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PART 3 Normative order in the administrative state

Roderick A. Macdonald*  OFFICE POLITICS†

Introduction

The following allegory is designed to canvass the internal normativity of administrative agencies, bureaus, and tribunals. While the problem stated is genuine and the structure of the paper reflects in large measure my own experiences as dean of a law faculty, I should like to record the standard literary disclaimer: the characters portrayed are fictitious; any resemblance they may bear to my colleagues at McGill or elsewhere is purely fortuitous.

A successful allegory needs no gloss (or even formal introduction and conclusion) by its composer. In fact, an author does a disservice both to text and to readers by collapsing a parable's several possible lessons into one ex post facto official reading. The collection of memos comprising 'Office Politics' is intended to make just this point. It is also meant to reveal the peril for complex institutions of an excessive reliance on formal instruments and canonical wisdom, and the value of constitutive practice for reaffirming the subtle and informal normative orders that make associational life possible. Of course, the uncharitable reader may conclude that in choosing the epistolary form I have sought to hide (even though unwittingly betraying) my own ideological position. By producing a bureaucratic text in which I speak behind the masks of my fictitious colleagues, I could stand accused of preferring mysticism and dissimulated power over authenticity and candour in social organization.

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† In preparing this essay I have benefited from the comments of several McGill professors in relation to an actual exercise of office allocation we undertook during the summer of 1984 and in relation to earlier drafts of this manuscript. I should like to acknowledge in particular Professors Frank Buckley, Jane Glenn, and Ralph Simmonds and Associate Deans Yves-Marie Morissette and Daniel Jutras. Initial research assistance was provided by Leslie Kelleher, and working translations of the French language memos were prepared by Gary Bell. Teresa Scassa and David Lametti, my research assistants during the summer of 1988, made a substantial contribution to the paper as it now appears. Both were hired under a grant from the Meredith Research Fund of the Faculty of Law. Finally, I am indebted to my two commentators at the Law and Leviathan Conference, Professor Lorraine Weinrib and Dean John Whyte, whose probing of the paper as delivered has helped me to tell a better story in this published version.

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In confronting the puzzle of speaking authentically in this introduction without flattening the allegory – how to inject Macdonald the author into the text while preserving the flaws of Macdonald the dean? – I asked several colleagues what to do. One said that I should simply write a précis of the story comprising a matrix for locating the point where each of my respondents fits in respect of the themes I seek to illustrate. Another argued that I should rehearse the feedback I have already received from professors at McGill. This would permit me to illustrate some of the possible readings of the text proffered by those to whom, and of whom, it speaks. The vice-principal (academic), to whom I had forwarded an earlier version of the paper, told me that what he missed most was not an introduction but a conclusion. Why this allegory? Should I not explain why I selected the university milieu (as opposed to a more informal setting such as a club or the family, or a highly structured organization such as a genuine agency or government bureau), and why I chose the exercise of allocating offices (as opposed to establishing the teaching timetable, managing the process of professorial appointments, or prosecuting a dismissal case) to make my point about how much law can be found within public agencies? In the end, I rejected all of these options for the same reason: they would have required me to introduce the text by indicating in some very explicit manner what I think it might mean.

If conventional beginnings and endings are not appropriate, what other options for introducing the paper are open? Obviously, I could carry the allegory one stage further with yet another memo, placed at the beginning so as to make the story unfold as a flashback. Several such dénouements were suggested by my colleagues. One proposed that I commence with the judgment of a court sitting in judicial review of the Grievance Committee decision. I was initially attracted by this idea, for I could then tell not only the familiar stories about judicial review in dramatic fashion, but also the less well known tale of ‘Bureaucratic Rationality in the Judicial Process’ and in doing so offer an effective counterpoint to the message implied in this panel's title. But adopting this strategy would have moved the paper too far from its ostensible subject-matter and would implicitly have confirmed the erroneous view that administrative distributions can be transformed without cost into claims of commutative justice determined through adversarial adjudication.

Another suggestion was to begin by responding to the invitation set out in the final memo. One of my associate deans thought that an attempt at self-justification should mark the dean’s passage from sin to redemption. In a parting confession to the vice-principal (academic) he would tender his resignation, embellished with lamentations for the faculty, complaints that he had been misunderstood or misrepresented, and a codification of rules and procedures for attributing offices. However, to present such a
conclusion as an introduction presumes both that deans can mature to omniscience and that occasions of corporate self-reflection must always end in martrydom.

