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THE DRAMATIS PERSONAE OF ADMINISTRATIVE LAW

By ALBERT ABEL*

Yes, Virginia, there is an administrative law.

But what is it?

Little is to be gained by simply taking another fling at Dicey for his incautious and inexact denial,¹ later recanted,² of its existence. It is now recognized. But it is not quite accepted. It fits no antique mould. Not knowing just what it includes, the legal profession has never felt quite at ease with it nor quite known how to handle it.

True, it is as hard to say just what law itself³ is but from long association that is seldom perceived as a question. Law is whatever lawyers concern themselves with as being within their special range of competence. It is what lawyers do as lawyers.

Similarly administrative law may be approached as the law relating to what public administrators do in the course of administering.

There are also private administrators. The law as to them is not administrative law. There are public functions which are not administrative. The law as to them is public law but it is not administrative law. A catalogue of the activities and the actors of administrative law presumes the distinguishing of public administration from non-public administration and from public non-administration.

Neither distinction is easy. The difficulty in the two cases is different. What activities are administrative is a matter of generalization, of working towards a definition. Which ones are public is a matter of particularization, of determining the presence or absence in a critically significant degree of the element of performance of a task for the government.

We can only continue to talk time worn empty words about administrative law until we commence by considering what we are talking about, that is, by identifying the set, public administrators, whose actions *are* public administration, the universe whose body of norms is administrative law. So both the definitional and the descriptive missions mentioned are necessary preliminaries.

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¹ See Dicey, *The Law of the Constitution*, (5th ed. London: MacMillan and Co., 1897) 327.

² See *Id.* xxxviii (8th ed. 1915).

³ For an elaborate examination of this problem see, R. Pound, *Jurisprudence*, (St. Paul: West Publishing Co., 1959) chapters 9 and 10.

Administration — What Is It?

Definitions can be disputed. They cannot be refuted. No definition is either correct or incorrect. A good one is a useful one; a poor one is vacuous. Those generally encountered are not broadly useful.

Take, for instance, legal usage both academic and judicial.

The writ-ridden content of legal rights and duties, now largely discarded in the private law context, persists in the attempt to build a structure of administrative law out of the materials of the prerogative writs, most notably for purposes here relevant certiorari and prohibition. "Acting judicially", essential to them just as a seal was to the writ of covenant or lease, entry and ouster to ejectment, indicated that only some action was judicial. A practise developed of labelling the rest "acting administratively". The intricacies of English legal history — the King's Bench's sturdy assertion of a supervisory jurisdiction over inferior tribunals, the resulting control over quarter sessions and the transfer of the "tribunal" concept from local authorities and non-common law judges to the miscellany of central government organs spawned over the last two centuries — explain it.

For defining and maintaining the bounds within which those outside the common law court hierarchy were permitted effectively to decide, there were certiorari and prohibition, the writs for controlling inferior tribunals. Clearly the new agencies to which supervision was being extended were not courts in the traditional sense. They were administrative bodies. For a variety of reasons — principled, prudential or practical as the case might be — the courts did not want to supervise all their determinations. They acted, they still act selectively. The basis of selection, accommodated to the available writ machinery, was said to be whether the action in respect to any given situation was "judicial". In application the concept has only vague if any contours; but that is another story. With an uneasy sense of its conclusory character, an effort was made to give it substance by contrasting it with "acting administratively".

The contrast is neither necessary nor helpful. One might think the actions of an administrative body, including those specifically judicial, to be generally administrative and that it would suffice, for certiorari or prohibition, that they were the judicial form of administrative action. The net result of the distinction proposed was a spurious dichotomy, two undefined terms in place of one. Floundering attempts to state a distinction followed. The most popular has been one which dubs as administrative decisions made according to policy or expediency whereas judicial decisions are based on law and authority. Any familiarity with how either courts or agencies deal with them reduces these characterizations to ideal types. Differences of degree are elevated into differences in kind.

No doubt if the courts are to continue to supervise agency claim resolution — and they quite evidently are — they must have some rationale for sorting out which they will consider. Talk about "judicial action" and "inferior tribunals" maintains continuity with the certiorari-prohibition origins.

It even furnishes the simulacrum of a reason, *stare decisis*, which, fail though it may when one runs through specific cases looking for predictive elements, answers the need of advocates and opinion writers for a convenient rhetoric. If using "judicial" and "administrative" in contradistinction is felt to fortify persuasiveness, there may be no great harm in it provided none of this very special use spills over into other areas. The parlance of judicial remedies, where expressions are terms of art, has no close or necessary relation with a taxonomy of occupational roles. The litigation meaning of "administrative" sheds no light elsewhere.

The public administration trade too places its emphasis in a way reflecting its peculiar concerns. It has hit indeed on a key element but failed to carry through.

While its practitioners and theorists have refrained from undertaking a formal definition, the focus of interest has been overwhelmingly upon organizational aspects. They find the essence of administration in the realm of the O. & M. professionals, whose preoccupation is with and whose special competence is in the administration of administration.

That is a legitimate, it is even an important aspect. It may embrace everything relevant for business administration from which so much of administrative science is derived. A firm is a discrete community with structured internal relationships. Its dealings with outsiders are not its administration but its output. So administration may quite accurately be assimilated to the arrangements bearing on the structure and functioning of its internal operations.

With a political community, every person natural or artificial is a member of the "organization". All are insiders. Not just the public servants but the general population are its components, equivalent to the personnel of a firm. In limiting their approach through organization to a consideration of relations within the official apparatus, specialists in the science of administration have imperfectly applied the analogy from business administration. Granted, the segment thus carved out is big enough and complex enough to justify particular study which, incidentally, satisfies the craving for a status claim as a distinct "profession". Calling it "administration" may be a convenient synecdoche. Nevertheless so labelling the part isolated for particular attention invited the confusion, which has ensued, that here as with firms an organization-oriented view of administration can exhaust itself on the authority flow within a limited group.

I accept that administration may validly be conceived of as organization but submit that it extends to the total organization, to all within the enterprise up to the point of its interface with outsiders. The conventional stress students of administration have placed on the interaction of official echelons alone rests on the implicit but wrong assumption that the citizenry are outsiders. This assumption perhaps helps sharpen the focus on what principally interests them. In other contexts, it stunts the defining potential of treating organization as the essence of administration and is what makes the standard literature of the administration industry of so little use for fixing the full range of administration.

Continental systems like the French which have a *droit administratif* face a special complication. They have two distinct bodies of law, administrative and private, whose content differs and two sets of tribunals, administrative and judicial.⁴ Civil law may govern some matters in an administrative proceeding. Administrative law principles apply at times in judicial litigation. With us, the need to get an idea of what administration comprises is so that we can make a start at a rational approach to ordering chaos. There is the converse task of elaborating the consequences of established concepts. Without presuming to state the refinements of the scholarly debate that that effort has occasioned, I observe that there is general agreement that administrative law applies to the "*service public*" which some think critical for administrative tribunal competence too while others refer the latter to "*puissance publique*".⁵ The controversy, whether substantial or merely semantic, bears on problems which have no parallel in common law systems. That makes the distinctions suggested not directly relevant.

Collateral enlightenment may be had however from the key role assigned to the "*service public*", though in various ways, and in the consensus that the actions of private bodies may yet be within the scope of administrative law and, if so, even subject to administrative tribunals while those of public agencies, if manifestations not of the state's political authority but of its corporate personality, may be outside both.

Like the blind men's view of the elephant, none of these observations about administration transcends its special approach. There is no overview. But the second and the third each give pointers to its distinguishing features. The administrative science schoolmen's insight that organization and administration are co-terminous needs to be freed, for useful application to public administration, of its restricting assumption, completing the organization universe by including the citizen component. The continental thinking emphasizes more what is "public" than what is "administration". What it contributes is the notion that the relevant organization is of a function, "*service public*", not just of a corps, "the public service". Operational, not formal considerations, the dynamics of authority not the statics of employment structure are important. Combined, they provide the comprehensive, coherent picture of a concept which while not a definition can do the work of one.

Administration, they suggest, embraces all arrangements devised and put into effect within a social entity — a state, a business, a church, what you will — for correlating the authorities and responsibilities of members which bear on the achievement of the entity's goals. To me this seems useful for the purpose at hand, namely, an exploration of what administration encompasses.

It seems at first blush to include everything officially done. Not so.

⁴ Brown and Garner, *French Administrative Law*, (London: Butterworth's, 1967) 4; 1 Auby & Drago, *Traite de Contentieux Administratif*, (Paris: R. Pichon et R. Dorand Auzias, 1962), 93.

⁵ See 1 Auby & Drago, *supra*, note 4 at 323-332; Roland, *Droit Administratif* (11 ed. 1957) 17; Chapuis, *La Service Publique et la Puissance Publique* (1968), 84 Rev. Du Droit Publique et de la Science Politique 235.

A trivial instance may be seen in the performance of ceremonial functions, as in serving as official representative on an occasion of public celebration or mourning, and this even though the actor may have a speaking part. Emotions may be affected by what he does but authorities and responsibilities are not.

A less honorific but more numerous group whose action is not administrative is those who directly handle things only without working on or through people. The immediate operators of government — or business — trucks or typewriters or brooms are not engaged in administration when doing their jobs, set for them by those who are. A like principle excludes high status personnel too — legislative draftsmen, regional planners, research scientists, the statistical analysts of DBS, the cameramen of the National Film Board. Though they manipulate ideas, not materials, theirs too is a production rather than a control function. They are administered, they do not administer.

