage the justice system since the inception of the Court because the justice system is responding more effectively to their needs. Institutional appraisal of prosecutorial success within the FVC is not based solely in terms of conviction rate; the responsiveness of the system to the self-identified priorities of the complainant is also taken into account. This shift appears to have eased the antagonism that too often marred relations between prosecutors and complainants who were reluctant to testify against their batterers.

At the same time, unemployed and Aboriginal men are significantly over-represented in the FVC, much as they were before the Court was set up,[58] suggesting that the overarching class and race bias of the criminal justice system is reproduced more or less intact in the FVC. It is still too early to measure the effect of the Court on the recidivism rate of batterers. However, Principal Investigator, Professor Jane Ursel, indicates that the new Court has placed increased pressure on the correctional system, which in turn will require restructuring to adjust to its new work load. The inference is that the objective of reducing the incidence of family violence will require follow up treatment after the judicial process has run its course. Professor Ursel stresses that the "ripple-effect view of social change suggests that when one part of a system is reformed it either

57. *See generally*, E. Jane Ursel, "The Family Violence Court of Winnipeg" (1992), 21 Man. L.J. 100.

58. Jane Ursel, *A Comparative Study of Sentencing in the Specialized and General Criminal Courts in Winnipeg* (Winnipeg: University of Manitoba Criminology Research Centre, 1992), Table 4 "Characteristics of Suspect by Data Set", at 19.

succeeds in forcing change throughout the system or the initial reform is seriously compromised."[59] As a first step, then, the Court is an unprecedented breakthrough, and the knowledge gained through the experiment provide information about the achievements and failures of the existing program as well as guidance for future reforms.

Now it seems to me that a project like this is worth more to victims of battering partners than a dozen law reform commission reports calling for an anti-stalking law, or indeed the anti-stalking law itself. Institutional reform *is* law reform, either as a necessary prerequisite to effective legislative reform or as a solution in itself.

As for the category labelled "actors in the legal system", what I have in mind are primarily law enforcement officials, judges and administrative decision makers. I can only reiterate my earlier point that *who* interprets and implements the law and *how* they do it have profound effects on *what* the law is. At least two ways of channelling reform through these agents are via the appointments process and through educational programs. Much has already been written in favour of revamping the process of judicial appointments, and I am not certain what more can be added at this point. Nevertheless, my impression is that much work remains to be done with respect to the process of selection for administrative appointments and the education of police, judges and administrative decision makers.

Finally, whatever methods are deployed to achieve reform, a critical determinant of success is information. Without research into the impact of any reform initiative, the dynamic of law reform has no rudder to guide it. Professor Mossman notes that no systematic follow-up data has been collected to measure the real impact of family law reform legislation in Canada. She contrasts this state of neglect with Australia, where the Australian Institute of Family Studies undertook to monitor the effect of its 1975 family law reform legislation. According to Professor Mossman, "ten years later, the Institute had significant data about the practical impact of legislative principles concerning property and support on divorcing spouses, data which was useful both for assessing the problems and for designing solutions."[60] The need for longitudinal studies about the consequences of law reform initiative seems painfully obvious, but it was a need that seemed to elude the LRCC.

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59. Ursel, *supra*, note 58 at 3.
60. Mossman, *supra*, note 48 at 16.

VI. *Conclusion*

I believe that the lessons one can take from the legacy of the LRCC is that its approach to its mandate was both too modest and too grandiose; too modest in its understanding of what constitutes law and reform, and too grandiose about the value of pursuing its narrow vision of law reform. Having begun my discussion with a reference to Robert Samek, I would like to finish with a quote from his article:

> "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."[61]

Robert Samek wrote those words fifteen years ago. I think it fair to say that the LRCC could not and did not pursue the course advocated by Professor Samek. Instead, it become something of a rarefied lobby group for legal academics. The government has removed the institutional impediment by abolishing the institution. Our challenge is to avoid resurrecting it and to prevent our own legalism from ossifying any future attempts at constructive social law reform. We now have a second chance to take Samek seriously; I propose that we take it.

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As the Conference drew to a close, a Department of Justice observer was invited to comment on the proceedings. She indicated that the Department has been sustaining its law reform activities since the demise of the LRCC through in-house work and external contract work. She further stated that the Department is advancing a proposal for a long term law reform program with four basic components: in house research; collaborative arrangements with provincial bodies, academics and professional law bodies; block funding for external projects; and a consultation process aimed at soliciting participation from a broader array of stakeholders. It would appear that this proposal was formulated by the Department of Justice prior to the Conference.

61. Samek, *supra*, note 2 at 435.