A third idea for presenting the allegory I owe to my wife, who thought that the text should commence with extracts from the dean’s personal diary. By revealing how this organizational conundrum at the university bears on his other lives as son, husband, and father, this approach would have had the advantages of restituting the allegory in a context of personal agency and of suggesting how public agency is reciprocal to personal agency. It would also have reinforced the point that it is in the recognition of intimacy and vulnerability and in the reconstitution of ourselves through our relationships with others that we understand why merely formal conceptions of authenticity are inadequate to capture fully the meaning of institutional life.

As my reluctance to pursue these didactic strategies in detail shows, each seemed to be an unsatisfactory prelude to the allegory. Yet as I worked on preparing the essay for publication, I continued to believe that the text would be incomplete were it to remain simply a collection of interoffice memos. What the parable lacked was a record of non-discursive and non-strategic interactions among colleagues and between professors and dean during the allocation exercise. For there is a tacit dimension to the faculty’s normative order which grounds most of its institutional knowledge. How ironic to have attempted to make such a claim explicit in an introduction.

In view of the problems with the above approaches, I have decided to use the exercise of reflecting upon how to compose this introduction as part of the introduction itself. The questions of organizational and legal theory that these suggestions from friends and colleagues raise are indeed among the major themes of the allegory. It follows that I have no adequate preface for those who decline to see in the parable of ‘Office Politics’ the same processes for nurturing an internal normative order that are found in our public institutions.

The allegory rests on the premise that the fundamental challenges of administrative law over the next decades do not lie in the perfection of theories of regulation and instrument choice, of the legal forms of agency organization, of mechanisms of judicial review, and of remedies against state action. Rather, the challenges are tied to the crafting of decision-making structures, procedures, and modes of justification within agencies and bureaus. Normative order in the administrative state emerges first from the internal management and operations of its various institutions. Only then does it appear in the public regulations and decisions of any particular agency or bureau and in the specific rules and offices through which administrative activity is undertaken. I believe that we can no longer afford to analyse administrative law on the basis of sharp dichotomies.
between state (public) and voluntary (private) associations, between law and politics, between legal rationality and political arbitrariness, between explicit (propositional) knowledge and tacit (inchoate) knowledge, and between external regulatory activity and internal agency management.

'Office Politics' is about the politics of administrative law and about the scope of legal ordering at all levels (from front-line inspectors and first-instance claims adjudicators to appellate tribunals and ministers of the Crown) of our public bureaucracies. It engages three main questions of administrative organization and regulation: (1) what is the relationship between legal theory, management theory, processes of social ordering, and the substantive precepts of distributive justice? Can the problem of justification of administrative decisions be separated from the problem of institutional structure? (2) How extensive is traditional normativity within public bureaucracies? What is the relative weight of legalism and authority in constituting the tacit normativity of these agencies? (3) Can institutions acquire knowledge beyond that of their members? Does the possibility of institutional knowledge mean that implicit normative orders are necessarily more democratic than explicit normative orders? 'Office Politics' is meant to suggest that each of these questions may be asked of all decision-makers in all contexts of public administration; but, as John Willis noted decades ago, while the big questions are the same the little answers will differ from case to case.

If the allegory that follows seems too heavily laden with detail (Whose secretary types which memos? Is a secretary used? How is the dean addressed? How is the issue characterized in the 'subject' part of the memos? What is the date of the memo? Which official language is used? What stylistic and rhetorical devices are deployed? To whom is the memo copied? Is the document a letter or a memo?) and too cluttered with apparently repetitive memos whose authors state only marginally different positions, I can only say that institutions themselves are laden with detail and marginal differences. To borrow a figure of speech, the problems of associational life flow more from the damage we cause inadvertently with our elbows than from that which we cause intentionally with our fists.

Again, if the allegory contains no overriding prescriptive model of regulation and allocation, it is because I am sceptical that any single ethical theory of 'economic' principle presumptively applies to all of our public agencies: the divergent moral theories and models of decision-making advanced by office claimants themselves constitute as large a part of the normative discourse within the Faculty of Law as the constitutional structure — royal charter, university statutes, faculty regulations — upon which it rests. I am also sceptical that the particular type of legal normativity we associate with Max Weber's formally rational model of authority should (or even could) be prescribed for all administrative agencies in all
cases: a true normative order is most successfully sustained in public institutions such as agencies, bureaus, and tribunals which encourage the candid inter-subjective communication among their members that makes associational life rewarding.

‘Office Politics’ is meant to generate just this type of participatory response to the problems of creating (and recognizing) normative order in the administrative state.  

discretion to assign offices on the basis of what I consider to be the best overall interest of the faculty. Nevertheless, given the oral representations I have already received on this question, I have concluded that there are at least two widely accepted criteria that could be employed in guiding office allocation decisions, namely, length of service to the faculty and academic rank.