Other examples demonstrate the effect of applying the business administration model to administration generally. In observing how the organizational approach used there carried administration to the point of interface with outsiders, it was noticed that so far as public administration is concerned, that point has in practice been wrongly placed by a tacit limitation to the official apparatus. But, like other enterprises, governments do have contacts outside, which mark where organization and so administration ends.

The obvious case is international or, for that matter, all voluntary inter-governmental relations. The United Nations, the Commonwealth Secretariat, the Council of State Governments — each has of course its own staff and organization and by that token its own administration; one might even say its proper administrative “law” to the extent that their internal rules can be called law. But in its dealings with them, a state engages in external dealings beyond its domestic system of controls. This is less evident in bilateral dealings between separate political communities, but really no different than in the instances mentioned. Administration ends where the power to prescribe the structure of relationships ends.

A comparable interface in principle exists for local transactions. Only in its governmental capacity is the state an all-inclusive organization. Where, laying that aside, it acts in its purely corporate capacity, for instance, as a supplier like any other in the marketplace, the bargaining partners with whom it deals are in that context outsiders. As an entrepreneur, administration is for it exactly what it is for any business enterprise⁶.

The proposition, however true as an abstraction, is admittedly hard to apply. This is so for two reasons. One can seldom establish that state trading is altogether commercial. Quite commonly and always potentially it is one kind of control mechanism for effectuating economic or other social policy. Its exercise to that end is administration for it is therein only a device to implement a desired structuring of relations within the political community.

⁶ Cf. *Republic of Congo v. Venne*, [1971] S.C.R. 977, 22 D.L.R. (3d) 669 (recognizing and discussing in an international law context involving sovereign immunity, the distinction between acts *jure imperii* and *jure gestionis*).

A second difficulty comes from the dual role of those acting for the state enterprise. To illustrate, consider a counterman for the Liquor Control Board; on the one hand and probably primarily he is like any retail sales clerk but additionally he is supposed to withhold supplies from persons intoxicated or under age, which is a low level decisional and law enforcement function related to social, not to commercial policy. These create troublesome ambiguities. At this point though, we are only concerned to establish the criterion. A catalogue of activities based on it will come later.

Exclusion from the domain of administration of the operations specified above does not imply exclusion of what precedes and supports them. Though retail clerks and sweepers do not administer, sales managers and plant superintendents do. They address their attention to the relations of persons within the organization, not just to things or to outsiders. So also with the staff of the Department of External Affairs as contrasted with ambassadors, or project co-ordinators as contrasted with laboratory scientists. Some will find this cautionary note supererogatory in view of the emphasis on organization as the talisman of administration. It is inserted to make it crystal clear that what is critical is not the nature of the end product but its nature as an end product divorced from internal organizational impact.

Public — When Is It?

What administration is private, what public can only be answered for the particular time and place.

It depends on whether the currently prevailing social philosophy sees given institutions as organs of the state or as autonomously grounded. Often discussion is in terms of totalitarianism or liberalism. Resort to such epithets befores the fact that as an absolute neither is often urged in theory or ever realized in practise. It is all a question of degree. Too, opinion on the subject is always in a state of shimmering flux.

The more numerous the areas of action not seen as civic action, the less extensive is the domain of public administration. This resembles and sentiments about it may be derived from attitudes about whether persons exist independently of or only in society. The questions are distinct, however. Our immediate concern addresses itself to groups, not to persons. We must ask by what warrant the power structure of the group exercises its controls. If as a vehicle of state authority, it acts by delegation — which may be implicit — from the state, then it is simply an element of organization, a mode of public administration. If otherwise based, its administration is not public administration.

Every social group other than the state exists by its sufferance in the sense that it could, if it so willed, deny consequential effects to the decision of the group's power bearers, thus reducing it to at most an ongoing unorganized rally. If everything in the way of organized association which the state permits depends on that permission and thereby derives from the state, all administration can logically be claimed to be public administration.

Instead there are examples of powers accepted, recognized, even in some cases affirmatively bestowed by the state which by common assent do

not have the effect of making the recipient a part of public administration. Convention, not logic, fixes the line between the public and the private.

Take the family, for instance. It has been called the basic social unit.⁷ It may prehistorically have been the first human group.⁸ It has suffered sadly in our urbanizing society yet visibly retains a good deal of vitality. It has still many vestiges of its traditional organization. Though the paterfamilias cannot as in Rome put the son to death⁹ nor even as under the mature common law bind him out to labour until the age of majority,¹⁰ if strong-willed he may assert some control over use of the family car. The socialization of the child, clearly a matter of public importance, is left to the parents. Theirs is the direction of his cultural and religious exposures.¹¹ By neglect they may forfeit their jurisdiction and surrender custody to explicitly public agencies. Legislation has even restructured the family "administration" by putting the mother on a parity with the father.

In some degree the family certainly is an organization. In some measure it certainly controls the relations of citizens in matters about which the community is not indifferent. Public monies are turned over to parents, one assumes, not as an award for fertility but as an appropriate delegate to expend for the child's benefit. In other times and places the state has done directly much of what here and now is left to the family — in Sparta, for example, or in the kibbutzim. The extended family in our own primitive law was a chief mechanism for peacekeeping through the device of the kinbote. Some of the powers of the *conseil de famille* under French law make it the manager of important affairs of the members.

Yet the very suggestion that the family functions in any way as an organ of public administration would raise an outcry. Our ethos finds in it the embodiment of an order of values anterior and indeed superior to those of the state.

Other spheres of human activity are accepted by us but not always or everywhere as none of the public's, that is, of the government's business. Here freedom of enterprise is an article of faith so business administration is excluded; freedom of worship is a basic postulate, so religious administration is excluded. Elsewhere their functionaries too are public administrators whose

⁷ ". . . [T]he family is the most important social institution of mankind". I Ward, *Dynamic Sociology* (2nd ed. New York: Appleton, 1911) 677; cf. 3 Sorokin, *Social and Cultural Dynamics*, (New York: Bedminster Press, 1937) 30 (" . . . the first fundamental form of social relationship and of social bond in the organized groups").

⁸ Cf. Homans, *The Human Group*, (New York: Harcourt Brace, 1950) 190; McIver, *Society*, (New York: R. Long and R.R. Smith, 1937) 201.

⁹ Kaser, *Roman Private Law*, trans. Dannenburg. (Durban: Butterworths, 1965) 61; Muirhead, *Roman Law* (3d ed. London: A & C Black Ltd., 1916) 27.

¹⁰ *Day v. Everett* (1810), 7 Mass 144 (S.Ct.). At the outset, the father's powers at common law seem to have been a good deal narrower, see 2 Pollock & Maitland, *History of English Law* (2nd ed. Washington D.C.: Lawyer's Literary Club, 1959) 436-37.

¹¹ *Final Report, Special Joint Committee on The Constitution of Canada*, 4th sess. 28th Parliament 1972 p. 24 (" . . . There are some matters in which a Government in a free society may not go beyond persuasion. In our view . . . the right of parents to choose their children's education is a basic human right which no government can encroach upon").

operations are part of administrative law. A Soviet commissar of industry or plant manager while addressing himself to much the same type and range of problems as a corporate board chairman or branch executive in Canada is a public administrator; his opposite number is not so regarded. The Swedish Ombudsman's scrutiny of the village parson's dealings with his parishioners, indeed in our own law that wellspring of convenient platitude, *Julius v. Bishop of Oxford*, demonstrates that where the servants of God are state servants too, their secular status is that of public administrators.

On the other hand, claims to autonomy in the name of academic freedom have failed. The courts persist in subjecting to the rules governing administrative conduct at least the publicly supported institutions of education including those of higher education. This probably faithfully reflects our society's relative downgrading of the mystique of learning as compared with those of religion or of business. In the Middle Ages it was otherwise and the universities' claim to stand outside the political community was honoured.

One feature about the business corporation, to return for a moment to it, seems to deserve special comment. The family, the church, the universities all arose spontaneously. Their functions though left undisturbed by and indeed at times encouraged and augmented by the state were not state created. In contrast every business corporation owes not only all its powers but its very existence to the state. (Originally, virtually all corporations were and now again, as the ideal of a controlled economy revives, some of them in whole and others in part, are contraptions for achieving public ends through private means.) Such will be dealt with later. Here I am talking only about the common or garden variety of business corporation — an artificial person, with the state as artificer. Management's entrenched position despite the shareholders' hollow "ownership" is state-sanctioned. It is through legislation that the power of freezing out minorities on a merger is now being acquired. An understanding that at least the more substantial corporations are all vested with a public interest is manifested by the general imposition of conditions on the distribution of their securities. A form of business organization the corporation may be but it is a form endowed by the state with an array of special attributes and capacities.

Yet, almost as much as for the family, it would grossly offend received notions, summed up in the shorthand of free enterprise, to suggest that its administrators are public administrators. Indeed business administration and public administration are often seen as fraternal twins together constituting the whole family of administration.

Most often private administration is so because its institutions realize values taken as transcendent which supersedes consideration of their role in the fulfillment of the purposes of the political community. Some though is private because its concerns are trivial. There is for instance, the fraternity pledge master. Or the sports referee.

The English locution of "domestic tribunals" seems to have originated in just this dismissal of the trivial. First came the social club. Ways of talking and thinking about it were transposed to professional associations and, when trade unions became lawful, to them. The gradual shift of the liberal professions from informal fraternities of gentry who had a common speciality to

depersonalized occupational categories, and the continually growing swarm of quasi-professions and pseudo-professions clamoring for prestige and prerogatives made the analogy less and less apt. Emergence of the trades unions, which were also treated as "domestic tribunals", as *de facto* regulators of access to employment eventually forced a recognition of its absurdity. In *Lee v. Showmen's Guild*,¹² it was substantially discarded. Legal discourse in Britain and Canada probably will continue to bear the "domestic tribunals" scars for a long time. But occupational associations possessing immense power are no longer to be regarded as "domestic tribunals" along with garden clubs and other trivialized organizations. Their place in administration can be examined in the light of their own great importance.

