

Roderick Macdonald has opened a window upon a law faculty that is grappling with a distributive justice controversy. Although such a dispute is rarely the focus of a court's attention, it has legal interest none the less. Lawyers often fail to recognize that their professional lives have a bureaucratic component that raises questions of applied justice. Macdonald's materials are particularly provocative for the academic lawyer because they invite a rethinking of the tensions inherent in institutionalized academic life.

The correspondence offered for our consideration suggests the wide array of responses that an empty office can generate in any organization: assertions of self-interest and attempts at self-promotion; expressions of hope, disappointment, and self-delusion; demonstrations of professional expertise and personal style; the search for order and aversion to it; and attempts to resolve the tension between individual and community. The material, to the disappointment of the narrative reader, lacks an ending;¹ the reading lawyer is doubly disappointed because it also omits its own beginning.

Let us fill at least the latter lacuna by asking why law professors have offices. To do academic work? To store books? Carrels in the library would do. To maintain files? Storage facilities would do. To do administrative work? Work stations (near the storage facilities) would do. To have access to a telephone? Phone stations would do. To meet with students? Small conference rooms would do. To meet with colleagues? Faculty lounges would do. To house personal possessions? A cloakroom or perhaps lockers would do. As we evaluate these claims we should consider the extent to which they are shared by students or clerical and administrative staff. And yet, in their mouths, these claims have less force.

Faculty members have offices to fulfil all these needs and functions conveniently and publicly. Ironically, the average academic's office may be the worst environment in which to do the kind of intellectual work that the university wants to foster, since it invites interruption and distraction. The idea, however, is that the office is a good work setting.

* Faculty of Law, University of Toronto

¹ All we know, after sixty pages, is that Barry Paul's hopes were dashed.

Professors rather than students or support staff merit the best offices because they have made a commitment to contribute to the highest goals of the institution. They are the indispensable human agents of the institutions's undertaking.

But all offices are not equal. Our eponymous dean ascribes the complexity of his distributive task to the individuality of the faculty's offices, both those occupied and those up for grabs.² He is wrong. Any organization, even one that houses its people in a modern, 'cookie-cut' building, would elicit similar responses. The occasion is not simply the opening of a market for a fungible commodity, but an invitation to evaluate the significance of the allocation of a particular institutional prize. It is in this light that office quality, size and location become important. Some of these factors will mark a particular office as desirable objectively; others, as a function of individual preferences and work habits, will elicit more unpredictable, subjective preferences. An office near the dean is not everyone's cup of tea.³

Many declarations will reach the dean's desk as raw claims of self-interest. Others will arrive mediated by generalities, legal argument, or moral disquisitions. Still others may take the form of oral argument by a carefully prepared advocate, or even perhaps by an intermeddling – and doubtless self-effacing – volunteer. At the vortex, it appears, is the dean's power. And the dean depicted in these memoranda appears to like it like that.

Authority to allocate office space falls to the dean as the highest officeholder in his fairly autonomous modern law school. It is part of his wider prerogative, his authority to bestow or withhold the few visible rewards that academic life offers. Other prizes, such as merit pay, travel grants, and clerical and administrative support are subject to less public scrutiny, are distributed more regularly, and can be more finely calibrated. Offices do not become available often, are an external badge of status, and provide

² 'If we occupied a new concrete bunker like some faculties, where all offices are more or less the same, we wouldn't have to face dilemmas like these.'