Strangers and Brothers

Some more things must be left out in deference to tradition.

One is the military services. Surely the most rigidly organized and the least private of activities, they are ordinarily seen as having a unique character. Military law is put on a separate footing.¹³ Any mention of those services is conspicuously absent from standard works dealing with public administration and administrative law. As hard as it is to justify on logical grounds their general exclusion, it becomes almost impossible where they are called on to preserve internal order, to bring Riel or the University of Mississippi to book. Nor is there a bright line distinguishing the military from other types of organizations. The train bands and their descendants, the militia, as well as the RCMP¹⁴ are marginal and cannot be firmly assigned. Along with the army and the navy, they are usually omitted from consideration. The feeder services for procurement of materiel or recruitment of personnel seem on the other hand to be taken as engaged in public administration. The former attitude suggests that the criterion of what is military is the mission of providing defense while the latter looks elsewhere for it. The temptation to apply a purely formal test, inclusion in the regular military establishment (broadened to include marginally military outfits) fails for cases like the U.S. Army Corps of Engineers whose major rivers and harbors functions are not military though the Corps is part of the military establishment, or the Coast Guard, in peacetime engaged in revenue and rescue tasks under the Secretary of the Treasury, in war charged with coastal defense and responsible to the Secretary of the Navy. Sometimes structural, sometimes functional attributes seem to elucidate how to tell a military service when one sees it. The tendency has been to treat as military and exclude from public administration everything done within or by an arguably defense establishment that is directed to an arguably defense-related objective. That shall be done here, fully recognizing that the distinction is only intuitive.

¹² [1952] 2 Q.B. 329.

¹³ See B. Starkman, *Canadian Military Law: The Citizen as Soldier* (1965), 43 Can. Bar Rev. 414. There has recently been a tendency to transport to military law principles and procedures developed in other contexts, see R. Dickerson, *The Codification of Military Law* (1952), 38 A.B.A.J. 1037; Coulet, *Le Nouveau Règlement de Discipline Générale dans les Armées* (1968), 84 Rev. Du Droit Publique et de la Science Politique 5.

¹⁴ See *The Queen v. White* [1956] S.C.R. 154.

Courts and legislatures are also by tradition excluded. These lofty institutions refuse indeed to acknowledge kinship with their poor relations, the administrators.

But there the genealogical record is. In England, they all stem from *Curia Regis*, the undifferentiated royal court. Specialist legal elements were hived off, first to Common Pleas and King's Bench, later to Chancery and to the Exchequer which remained a hybrid for centuries. These taken together composed the central judicial structure whose fusion into a unified court system is only a hundred years old. True, there was also a network of local tribunals, assizes, and quarter sessions; there were the humble indigenous courts baron and borough courts; and there were antecedents of today's self-governing professional tribunals in the courts of the merchants, of chivalry, of the church. From the likes of these, our contemporary minor courts eventually grew. Some of them were, like *Curia Regis* ancestors of the august royal courts, initially undifferentiated globs of official authority. In their blend of functions, the quarter sessions of pioneer Canada still showed traces of their descent from the English local magistracies. Nor was this peculiar to the British strain in the nation's heritage. The municipal councils of New France, which served as its judicial tribunals, feeble New World copies in this respect of the *parlements* of the Ancien Regime, had important administrative functions as well.¹⁵

Parliament too and all the other legislatures in all the places where the public law derives from that of England evolved out of the *Curia Regis*. Without tracing it in detail, that evolution, with the emergence of the House of Lords and then the House of Commons, originally to make grants of money to the King, venturing in turn to humbly petition as well, becoming a full and finally the dominant partner in legislation, deserves to be recalled to mind.

Here there is not the blurred boundary which was observed as existing with respect to the military. Only courts and legislatures are being ruled out, not the organs of adjudication and legislation.

Latter day separation-of-powers theory has tended to equate them. But Aristotle ran his line differently;¹⁶ Montesquieu, who by his great work may almost be said to have invented the theory as a working principle, never mentioned a judicial power but seems to have lumped it with the executive.¹⁷

¹⁵ "Au debut, dans le domaine judiciaire, vu la minime population et l'absence de cours régulières, les causes se plaident devant un juge et un greffier *ad hoc*, et très souvent devant le gouverneur de Québec ou celui des Trois-Rivières, Montréal se contente d'une cour seigneuriale, comme le feront deux ou trois seigneuries. En 1651, Lauzon établit une magistrature à Québec et au Trois-Rivières. . . ." 1 Lanctôt, *Histoire Du Canada* (3d ed. rev. 1962) 398.

¹⁶ See *Politica*, Bk. IV ch. 14 (trans. Jowett) in *Basic Works of Aristotle* (ed. McKeon, New York: Random House, 1941) 1225.

¹⁷ *L'Esprit Des Lois*, Livre 11, c. 6 ("Il y a dans chaque Etat trois sortes de pouvoir: la puissance législative, la puissance exécutive des choses qui dépendent du droit des gens, et la puissance exécutive de celles qui dépendent du droit civil. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisième, il punit les crimes ou juge les différences des particuliers. On appellera cette dernière la puissance de juger; et l'autre simplement la puissance exécutive de l'Etat.")

Truly administrative bodies author subordinate legislation and the power of adjudication does not make a court, let alone a "section 96 court". Judges and legislators are exceptionally vested with maverick official duties but, when they sit and function as courts or legislatures, they customarily do not think of themselves nor are they thought of as engaged in administration save, indeed, in judicial administration or in equivalent parliamentary procedure, neither of which is normally studied as a part of administrative law. The nature of the body, not the nature of the activity, attracts the deferential agreement that administration does not reach so high.

Should one think in terms of two grand divisions of public law, with constitutional law concerned with that part of the machinery of government mentioned in the fundamental charter, and administrative law with the rest? In Britain there is no fundamental charter but there administrative law is all mixed up with constitutional law. This tends more to support than to dispute the suggestion. Telling formidably against it, however, are such instances as the entrenchment in the Australian Constitution of the Inter-State Commission¹⁸ and the provisions for a wide spectrum of department heads, boards and commissions in American state constitutions. So this attractively convenient ground of distinction cannot be fully sustained. Yet it gives some guidance. The legislatures outside the administrative framework are those the constitution talks about. The courts excluded are those that are members of the judicial establishment it contemplates. Note that this is not necessarily limited to those it creates. The British North America Act creates no courts and only by pregnant abstention recognize those not "superior, district and county courts". Yet it, like other constitutions, recognizes the judicial establishment as a distinctive institution composed of courts.¹⁹ These are by tacit assent conventionally omitted from the world of public administration.

These three dimensions of administration, the first of them, What is administration? rationally based, the second, What administration is public?, a screening concept for current social values, the last, What family members have established separate households?, are purely artificial, but fix the limits of this inquiry. All who act within those limits are public administrators. As will appear they come in many shapes, sizes, and colours.

The Extended Family of Administration

The classical and obvious candidates for inclusion are the persons who operate within the familiar hierarchically structured departments. In parliamentary systems, the Minister at the apex has a somewhat ambiguous status, while his fellow, the Secretary in the United States, is clearly within the ranks of administration. So in both cases are all those below from the deputy minister (assistant secretary) on down.

¹⁸ Commonwealth of Australia Constitution Act, 64 and 64 Vic. c. 12, secs. 101-104 (U.K.).

¹⁹ British North America Act 1867, 30 & 31 Vic. c. 3, sec. 96-101. For an excellent analysis of how these provisions bear on the interrelation of the judicial and the administrative establishments, see Pepin, *Les Tribunaux Administratifs et la Constitution*, (Montreal: Les Presses de l'Université de Montréal, 1969) *passim*.

With the subordinate ranks filled as they largely are by civil servants, there is a naïve tendency to think of the civil service, the departments and public administrators as different names for one thing. Really no two are identical.

Some civil servants are not connected with departments. Some so connected are not engaged in administration. It is true that nearly everybody who is engaged in administration in a department is a civil servant. It may be that almost all civil servants beyond the lowest grades have some administrative functions whatever their classification — which still leaves out the bulk of the civil service personnel in some departments. Most civil servants may be associated with departments and many persons associated with departments may have administrative functions. Beyond that one cannot properly go.

Yet public administration has generally been seen in the image of the civil service personnel working within a department. That image is so strongly fixed that it dominates the thinking of people with quite opposite reactions to the spread of administration. Some, apprehensive of bureaucracy, draw the picture of “ministers’ powers” operated through an elaborate hierarchy, a vast civil servant anonymity through whose mindless maze no subject’s rights or liberties can confidently count on passing unscathed. Others, enamored by scientific management, see as regrettable deviations the forms of administration which have grown up outside the departments and address themselves to constraining everything into that one true pattern. In both cases one variety of administration is treated as though it were the whole of it. That is understandable. For one thing, because of its relatively uniform pyramidal pattern, it is highly visible and intelligibly symmetrical. Moreover, areas of activity particularly pregnant with political risks and rewards tend to be entrusted to central departments having a ministerial apex located in institutional and usually in geographical proximity to the supreme political organ. The tasks left to administrators outside the hierarchy are likely to be less sensitive politically. Form and content have conduced therefore to highlight administration through departments and to obscure other kinds.

Identification of administration with this one component, greatly important though it is, has been bad for the development of a rational administrative law. The morphology of bureaucracy is as relevant to governmental as to other large hierarchical structures.²⁰ To it belong the familiar issues relating to subdelegation and to the institutional decision. Even more fundamentally, the internal division of labour characteristic of bureaucratic structures means that functions are parcelled out. Their character as related components in an organism established for the implementation of public policy is in danger of subordination to their own special form where that is adapted to doing things which resemble the standard operations of “non-administrative” bodies such as courts. These latter and the lawyers, whose work centres around them, find it natural to displace the specialized activity from the administrative to the adjudicatory universe. It belongs in both. The elusive differentiation

²⁰ The attributes and elements of the ideal type, legal authority with a bureaucratic administrative staff are set forth in Max Weber, *The Theory of Social and Economic Organization* (trans. Henderson & Parsons, London: Free Press of Glencoe, 1947).

between "judicial" and "merely administrative" decisions inarticulates a hunch about which of the dual aspects to emphasize.

Choosing a label may be a procedurally necessary preliminary. But the choice does not alter the hybrid nature of the action. What weight to attach to each element raises perplexing problems. Discussed in terms of the conventions of "natural justice", they have given rise to the muddle of judicial decisions and dicta which to many represents the corpus of administrative law. Recognition of the distinct ends served by each of these universes and a sophisticated concern for choice and accommodation between them is needed but unlikely. That goes as well for extradepartmental administrative organs mired in the same conceptual bog.

Indeed promotion of uncritical conceptualism seems to have been the worst consequence of confusing administration with what departments do. The stigmata of bureaucracy have been generalized as being the characteristics of administration.²¹ The legal rules that evolved were expressive of reactions to them. They have then been applied across the board regardless of the sort of administrative agency whose action was involved. If clearly inapplicable, the actor's function as a device for organizing and implementing government authority is left unheeded and discussion of the activity has proceeded without reference to the notions familiar in administrative law discourse.²²

A global survey like this cannot even begin to deal with the details of the composition of departments. Individually they are too various, collectively they are too kaleidoscopic for that. Each has its own pattern reflecting the demands imposed by its particular mission and the human and material resources given it.²³

Typically, each is topped by a minister and a deputy and bottomed by a field force with horizontal levels and vertical divisions appropriate to its tasks and its size. In each may be found the uneasy tension between line and staff, the formal communications network, the routinization of operations, in sum, all the characteristic features of hierarchical organizations.²⁴ But the blends differ.

As a group they are in a constant state of flux. Departments are created, divided or combined, activities and personnel are transferred between them

²¹ The classic formulation of this attitude in Hewart, *The New Despotism* (New York: Cosmopolitan Book Corp., 1929) c. 1 has been repeated in substance many times.

²² The relevant materials lie mainly outside judicial decisions and technical legal writing which do not deal much with these other aspects of official action. See, as representative specimens, R. C. McIvor, *Canadian Monetary, Banking and Fiscal Development* (Toronto: MacMillan Co. of Canada, 1958) c. 11 and U.B. Bergevin, *Gaspé: A Case Study in Regional Planning* (1966), 9 Can. Pub. Adm. 86. Cf. *Re St. Lawrence Starch Co. Ltd.* (1971), D.L.R. (3d) 24 (Ont. Sup. Ct.).

²³ The multi-volumes Whitehall Series, authored as to each volume by a very senior civil servant and published by Allen & Unwin — is the most extensive demonstration of this. For Canada, see 1 *Report of the (Gordon) Commission on the Organization of Government in Ontario* (1959) *passim*: Cf. *Report of the (Glassco) Royal Commission on Government Organization* (Ottawa: Queen's Printer, 1965) 48-66.

²⁴ Cf. Urwick, *The Elements of Administration* (London: I. Pitman, 1944).

as changing technology or economics or sociology or shifts in pressure groups strength, or the needs for political fence mending dictate. There would be no point in undertaking a list of the many federal or provincial departments. What exists at any given time is only a transition stage. Within the aggregate, departments interact in areas of overlapping concern. Ad hoc or standing committees with representation from the interested departments by personnel of appropriate, usually equivalent rank are often constituted for such cases. Other coordinating devices are also used.

The one generalization that can be made about the departments is that practically everybody connected with them, aside from those who deal only with things including ideas, is engaged in administration, high, middling or humble, in a classical bureaucratic context. They are all true bureaucrats; but this does not mean that they alone are truly administrators.

The members and staffs of boards and commissions are just as unambiguously so.

In the United States the talk is of "independent regulatory commissions". In Canada and Britain a commoner expression is "independent tribunals". The different phrasing may reflect a different emphasis in their characteristic use. The principle of ministerial responsibility, a corollary to our version of the parliamentary system, may account for that. In the United States control has certainly been confided to commissions over some matters which in Commonwealth countries are reserved for ministers. Not wholly reserved though, for there has been a growing tendency to separate out and channel to extradepartmental bodies the resolution of claims arising in connection with the carrying out of departmental missions. In the United States the same impulse has manifested itself in the creation of a corps of hearing examiners distinct from both the departments and the commissions, which are treated alike in this respect, who make the initial determination, the power of ultimate decision still being potentially with the secretary or the commission although under restrictions. Canadian boards more than American commissions find their focus in a specialized tribunal function. This has had verbal consequences on the way people think about them. It may also have had substantive consequences by affecting the way they think about themselves.

Still they are used in much the same way in both countries. Besides the proliferating appeal boards with their special jurisdictions, Workmen's Compensation Commissions and Labour Boards are found in both. And Canada too has commissions which are not just tribunals — the Ontario Municipal Board and its fellows in many other provinces, for instance, or the civil service commissions.

Some — the Board of Trade in England, the Board of Railway Commissioners in Canada²⁵ — were established to relieve the central executive of regularly recurring, time-consuming chores. Some — the Environmental

²⁵ See McLean, *National Highways Overland* in 10 Shortt & Doughty, ed., *Canada and Its Provinces* (Toronto: Publishers Assoc. of Canada, 1914) 470-72.

Quality Administration in the United States²⁶ — integrated bits and pieces of responsibility previously scattered among departments to make them the primary rather than an incidental concern of the administering body in the hope of greater effectiveness. In federal states, some co-ordinate the action of the central and the member governments to remove obstacles created by the constitutional division of powers, a form often called intergovernmental but more properly co-governmental, a participatory mechanism for each government to exercise its segment of authority over the common citizenry. The hiving off from departments of categories of action, notably adjudication, and pioneering of government control into new areas requiring specialist skills in scarce supply in the established departments accounted for others. They emerged for many reasons to do many things.

Matters seem frequently to have been shunted to them over which no minister was eager to claim jurisdiction, as where massive expertise seemed called for and where public feeling was intense but its drift was obscure. Where there is an exceptional hazard of coming a cropper, whether from manifest ineptness or from misjudging the relative dynamics of reaction of opposing interest groups, a programme's administration is politically unattractive and readily confided to persons who stand outside the hierarchy for which a minister must answer. At the start such persons are usually recruited extramurally for their eminence or at least reputed disciplinary competence having some relevance to the regulated field. The professional orientation of commission members and staff and the different approach to persons so oriented, which our public morality accepts as proper, may temporarily damp down the assertion of interest group claims and in any event deflects them from the minister.

That is so only for free floating commissions. The boards and commissions established within departments and staffed with departmental personnel are a different breed. No more than a formal variant of the departmental hierarchy, they often constitute a collateral duty for departmental members who have other principal assignments. They differ from committees only in that their existence and specialized functions tend to rest on statutes or orders-in-council rather than on *ad hoc* designation as an occasional convenience. Their more formal label and relative permanence may lead to their developing standard operating routines and thus an illusion that they have a separate life.

Even extradepartmental boards and commissions must, under a parliamentary system, report through some minister and for budgetary purposes fall within the vote to some department. Notwithstanding this fact, they are outside the departmental machinery. The minister who reports for them determines neither their staffing nor their policy and is not open to questions in the House respecting their operations. They are not part of the regular bureaucracy, but they clearly are a form of administration.

Departmental committees dressed up as boards are seldom if ever given a distinct legal personality. True boards and commissions often receive

²⁶ See Reorganization Plan No. 3 of 1970, (1970) 3 U.S. Code Cong. & Adm. News 6322-6324 and the accompanying presidential message, *id.* 6329-6333.

attributes of a legal entity, such as the capacity to sue and be sued. Such a board in whose mix of responsibilities adjudication is dominant or prominent may be made by statute a "court of record". The implications of the term are cloudy. It clearly does not incorporate the body into the regular judicial structure, let alone make it a "superior court" but leaves it to function as still a part of the administrative establishment. Whatever the principle or the considerations if any which cause such special features to be annexed, their presence commonly signals exclusion from the bureaucratic hierarchy but not from public administration.

The independent commission or tribunal seems to be somewhat less fashionable than it was a while back. More resort is being had to a functional equivalent, the crown corporation.²⁷

Rather a revival than a novelty, this mechanism carries forward traditions from the very origins of Canadian history. The Company of New France and the Hudson's Bay Company were prime examples of the chartered trading monopolies which at the dawn and noonday of mercantilism were the favored way of organizing expansion of state (that is to say, of extending Crown) authority to new lands. Phased out with changes in the economic and political environment so long ago that their very memory is blurred, the corporation recurred in various forms and in such special contexts as banks and transportation as an administrative alternative to more orthodox methods. It is now in high favour as an instrument for dealing with special situations.

A proposed classification of crown corporations between those which are enterprises and those which are service oriented is useful and to a degree serviceable.²⁸ A crown corporation which essentially operates a business like other firms in the same line of industry should probably be classed along with them as engaging in private rather than public administration. This is so even though some missions, like providing yardstick competition and serving uneconomic markets that are alien to them may fall to it.