³ In the modern office building, professional, personal, and administrative significance merely attaches to different attributes, such as exposure to natural light, view, temperature fluctuations, and floor number while retaining the other variations tied to the layout of the facilities, such as proximity to support services, personal services (elevators, washrooms, coffee, food, and allies), and professional amenities (lounge, library, colleagues in one's own or similar fields), and exposure to students and/or the administration. In addition to the elements that are tied to the particular office, non-fixed elements play a role. Among these are assignment to the best secretary, the opportunity to redecorate, the desire for a change or other aspects of timing (for example, the need to have a sense of professional progress or the desire for others to know that one's star is rising).

a home for one's day-to-day professional life. They are important as locations and environments but even more as symbols.⁴

An institution that distributes its prizes *seriatim*, with no ongoing system of valuation of the prizes or the claims of the contenders, dissipates its power. By choosing to exercise this important distributive function in the context of one moment in the life of the institution, in regard to one distributive occasion, in response to the current population of claimants, each of whom is at one moment of his or her personal and professional development, the dean loses a rare opportunity to reaffirm institutional values. The method of distribution of institutional prizes, especially in a universe of few prizes, is a measure of the health of the collectivity.

John Rawls has written that the basic structure of a just society is a 'public system of rules defining a scheme of activities.' In pursuing these activities, members of the society at the same time increase the sum of benefits available and establish their claim to share in those benefits. Distributions, therefore, accord with the legitimate expectations created by the system of rules.⁵ Academic institutions do not conform to this model because there is no necessary nexus between the quality or productivity of academic life and the production of benefits for distribution.⁶ Offices, to continue Macdonald's metaphor, become available for reasons unrelated to academic achievement.⁷ Indeed, for all the university's insistence upon academic excellence, there is a palpable institutional aversion to formal evaluation of the quality of one's writing, performance at conferences, or teaching in any public way. For even though evaluating others is the quintessential professorial exercise, conditioning a professor's public

⁴ Because the allocation of one office often frees others, there is some opportunity to satisfy the claims of a number of people. It may still be true, however, that more people will be unhappy at any distribution than pleased. In a completely discretionary system, there may be constant lobbying for offices and a network of outstanding promises and expectations at play.

⁵ John Rawls *A Theory of Justice* (Cambridge, Mass.: Belknap Press 1971) 84

⁶ In these days of university austerity this is certainly the case, although law schools, like other professional faculties, may fare somewhat better than average in university distributions.

⁷ The plum offices become vacant on occasions that may coincide with achievement, but not necessarily because of achievement. For example, the retirement of a senior scholar or the departure of a high achiever to another school – still rare in Canada in comparison with the degree of mobility that obtains in the United States – may release prime office space. The departure of law professors to the practice of law is probably more common in early years of academic life when the office in question is probably not particularly attractive. Law faculties, unlike other parts of the university, may lose senior members to the bench. In any event, these departures release office space because the occupants leave, not because academic work enlarges the holdings.

position upon evaluation by his or her colleagues would stifle the equally important values of collegiality and academic independence.⁸

This is not to say that Rawls's observation is unhelpful. Its insistence upon prescribed rules tied to general advantage, which creates legitimate expectations of desert, turns the distributive task away from personal bias and preference. This orientation identifies a basic flaw in the institution depicted in Macdonald's fictitious memoranda: there appears to be no system for allocation of office space. The correspondence – both the dean's overture and the responses – offers a glimpse of an institution whose members, senior and junior, simply do not know the rules for allocation of office space. Probably, none exist.

There is a more significant defect, however. Without rules, the institution lacks a stable, commonly held system for evaluating the quality, productivity, or good citizenship of its members and can have no mechanism for integrating merit and desert into the larger institutional framework, which includes office assignment. The number of considerations relevant to such an evaluation, their polycentricity, and their uncertain ranking render systemization difficult. As the sheaf of memos so aptly demonstrates, however, the failure to undertake the task diverts energy that otherwise could forward institutional goals into memorandum-writing, corridor conferences, negotiations, and after-the-fact repair work.⁹

This is not an institution whose values are unknown or unstable. Collegiality, excellence in instruction, academic independence, and good scholarship are its authentic goals; they provide good starting-points for deciding how to allocate the available emoluments, including offices. Other considerations, such as seniority, dedicated effort or exceptional contribution in administrative matters, or special expertise or needs are also important. There may also be moments when the institution must