The puzzle comes in separating enterprise from service operations. Hardly any crown corporation is purely entrepreneurial. A possible exception might be one set up for the short-run purpose of liquidating surplus stocks. Another kind which approximates an ordinary firm is one like the CNR or CBC whose operations are controlled and conditioned by a regulatory agency having general jurisdiction over the relevant area of activity whether Crown corporations or private corporations be involved. These are special cases. A general criterion is lacking. The experience or the prospect of profits or deficits is not of critical significance. Business firms concern themselves with satisfying a demand for economic goods at prices which will return more than the outlays for factor costs, but which typically do not take into account

²⁷ Ashley and Smail, *Canadian Crown Corporations* (Toronto: MacMillan Co. of Canada, 1965); Friedmann ed., *The Public Corporations* (Toronto: Carswell, 1954) (comparative study of thirteen nations).

²⁸ The distinction between enterprise and other crown corporations is a main theme of an informative article, Irvine, *The Delegation of Authority to Crown Corporations* (1971), 14 Can. Pub. Adm. 556, setting forth in tabular form pp. 560, 561 a classification of existing Federal Crown Corporations into one or the other type.

the value of social goods exploited. Crown corporations, even those which are primarily enterprises, are all conglomerates marketing both private and public goods. The Salt Fish Corporation deals both in fish and in the maintenance of employment.²⁹ The Central Mortgage and Housing Corporation provides construction credit and development rationalization.³⁰ The Toronto Transit Commission sells to its passengers transportation and to the community some mitigation of arterial sclerosis.³¹ Whether the income flow from the private demand sector covers the jointly produced public good too, with a margin over, or whether an explicit separate payment for it, a "subvention", is required in order to continue supplying the whole package of public and private goods, is fortuitous, not determinative. Financial accounting does not give the rule for the assignment of crown corporations between public and private administration.

The market structure for the particular commodity may be a more useful indicator. Where it is competitive in the sense that to a considerable extent private firms are supplying equivalent goods on similar terms, the crown corporation should perhaps be equated to those other suppliers. Where it has a monopoly or a virtual monopoly, whether by reason of legal policy or of serving an uneconomic market, the lack of analogous private enterprise activity leaves no class of businesses to which it can be assimilated while in no way affecting its membership in the set of governmental bodies. So it takes its colour from the latter. Thus Polymer or the Ontario Food Terminal are seen as components of public administration even though they may be operated profitably and in general on strict business principles.

This analysis implies that a crown corporation enterprise may combine private and public administration, indeed even that its managerial personnel may be engaged now in the one, now in the other.

At some times and places crown corporations supply entirely goods and services which are elsewhere brought to market altogether by private firms. This calls for no qualification of the foregoing remarks. What matters is the organization of the particular political community at a given time and place. Intoxicating beverages or electricity may be here a state monopoly supplied by a crown corporation, there an article of private commerce. In taking them over as its exclusive preserve, the state is not electing to enter into a line of business. It is electing a method of regulating distribution.

Only the enterprise type of crown corporations presents the ambiguities just examined. The others unquestionably are simply a special form of organizing the "service public". That of itself confirms that the corporate form is adopted simply as a matter of convenience to obtain certain collateral advantages. This is corroborated by the fact that it is not only used alternatively to boards. It is also resorted to, albeit infrequently, to replace more traditional structures, a development recently exemplified in the case of the

²⁹ See *The Saltfish Act*: R.S.C. 1970, c. 37 (1st Supp.), sec. 7.

³⁰ *Central Mortgage and Housing Corporation Act*, R.S.C. 1970, c. C-16.

³¹ See Kaplan, *The Toronto Transit Commission: A Case Study of the Structural-Functional Approach to Administrative Organizations* (1967), 33 Can. J. Econ. & Pol. Sci. 171.

post office. Nor does the absence of a corporate charter turn into public administration government dealings which are standard marketing operations. Information Canada, like the Queen's Printer before it as a publisher and bookseller, is just another publishing house. Admittedly its line is specialized — but less so than Carswell's.

That the personnel of crown corporations mostly are engaged in public administration results not from their corporate clothing. It comes instead from the circumstances that only a little of what they do finds a parallel in private entrepreneurial activity. That little can usually be identified and excluded with relative ease.

What is not at all easy is to characterize for the purpose at hand the situations where the government farms out to non-public organs the performance of some of its functions or adopts as subjects of official concern matters originally within the private domain while leaving their performance to the bodies with which they originated.

A common way of doing so has been by contract. Its use is not new. It seems however to keep finding fresh applications.

Many, perhaps most government contracts, clearly involve no participation in public administration by the government's contracting partner. The state simply procures goods or services like any other purchaser, exercising full control over what is done with them after acquisition. The contract even there may impose policing responsibilities on the supplier by specifying domestic sources, prevailing wages, or anti-discrimination practices. But, however effective such contract conditions are to bring about conformity of the conduct of contractors or subcontractors, actual or aspiring, with non-economic policies, they do not vest a power but only create a potential of control in them.

It is the contract that contemplates employment of a private entrepreneur as a substitute for direct official dealings with the affected public that smacks of public administration.

Under such a contract, in its classical form, the co-contracting party was a chosen instrument of the state. Often it was given a monopoly. The *fermiers generaux* of the Ancien Regime in France were an old unhappy instance of the system at work,³² the licenses for the fur trade in early Canada were an instance where it did not work.³³ The English Statute of Monopolies was aimed at correcting its abuse.³⁴ The provision of postal services started under the regime of private contracts.

These examples are antiquarian. But the device is constantly updated to new uses.

³² The abuses flowing from this policy were a perpetual source of complaint, e.g. 2 Sully, *Memoires* (ed. Lefèvre, Paris: Gallimard, 1827) 443-445; Vauban, *Projet D'une Dixme Royale* (ed. Coornaert 1933) 14; 4 Saint-Simon (ed. Pleiade 1958) 786-788.

³³ An interesting account of this phase is to be found in Innis, *The Fur Trade in Canada*, rev. ed. (Toronto: University of Toronto Press, 1956) 63, 83.

³⁴ 21 Jac. 1, c. 3(1623).

In the United States it has been flexibly adapted to the implementation of the civil rights legislation of the last decade. In Canada the Medicare programme involves a network of contracts with hospitals and practitioners of the health sciences, while legal aid is furnished not by government lawyers but by members of the practising bar who make their services available to clients under contracts of adhesion with the province. The contract activities of research foundations defy classification; their organizational links with sponsoring official agencies range from virtual affiliation to clear independence;³⁵ the direct user of their work product is sometimes the government sponsor, sometimes the wider industrial and scientific community. A private enterprise used as a middleman for the purveyance of government services or controls resembles a franchised dealer in private law in being part independent contractor, part agent. If formal status is the determinant, such bargaining partners of the state are clearly not within the ranks of officialdom. If substantive role is, they are clearly fulfilling a recognized government mission.³⁶ To me it seems a mere question of tactics whether to use the regulars or the auxiliaries.

The joint enterprise in which the state and private operators are associated is a special form of chosen instrument. In post-World War II Europe it has been a quite fashionable technique for evolving and implementing the economic plans which figure so prominently there. In many developing countries it appears, notably though not exclusively in connection with mining, as a way of attracting outside investors without surrendering to them the national patrimony. It is less often encountered in North America. This may be because the sentiment that government and business are different universes is stronger here. Even so, the Comsat sort of venture is a well-publicized instance of it. In Canada, programmes of development in Newfoundland and in Quebec have flirted with it and it should not be forgotten that the original version of the Bank of Canada was set up along those lines. There seems to be little basis for denying to these hybrids the character of public organisms or to their personnel that of public administrators. A fortiori this is so where a joint enterprise is used as, for example, under the Canada Water Act,³⁷ to integrate the initiatives of different levels of government.

Extragovernmental elements can be enlisted in public administration as well by the assignment of authority to them as by contractual enrolment for the exercise of public functions.

³⁵ See Grove, *Government and Industry in Britain*, 275-76 (1962); Coddington & Milliken, *Future of Federal Contract Research Centers* (1970), 48 Harv. Bus. Rev. 103. The meagre Canadian experience is noted and described in 4 (Glassco) Royal Commission on Government Organization 291-93 (1963).

³⁶ The Air Transport Association, recognized by the CAB as the valid voice of the industry to channel and confirm proposals for it, is a particularly subtle form of such indirect administration, see Redford, *The Regulatory Process* (Austin: University of Texas Press, 1969) Ch. 6.

³⁷ The Act, R.S.C. 1970, 1st supp. c. 5, envisages both federal-provincial water quality management agencies, secs. 9, 10, and purely federal water quality management agencies, secs. 11, 12, depending on the jurisdictional attributes of the waters involved, with common functions and powers for each type of agency, sec. 13.

Occupational licensing and discipline are a prime example. Save for the loose rein of implied assumpsit, the common law was originally content to leave questions of professional qualifications and competence to be ruled by whatever group sanctions the corps of practitioners could bring to bear. The combined pressures of a progressively more interdependent society for some assurance of a minimum skill level and of the occupational groups for the benefits of legitimated monopoly brought about a nineteenth century commencement and a twentieth century culmination of a legislative policy of officially bestowing on assorted callings the governance of all holding themselves out to exercise the particular art. Spreading from pilot boards and the health professions, where hazards to life and limb were obvious, the practise has fanned out to encompass almost the whole range of service occupations. The extent of autonomous control, of prescribing and enforcing the rules applicable to those who engage in the activity, does tend to vary roughly in line with the status of the activity. Whatever its limits, however, a statutory warrant enforced when requisite by public sanctions marks those holding authority in such a group as participants in public administration.

Labour unions, with their sanctioned control over access to employment, and local marketing boards, with corresponding powers over producer quotas, are in somewhat the same position. From political considerations mostly, but to an extent from structural differences as well, recognition of their administrative role has been delayed. It is only tangential even now. They were long condemned as conspiracies. They were eventually legislated into legality but only as voluntary associations without rights, duties, or powers. Only yesterday comparatively speaking were they set apart from clubs whose "domestic tribunals" could act by whim so long as they respected contract terms and rights to share in club assets. In some ways they do differ from professional governing bodies. Thus, non-compliance with their rules and rulings attracts no official but only private sanctions — pretty effective ones, though. Again, with the market for the licensed practitioners' services typically the dispersed general public, the decrees of their governing bodies have a patently public bearing, whereas in organizing workers or producers to bargain with one or a few enterprises, the union or the marketing board seems to be operating only in the business universe. They look to be and to a degree are more remote from public administration. Yet it is through the state that they are vested with control³⁸ over those who seek to work or to sell and, in exercising that control, it is beginning to be demanded that they

³⁸ "La Convention collective du Code du travail se présente comme une institution juridique autonome par rapport au droit civil. La réunion de certaines conditions de fond et de forme, l'entente sur certains objets — les conditions de travail — lui donnent une véritable effet réglementaire. Aux salariés représentés par les syndicats et, le cas échéant, aux employeurs membres de l'association signataire, elle apparaîtra comme un système de "legislation" privée temporaire. Contrairement à la plupart de conventions de droit privé elle a sa source dans une obligation imposée à la fois à l'employeur et à l'association des salariés. Elle tire sa force obligatoire non pas de la volonté des parties mais de la loi elle-même. Elle ne concerne pas des individus, mais un collectif de salariés, l'unité de négociation, qui se maintient sans égard au passage des individus dans son cadre. Elle lie tous les salariés actuels ou futurs visés par l'accréditation. Elle aussi l'employeur et plus précisément son entreprise . . . 55 Gagnon, LeBel et Verge, *Droit Du Travail* 235 (1971).

conform in some respects with what is required of persons engaged in public administration.

The government employees' union is a very particular case. Until recently, the fixing of the terms and conditions of government employment was for unilateral decision by the regular administrative bureaucracy. Now Canadian governments, following the British lead, negotiate these matters with organizations recognized as representing the employees. In whatever sense unions generally are public administrators, these organizations accepted by the government as bargaining partners are. But, more than that, they share in making determinations which were formerly at the very heart of public managerial responsibility. If those who made them before were engaged in public administration, it is hard to see how those doing it now are any less so. The process for determination has been reorganized but the nature of the activity remains unchanged.

Another kind of devolution of authority is represented by referential legislation which adopts as legal standards the rules from time to time formulated by private groups, as in the reliance on the Canadian Bankers Association for clearing house rules or on the securities exchanges for listing standards and similar matters. This may be done tacitly though deliberately as by the SEC decision to leave to the certified public accountants the formulation of generally accepted accounting standards instead of adopting its own as the FPC or the ICC chose to do. In such a case, it may be argued that it is improper to speak of the norm-enacting agency as engaged in administration since it acts by sufferance. No explicit official consequences are authoritatively ascribed to what it does. But where a government authority directs that the determinations of a private group shall fix the standards or practices for areas of activity, this would seem to incorporate it *pro hac vice* in the universe of public administration. It resembles the situation where one level of government in a federal state delegates the application of its legislation to members of the other's agencies. There, it is true, the persons selected as delegates are already public administrators rather than being chosen from the private sphere; but in essence the cases are alike.

Municipalities and educational authorities are in a comparable position. Unlike systems such as the French, where communes and other local establishments while retaining a limited, distinct identity are woven into the fabric of central administration,³⁹ in the common law world they form in theory no part of it. Created by it, yes, and dependent on it for the definitions of their powers and procedures⁴⁰ — but in that they resemble business corporations. In the ancient liberties and franchises of cities and manors and the community functioning of parishes there was an array of indigenously based local

³⁹ See Rolland, *Droit Administratif* 141-144 (history), 196-211 (11^e ed. 1957); Cf Medard, *Les Communautés Urbaines: Renforcement ou Déclin* (1968), 84 *Rev. Du Droit Publique et De La Science Politique* 737. See Tocqueville, *L'Ancien Regime* 50-60 (Headlam ed. 1949) for a sketch of the historical situation.

⁴⁰ The historical position is set out in Henderson, *Foundations of English Administrative Law* (Cambridge: Harvard University Press, 1963) c. 1. For the present extensively modified position, see Griffith, *Central Departments and Local Authorities* (Toronto: University of Toronto Press, 1966) Ch. 1.

authority which some have seen as the guardian against absolutism at critical times. Like firms, they clearly engaged in administration. Unlike firms, they were not fingers on *laissez-faire's* invisible hand and thereby non-public.

To this day municipal administration and educational administration are largely ignored by general administrative theorists (although recognition grows as autonomy shrinks). They still keep much of their traditional character.

Besides their old-line administrative spheres, their volume swollen as society becomes more urbanized, municipalities are being given added assignments by the provinces and the states. Herein the senior governments adopt as a policy choice a scheme much like the constitutionally inspired federal-provincial interdelegation. In each instance an available corps of public administrators is borrowed for the occasion to do things that alternatively might be done directly by personnel of the delegating government.

Local administrations tend structurally to be microcosms of those found in their senior governments. The difference in scale is characteristically reflected in a simpler pattern, with major reliance on hierarchical structures, less use of independent organs outside the chain of authority and a less elaborate specialization of responsibilities. Size is important. Large cities can be at least as intricately governed as small provinces or even small nations.

Formed by the will of the state but not part of its cadres, local authorities are public administrators *sui generis*. In going about their own business, they are rather conventional specimens. Their territoriality is their common feature. Within their bailiwick, some have a general authority, others deal only with specific subjects, education traditionally but joined now by a number of others particularly in the United States through the device of special districts.

The position of arbitrators is highly particularistic. Voluntary submissions are purely a matter of contract. However fully the award or even the advance agreement to submit may be enforced at law, that does not remove them from the business universe or place them in that of public administration. But where the state specifies that certain matters must be submitted and furnishes the machinery for doing so, the arbitrator's status is fundamentally different. With an authority derived from the state, they must in its exercise conduct themselves in important respects as though they were tribunal members. That they act *ad hoc* does not alter the quality of their action.

All the foregoing examples are representative of those having responsibilities in connection with the formulation or application or both of norms creative of legal rights and duties. Called regulatory or adjudicatory in their more formally patterned manifestations, ministerial or merely administrative in routine ones, they make up the bulk of the administrator's work. But administration is not wholly in the imperative mood. Oftener than not perhaps it may be prescriptive. But sometimes it is indicative.

To distinguish between them is in fact not always easy. Even where courts are concerned, the declaratory order triggers no process for enforcement yet it is not just a *brutum fulmen*. For that matter, considered dicta exert a potent influence.

Correspondingly there are functionaries who can in fact compel though they do not in form command.

The Ombudsman, that current darling of the academics, is a prime instance. The office has been created in different places with variations as to what matters he may concern himself with and how he is to be seised of them. Quite uniformly, however, his functions are limited to admonition and exposure.⁴¹ But only a foolhardy administrator would maintain his position against the contrary view of a person with the access and the aura of the Ombudsman. Rational prudence and the native timidity of civil servants combined have made that a rarity. With the only grist that comes to his mill administrative action or inaction, his business is plainly public administration. True, conversely to the Queen, he governs but does not reign. True, he is not a civil servant. True too, he is an adjunct to Parliament and outside the executive establishment. All the same he is a public administrator and by that very fact rebuts any notion that the factors last mentioned are critical to that status.

However exceptional, he is not quite unique in his mandate to bark but not to bite. Social control by means of early warning signals is a stock administrative technique with a range from mild guide-line statements through to blunt intimations of imminent sanctions. It is usually found in conjunction with authority to penalize behaviour departing from prescribed standards. Most of the familiar kinds of administrators mentioned earlier have such authority. Advance notice of their reactions to lines of conduct can be on the one hand useful to advise people how to shape their plans so as to stay in the clear, but on the other inhibiting of legitimate activity. Its value resides in lessening the occasions for invoking sanctions. So it is seldom given unannexed to some power of authoritative decision.

The Ombudsman's supposed uniqueness rests in great part on the specious notion that he lacks all power of effective control. The picture as drawn is that of an aloof monitor pursuing an ongoing inquest into the satisfactoriness of performance of the administrative apparatus.

Were he indeed such, there would be an evident analogy with commissioners (tribunals) of inquiry. Their mission is to inquire and report. The prerogative until and unless displaced is an adequate basis for their appointment.⁴² In Canada they now ordinarily receive their powers by virtue of statute, often a basic Inquiries Act.⁴³ They must to the extent that compulsory powers for the production of evidence are to be exercised rely on statutory warrant. They must keep within the ambit of investigation designated by their instrument of appointment, their letters patent in case of an *ad hoc* commission or the foundation directive in case of a standing appointment.

⁴¹ The literature is almost superabundant. For interesting comparative surveys see Gellhorn, *Ombudsman and Others* (Cambridge: Harvard University Press, 1966) and Rowatt, *The Ombudsman: Citizens' Defender* (2nd ed. London: Allen and Urwin, 1968).

⁴² See *Jellicoe v. Haselden* (1902), 22 N.Z.L.R. 343.

⁴³ See, e.g. The Inquiries Act, R.S.C. 1970, c. 1-23; The Public Inquiries Act, R.S.O. 1970, c. 379.