8 Tenure may appear to be an exception to this statement. But it is the milestone of tenure that permits the institution to refrain from evaluating the mature product of one's professional life. Compare Joseph Tussman *Government and the Mind* (New York: Oxford University Press 1977) 42–4. It is true that superstars are publicly lauded and fêted, but those who are below standard meet the judgment of their failure in private disappointments on occasions of merit pay awards, promotions, or requests for special allocations of resources. Compare business organizations, where the rule is 'up or out,' or law firms, where achievement is marked in quantifiable terms, such as billable hours and the ability to attract and hold clients, and where income varies accordingly.

9 Even without knowing the final disposition, one can predict that the dean will find himself making new promises – holding out expectations for future favourable distributions within his power – as well as engaging in apologies, excuses, and justification in its aftermath. This is another indication of the high costs in terms of restraint of future discretion and breakdown of good will that poor structure precipitates.

symbolize the importance of new applications of accepted values¹⁰ or rethink the distribution of resources among the various constituencies within the institution – the professional, administrative, clerical, and student populations. The challenge is to set up a fair system of rules for the allocation of *all* benefits consistent with the institution's underlying values. When this analysis is performed in the university setting, some of these values, such as collegiality and quality standards, may be in tension.

Those of the dean's correspondents who urge the creation of a system for allocation of offices generally are justified in their yearning for an impartial, informed set of rules. The project should, however, extend beyond the complexities of allocating this particular prize, at least to the recognition that office allocation must fit into a coherent, fair system of benefit distribution. Otherwise, each occasion for distribution will sap the energy of the institution and mark a lost opportunity to build the secure sense of self-worth that a well-running institution imparts to its members.

The issue raised by the correspondence is thus not the question of the allocation of a particular office, or even of office allocation generally. The real issue is the way in which the power to allocate is structured. And while there are a number of values that are indisputably central to the institution, no single value presents itself as the obvious determinant for the assignment of office space.

Is this, therefore, a situation where process rather than substance should predominate? Rawls sketches three procedural paradigms for analysis of the structure of the decision-making task: perfect, imperfect, and pure procedural justice.¹¹ The first has both an independent criterion for testing and a fair procedure for reaching the result.¹² The second paradigm also has an independent standard for the result, but lacks a procedure to ensure it.¹³ The final possibility, pure procedural justice, stresses procedural fairness and impartiality, instead of result, to promote

¹⁰ If there has been past discrimination, for example, then symbolism in the other direction may be fitting. Concessions to alleviate the inconveniences attached to disability may also be in order, both because sensitivity to such issues has been absent in the past and because flexibility is important to provide encouragement for the future.

¹¹ Rawls, *supra* note 5, 83–90

¹² The example Rawls gives is the equal division of cake among several people. The independent criterion of distribution is equality. The process necessary to reach that result is the selection of one of the claimants as the cutter – assuming that he can cut properly – and as the last person to choose his portion.

¹³ The example given here is of criminal justice. The independent criterion for the undertaking is conviction only of the guilty. Although this objective is clear, the process for its determination is not. Trial procedure and rules of evidence are 'best calculated' to reach the desired result, but even when they are followed the wrong result may be reached.

the acceptance by those affected that the system serves the best interests of the community of which they are members.¹⁴

Rawls's paradigms fail us here. The possible criteria for office allocation are diverse and unordered. On the one hand, no one of them supplies the clear, undisputed benchmark required for perfect or imperfect procedural justice. Moreover, an evaluation of some of these elements would be destructive of collegiality and academic independence. On the other hand, pure procedural justice is intuitively inappropriate in an institution, such as a university, that aspires to certain substantive values.

The process revealed in the memoranda is, on any rendering, a bit thin. It provides only the opportunity for those concerned with the issue generally, or those vying for the available office in particular, to express their views to the dean. Participation is commendable; but as only one element of fairness, it offers no assurance of fair process or appropriate result.