It grossly oversimplifies to lump all investigations together. Some are indeed what the name implies, the gathering and processing of data on problems of public concern. They serve affirmatively to assemble materials as a basis for policy formulation or negatively to smother awkward issues. Others though focus on individuals. They are in substance a form of discovery proceeding as a foundation for the imposition of sanctions. This kind, whether their consequence is public obloquy or derivative judicial proceedings or once in a while direct effective condemnation, in essence substitutes for or is a stage in programme enforcement, conventionally effected through more traditional authorities. Because individual malfeasance and system malfunctioning so often concur, it is hard to assign cases with precision between these two types. In principle they are clearly different. In both being a part of the administrative process they are however alike although the relation of what the prosecutorial investigation does to other administrators is much more evident.

The role of advisory committees is ambiguous. No doubt anyone in a position of authority may in general seek counsel wherever he sees fit. But when an institutionalized organ of consultation is appointed by law, things change a bit. Ordinarily indeed it is left to the person responsible for the decision how much or little he will consult or heed it. Still, psychological and political considerations will incline him to give at least some weight sometimes on some matters to its views. Advisory committees established within and staffed from a department are, like other departmental boards, only a variant of the regular bureaucratic structure. Others composed of or including representatives from outside — and there are many such — cannot be so characterized. Yet they too seem properly subject to being described as engaged in public administration when they act. Whether seen as distant cousins of the Ombudsman in that they keep the functioning of the functionaries under scrutiny or as making a policy input by alerting officials to the sentiments of interest groups or as handymen for sorting out claims arising for administrative disposition — and advisory bodies have been used in all these ways, they are a planning and inspection adjunct to the regular officialdom.

Besides they can and often do communicate from as well as to the agencies with which they are associated. This aspect of their action is not administration at all, hence not public administration. Though administration signifies the organization of group effort toward the accomplishment of some end, usually the provision of some good or service, the actual transfer to consumers of that utility, be it an airplane ticket, a classroom lecture, or information about official sentiment is no part of administration. It is only its aftermath. So far as advisory committees transmit information from government sources, they supplement and resemble the press. The same may be said of public information officers whose activities seem no more administrative than those of postal carriers.

Still, information blends into admonition and, to the extent that advisory committees enjoy creditability as having a potential for influencing official determinations, their communications to the public like guide-line pronouncements of the bureaucracy have an administrative quality.

They are not the only ones who act administratively in some contexts but not in others. A similar situation has already been noted in connection with Crown corporations and school personnel.

A prime example is found in the case of judges or ministers functioning as *persona designata*. The practice or at least the expression is fairly common in Canada, less so elsewhere. It occurs where one whose ordinary duties lie in governmental areas conventionally not classed as administrative is called on to function in some capacity that is.⁴⁴ Mostly judges have been used.⁴⁵ The type situation is assessment review.⁴⁶ No one would venture to say that judges as an occupational group are public administrators. No one denies that when acting as *personae designatae* they are public administrators *pro hac vice*.

An almost unclassifiable category is that of the actors who mediate the political participation of the citizenry in the process of government. In one party states, where the functions of the party overlap and may overshadow the spheres of authority legally assigned to officialdom, it would be most unrealistic to exclude the party apparatus from the ranks of public administrators.⁴⁷ In Western-type democracies, their members do not belong there. In their nadir the bosses and party machines who controlled patronage and policies, while perhaps crypto-administrators, yet used puppet administrators to implement their purposes. Wherever an opposition party is a recognized legitimate institution, the parties fall outside administration. Like the family, the church and free enterprise, they stand for a transcendent value, in this case the freedom to make a political choice.

Electoral incidents which do not curtail that freedom, voter registration and polling procedures for instance or the determination of disputed elections, can perhaps be regarded as aspects of the management of personnel recruitment, a standard administrative task. In logic those who work the electoral machinery seem to belong among public administrators. But this is going too far. Just as the shareholders of a firm in theory stand above management and their general meeting is external to business administration, so and still more the electorate stands above the government organs whose workings are public administration and whose staffs are public administrators.

Submissions Based on the Evidence as Presented

Neither a desire to swell my list of publications nor an academic delight at the wonders of administration inspired this discussion. Its object is utili-

⁴⁴The concept has received little systematic attention. The main references are Gordon, *Persona Designata* (1927) 5 Can. Bar. Rev. 174; Kinnear, *The Doctrine of Persona Designata as Applied to the Ontario Dependents Relief Act* (1942), 20 Can. Bar Rev. 324. Where a court rather than a judge is used in this capacity, the expression used is *curia designata*.

⁴⁵Occasionally a Minister of the Crown is so used, cf. *Garipey v. The King*, (1939) Ex. C.R. 321.

⁴⁶The artificialities and whimsicalities of the Canadian law in this connection are elucidated in Laskin, *Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case* (1955), 33 Can. Bar. Rev. 993.

⁴⁷Cf. Vyshkinsky, *The Law of the Soviet State* 159-160 (1948, trans. Babb); Miller, *The Rural African Party; Political Participation in Tanzania* (1970), 64 Am. Pol. Sci. Rev. 548.

tarian. Its recital of the range of matters falling legitimately within the purview of administrative law exposes how partial and inadequate has been the standard approach.

This implies no blame moral or intellectual. Loyalty to categories and concepts whose usefulness has been exhausted is in our professional tradition. Feudal tenures and their incidents cluttered land law well beyond a time when they had any relevance. The particularities of debt, detinue and covenant were critical until the rise of a market economy submerged them under a notion of enforceable agreements and a law of contract. Legal constructs end up, like other elegant artifacts, as treasured museum pieces when they are no longer functional. The old and comfortably familiar are abandoned reluctantly. But eventually and inevitably they are abandoned.

Social dynamics compels it. Always we back into the future with our gaze fixed on the past, our retreat into progress marked with bumps and bruises. It were well instead to take heed of our present position and guide our steps by observation of the surroundings.

Talk and thought about administrative law have confined themselves to selected parts of it. These have been chosen for or warped into analogy with those tidier institutional models, the courts or the legislatures. The great organizing principles of natural justice (procedural due process) and *ultra vires* have been taken over from them. These have served well to cut the executive down to size. When the state's one important internal task was seen as the imposition of order, they were effective counterforces in the interest of freedom.⁴⁸

Examples scattered throughout the earlier discussion show that state action never did take only the forms of coercion and command. Subtler and more various public controls have long been exercised. But until recently they were uncommon. Regulation and adjudication swamped them. The fringes of public administration got scant attention. Administrative law took shape from templates appropriate to the commoner manifestations. In developing the ideas of *ultra vires* and natural justice to reconcile the claims of order and freedom, there was a true instinct for what was needed in the then situation. There has been weird extrapolation from those concepts, a cloud of misleading nonexplanation in the innocent double talk of characteristic discourse. Still there was a reasonable fit between the principles and standards applied and the great mass of administrative phenomena with which they had to deal.

They are no longer adequate. They become ever less so. They are not defective. They are deficient. The state becomes relatively less and less a master, more and more a manipulator.⁴⁹ Regulation and adjudication continue but as adjuncts or alternatives to a heterogeneous array of official interventions

⁴⁸ ". . . The maintenance of public order as an objective of the law declines in relative importance", Corry, *Law and Policy* (Toronto: Clarke, Irwin) 25.

⁴⁹ ". . . [T]he expansion of the range of activities and services in which the various states are today engaged has blurred the distinction between governmental and non-governmental functions or acts or between so-called public and private domains of activity." *Republic of Congo v. Venne*, 22 D.L.R. 2d, 3d 669 at 687 (Can. 1971) (Laskin, J.).

into the life of the community. When the reconciliation of freedom and order was what administrative law was all about, promotion of inefficiency was up to a certain point a positive benefit. The stress on rules tending thereto was healthy. Now it is less so.

What do I propose? Nothing specific, really. Just a whole reorientation. Examination of the administrative universe has revealed how much of it has no resemblance to what the current fundamental concepts of administrative law assume. The devising of more suitable ones calls for a vast concourse of observation and deliberation. I do not claim to have given or to have the answers, only to suggest the pertinent kinds of questions.

Even that, it may be objected, is not achieved by a mere list of administrative actors with a description of their roles. Such an unsorted jumble of instances is a vexation of inquiry and no guide. The objection is a fair one. So I shall risk some reflections submitted only as one starting point for further analysis.

The law applicable to administrative agency operations ought to be responsible to the formal and functional particulars they are seen to exhibit. Form and function are often related. Some structures are used oftener and perhaps are better adapted to some functions. However there is no regular pattern of use. But, as an approach, a specification of functions and of formal features commends itself.

The state still has as one very important job the definition and enforcement of rights and duties between individuals. It has the further tasks of allocating the social increment and of operating the burgeoning public sector of the economy. For all three its major instrument is the administrative apparatus in the aggregate.

Certainly it is not the only one. The courts for the first, the legislature for the second keep their old hegemony. But they were conceived for the simpler needs of yesteryear. Their available resources of time and skill are fully employed in discharging their familiar assignments. They cannot be stretched to include primary handling of the phenomena emerging from increased urbanization and industrialization. The administrative branch has a wider potential range. The total administrative apparatus addresses itself to all three tasks but individual administrators or agencies may differ markedly. Some are primarily regulatory, others primarily allocative, others primarily businesslike and blends of all sorts and degrees occur.

The underlying values central to the functions differ. Their processes differ correspondingly.

Within the first safeguards for the individual are stressed. The demands of public order must be qualified by those of personal liberty. It approximates what courts do. The similarity has tended to blind them and the legal profession to the other functions of administration and to exalt this one. The result has been, if not to impose a strict court regime on all administration, at least to make all administrative processes fit the mold of natural justice. Sometimes complacency with the usual incidents of trial exaggerates this into a requirement of virtual parallelism. The expression "merely administrative" signals a

sense that the court analogy is inappropriate. Ordinarily it manifests a fumbling recognition that protection of individual interests is subordinated to other values because the relevant administrative action relates primarily to other functions and is only incidentally regulatory. Conditioned by training and work environment, lawyers off and on the bench lean toward giving all administration a regulatory and even a penal cast. Some is accepted as being only minimally of that character and best left to be ruled by other considerations. The result has been a treatment appreciably though perhaps not grossly skewed toward the compulsory or prohibitory features of administration and their consequences for individuals. What is most to be deplored is the absence of fundamental analysis and explanatory discourse.

The allocative function involves other values and other procedures. It seeks to effect a satisficing spread of social increments and decrements amongst the members of the political community. Its governmental archetype is the legislature. Its techniques are those of bargaining and compromise. The large accommodations of competing interests at the legislative level are made thus. Those turned over to administrators differ only in being of limited scope. The legislatures make policy wholesale, the administrators in the exercise of this function make it retail. The notion of *ultra vires* preserves the bargain which the legislature has struck by restricting ensuing subsidiary compromises within the range of concerns confided to the administrators. Inside that range the resolution of claims will reflect the considerations the legislature itself would respond to were it dealing directly. The calculus of constituency gratification governs. For political parties, properly absent, there are substituted public representatives, advisory committees or similar artificial equivalents. In the parcelling out of the social product, an acceptable reconciliation of discordant pressures is the objective. Ideally the content and the context of decision are unlike, they may even contrast with those useful in connection with the function of supervising individual conduct — diffuse and relatively unstructured where that is focussed, ambulatory where it is definitive, a dredge for materials of decision whereas that is a sieve. Effective demand for social — as for economic — goods, whether it be the best or not is the inescapable determinant of their distribution. Legal rules calculated to frustrate its operation are ultimately futile and hence unwise. The administrator should not be hampered in his use of the methods and materials useful for fashioning an acceptable settlement of competing claims in the social dividend.

Finally, government is big business. As such, it like other businesses has efficiency as a prime value. Both the courts, preoccupied with the regulatory function, and social scientists, sensitive to the allocative function of administration have at times denigrated efficiency. But it retains a very real importance. An inefficient, that is, wasteful deployment of resources human or material in the conduct of public as of private business has nothing to commend it. That is obvious when government comes to market as an entrepreneur. It is just as true when it is engaged in activities which have no private analogues. The collection and retention of redundant and overlapping reports, the excess stockpiling of personnel or inventory, the self-defeating diffusion of memoranda and other paperwork — who would question that these are bad in any connection? Not just in these specifics but in general, efficiency should

be taken to be a legitimate objective of administrators in all matters relating to production processes rather than the end product. Other values may still be given more weight. But that should not be done automatically nor until after a preliminary functional analysis of the activity involved.

In practice the functions are all jumbled together. Many administrative actions and almost all agencies are not simply regulatory or simply allocative or simply conducting businesses. They are compounds. There is room for difference of judgment as to the relative significance of the different functions when they coexist. Such a difference of judgment is at the root of the recent pleas for more stress on regulations and less use of decisions. This is fine if the disagreement is deliberated disagreement. The essential thing is to dissect each act of administration to discover its functional characteristics and then shape the applicable law to maximize the realization of the values special to its particular set of functions. Most activities will be hybrids. One function with its values ought not be allowed invariably to swamp the others.

From the catalogue of administrators, formal as well as functional distinctions appear. They too deserve consideration.

If one could assume diligent infallibility, the formal structure if quantitatively suitable with neither too few nor too many administrators for the handling of their business would be of little interest. Instead one not only must assume, one actually observes lethargy and fallibility. Hence the need of some kind of control to get enough and good enough performance. My postulate is that no administrator should be exempt from some control mechanism to that end.

Of the administrative arrangements examined, some lend themselves more readily than others to internal controls. For all, external controls are possible. But the need for them and their nature may differ for different administrative structures.

External controls are more dramatic and the legal profession or at least the law schools are obsessed with them. Internal controls are vastly more important, however.

Like freedom from prejudice, good administration cannot be brought into existence by courts or legislatures. They can at most condemn deviations considered unacceptable. Overindulgence in pejoratives, "arbitrary" and "abuse of discretion" has obscured the fact that the greatest shortcomings of administrators are inertia, procrastination, and slovenly adherence to routine. Hyperthyroid officiousness is rare. Elaborately safeguarding against active maladministration is often counter-productive. It aggravates the incentives to inaction, thereby costing more than it is worth on balance.

The diversities among the kinds of administrators suggest many particulars which seem to warrant investigation into their bearing on internal control in both its corrective and its dynamic aspects.

In classical hierarchical bureaucracies, there is a potential and an opportunity for revising lower echelon decisions. Its perfunctory exercise is valueless. A very active exercise is harmful alike in diverting agency resources

from alternative uses for the reconsideration of a particular item and in reacting adversely on responsible initial performance. A discriminate exercise keeps all levels alert to the considerations and the procedures appropriate to the agency's function as respects the matters at hand. Differences in internal structure — the number of levels, the pattern of division of labour both for sections and for individuals, the communications channels, the geographical dispersion or concentration of staff — may condition the efficiency of the inherent potential for internal control. Whether and how they facilitate or impede it needs to be separately resolved for each of them in evolving a mature system of administrative law.

Whether the administrator whose activity is involved is an individual or a collegial body may be relevant. For efficiency the former, for representation and compromise of a range of sentiments the latter would seem to be preferable. Almost always when authority is vested in an individual, he has bureaucratic superiors and is subject to check by them. Plural member administration occurs at least as often outside as within departments. Control by superiors is lacking where there are no superiors.

There is nevertheless a possibility of internal control of a different kind where there is an appropriate diversity among members. There is with statutory arbitration boards. Often there is on advisory committees. On standing boards and commissions, representative diversity is less common. With them there is a tendency to appoint to membership from the department's staff or other civil service posts. There is also a tendency to develop over time a special rapport with their regular client groups. These weaken the operation of plural membership as a servomechanism reducing the need to rely on external controls.

Visibility of the administrator to the relevant community can be important.

In large bureaucratic establishments, anonymity of the participants in decision is not only characteristic, it is regarded as a desideratum. The decision is an institutional decision; interventions from outside are at a cost to the agency's performance as a system. If the agency task is seen as subordinate to other primary values, that cost may be justified, though such a partial stultification ought never be inadvertently made. As a rule, the details of operation are best left to internal supervision. External controls ought to address themselves to the agency head who will be visible. He is properly accountable for how it operates but neither he nor anyone can fairly be held responsible if the particulars of its operations are tinkered with from outside.

Visibility is in itself a kind of external control or, more accurately, provides an external stimulus for internal control. Administrators who are exposed to continuous scrutiny by a concerned public — for instance, committees of adjustment in neighbourhood-sized communities, the Canadian Radio and Television Commission — in practice are not indifferent to how that public reacts to what they do. Persons with appropriate professional qualifications in administering technical or specialized programmes are not only conditioned by received professional ideals but monitored by their professional brethren outside government. This check fails, however, in the

administration of occupational self-government; there a shared self-interest inverts the effect of professional scrutiny and supports increased use of external controls.

The latent potential of the structure for internal control should be exploited to the maximum. That is the way to raise the general quality of administration.

The administrative law we have has been too preoccupied with the prevention of bad administration. The administrative law we need is designed for the promotion of good administration.

External controls perforce deal mostly with the former. Even for that they are not very good instruments.

Legislators act when they vote the budget or at long intervals by recasting an agency's statutory delegations. They seldom retrench seriously either funds or powers. They act in relative ignorance of the full particulars of administrative performance. So indeed they must. Growth of the administrative apparatus has come about principally because government got too big for any legislator's personal attention. It is only the really dramatic discrepancy, real or alleged, between administrative performance and public expectations that is subject to legislative control.

The courts too are an imperfect instrument. Their habitual fixation on the regulatory function and relative insensitiveness to the allocative and business functions come naturally since property, civil rights, and criminal law are their daily grist. Nor is the judicial process in any event well adapted to the purpose at hand. Its great defect is that it is episodic. The self selection of litigation is not even a random sampling let alone a systematic quality control of the administrative work product. By rerouting administration to favour those who have the means to urge their claims thus, judicial controls can mess up rational administration. Moreover alacrity in their use chills administrative vigor and encourages the already endemic sluggishness.

It would nevertheless be foolish either to desire or to expect the discontinuance of legislative or of judicial supervision. Their presence cautions against laxness in making use of such internal controls as are available. Their value is in the contingency of discriminating use differentiating according to the various kinds of administrators and administrative action.

A sketch such as this cannot pretend to completeness. In proposing as a point of departure for a rational administrative law the work force of public administration of which a definition is attempted, in instancing important components central or peripheral of that work force, and in calling attention to functional and structural elements as possibly pertinent, it is but a preface to analysis. It serves as a broad panorama. A detailed mapping of the terrain is needed. The validity of the suggested bases for differentiation calls for examination, their consequences for elaboration, and no doubt others ought to be added.

The development of administrative law deductively from *a priori* propositions framed in other contexts has failed. An inductive approach is demanded.

An ever more crowded and complex world has entailed and will entail an ever more administered world. Dissatisfaction with the institutions of government is already disturbingly prevalent. It is urgent that the law about those institutions shape itself to fit the phenomena rather than keep struggling to make them fit a body of precepts.