What is required is a system of rules that extends beyond the particular prize at hand. Indeed, the situation calls for a set of rules for office allocation encased in another set of rules for the allocation of the other rewards available for distribution from time to time. Office allocation should not be the arena for fighting the varied battles of academic life. By devising a system of rules, each individual could help discern the appropriate values for consideration and the proper process for their application. Participation in such a fundamental endeavour is an exercise in citizenship—indeed, in constitution-making. It has more meaning than voicing one's preferences to the dean when the occasion arises, and it is also likely to arrive at a procedure, and possibly a result, that enjoys more support of those affected over the long term.

While no singular determinant of office allocation springs up, the contextualization of the issue of office space indicates that some of the institution's values readily apply to other allocative tasks. For instance, decisions on merit pay, support staff assignment, and travel allowances are clearly tied to evaluations of the quality and quantity of one's work. In contrast, the need to avoid public, formal deliberation on questions of merit suggests that a neutral category, such as seniority, may work well for office allocation.¹⁵ Under such a system the dean would of course lose a

¹⁴ Rawls provides the example of gambling, where betting is fair and voluntary and there is no cheating.

¹⁵ Seniority of some sort may be the fairest, most neutral means of assigning office space, leaving the evaluation of merit and comparative contribution and productivity to more private institutional allocations. Seniority has an added advantage. Unlike other entitlements, it is within the reach of most of the members of the community over time. Contribution to administrative operation is a similarly neutral criterion, although it

good deal of his power, but he would also extricate himself from a no-win situation.¹⁶ Moreover, the institution would be a better one, not merely because the allocation of offices would not sap its energy but, more positively, because each such occasion would offer an opportunity to reinforce shared values and would thus encourage the community's members to further its goals. In the administration of complex institutions, beginning at the beginning makes good sense.

does not apply as universally as seniority. There are several complications, however. For example, one might want to precipitate an office change-over upon retirement or the attainment of emeritus status, especially if mandatory retirement ceases to be government policy. Offices should change hands on some generational basis, at least, and the demographic bulge in the age of legal academics, given the expansion of law schools at various times, will for some time militate against such change. A fair seniority system would recognize service in other institutions and discourage jockeying for office space to obtain a small incremental advantage. Thus, discretion is not ruled out; it is harnessed to an intelligible system of institutional purposes.

¹⁶ We can see that the decision, once made, settles nothing. It becomes a starting-point for a new round of negotiations with a new set of promises, expectations, and disappointments.

University of Toronto LAW JOURNAL

volume XL, number 3, summer 1990

Law and Leviathan: Introduction	JOHN FRECKER	305
PART 1 THE NATURE OF THE ADMINISTRATIVE STATE		
The past and future of the Canadian administrative state	ALAN C. CAIRNS	319
The administrative state: Theory or pragmatism?	DAVID J. MULLAN	362
Interest group representation in the Canadian administrative state	M.A. CHANDLER	369
PART 2 THE SCOPE OF LAW IN THE ADMINISTRATIVE STATE		
Mice under a chair: Democracy, courts, and the administrative state	ALLAN C. HUTCHINSON	374
Reimagining the state	H. WADE MACLAUGHLAN	405
Public duty and private power in administrative law	GENE ANNE SMITH	412
PART 3 NORMATIVE ORDER IN THE ADMINISTRATIVE STATE		
Office politics	RODERICK A. MACDONALD	419
The inalienable right to be alienated	BRYAN SCHWARTZ	477
Why the dean?	LORRAINE EISENSTAT WEINRIB	484
Normative order and legalism	JOHN D. WHYTE	491
PART 4 NEW PERSPECTIVES ON INSTRUMENT CHOICE		
Smaller or smarter government?	ROBERT HOWSE, J. ROBERT S. PRICHARD, MICHAEL J. TREBILCOCK	498