Let me suggest that, as a general rule and everything else being equal, where length of service to the faculty is approximately the same as between competing claimants, priority will be given to the faculty member with the more senior rank. In other situations decisions will be influenced primarily by considerations of long service. You can appreciate, however, that I would be reluctant to favour an associate professor of considerable length of service over an incoming full professor of notable status within the legal or academic community. Nor would I be inclined to apply standardized criteria blindly in cases where I perceive that this would be disruptive to the dynamic of the faculty.

Finally, and simply to give some indication of the complexity of this issue, I should like to mention some variables that bear the actual application of the above-mentioned criteria. (1) Should length of time in one's present office be relevant? (2) When a colleague returns, after having resigned or having taken an extended leave, should years of service be cumulated? (3) Should service on full-time reduced-load status count equally with full-time service? (4) Should status as ex-dean be considered? (5) Should tenure, or even tenure-track status, be factored into any equation?

Please let me have your thoughts if this matter is of concern to you, even if you do not now wish to be considered for one of the five offices coming vacant. I expect to make a decision by May 15, and I invite your comments before May 1.

RAM/IC

MCGILL UNIVERSITY Faculty of Law April 3, 1988

TO: Dean Macdonald FROM: Prof. B. Paul
SUBJECT: My new office

I have to say I was surprised to receive your memo about office allocations. I've known for a long time that Professor Eaton was leaving and that her office would become available. I had assumed that I would be getting that particular space. If you remember, Max promised me a proper office when I signed on here at the faculty. I had several other offers but I chose McGill on the basis of the whole package.
I realize that other people will be putting pressure on you for Professor Eaton's office. They will all come up with their own reasons and criteria. People who insist on factors such as research, publications, etc., have to remember that to do any decent work you need a good office. I would like to see any of them try to publish from my little hole in the wall.

Regardless of this, I don't think their claims can stand up against mine. According to my contract, I am entitled to a bona fide office. I don't see any justification for your disregarding this contractual obligation just to please more senior professors. Their claims might be well and good if all other things were equal, but I don't understand how any of those intangible considerations can override a valid and binding promise made by your predecessor.

/mb

Université McGill  Faculté de droit  3 avril 1988

À: M. le doyen Macdonald  DE: Prof. Françoise Dugas

Objet: Attribution des bureaux

C'est avec grand intérêt que j'ai pris connaissance de votre note de service et des critères que vous y suggérez. Je suis heureuse d'apprendre que les nouvelles affectations des professeurs Lindsay, Savard, Dupont et Allen nous donneront plus d'espace. Mais je vous préviens que si vous allouez ces locaux selon les deux critères suggérés, personne ne sera satisfait (sauf, évidemment, celles qui recevront ces bureaux).

Vous m'avez demandé mon opinion — et vous l'auriez! Je recommande fortement qu'un comité ad hoc se penche sur ce problème. Je suis consciente de la paperasse qu'un tel comité nécessite et engendre, mais je crois que c'est la seule façon de préserver la paix. Un tel comité pourra regarder tous les aspects du problème et faire justice aux cas particuliers, mieux que vous ne le pourriez, étant donné vos nombreuses tâches. Ce comité rédigerait une procédure et des principes directeurs qu'il soumettrait ensuite au Conseil de la faculté. Ainsi tous pourront débattre de la question et participer à la décision. Puis vous n’auriez qu’à appliquer la politique retenue pour arriver à un résultat objectif que nul ne pourra contester.

Vous trouverez, ci-joint, copie de la politique suivie à l’université où j’ai passé mon année sabbatique. Cette politique n’est pas suffisamment précise, mais ce serait au moins un point de départ. Je crois que vous
devrez adopter une telle approche si vous voulez un résultat objectif qui évite les débats à n'en plus finir et la contestation de vos décisions.

En passant, si vous décidez de ne pas suivre mes suggestions, sachez que j'ai un œil sur le bureau de Sharon depuis un bon bout de temps. Ce bureau est grand, bien éclairé et a l'avantage d'être situé sur le même étage que la seule toilette pour femmes du pavillon 'Chancellor Day Hall.'

ay /

POLICY ON FACULTY OFFICE ALLOCATIONS
ADOPTED: October 1979

1 For the purposes of this policy, 'full-time tenured faculty member' means a person who (a) holds a teaching appointment carrying tenure at the University, and (b) holds his or her principal appointment in the Faculty of Law.

2 No full-time tenured faculty member and no full-time faculty members in the tenure stream will be required to give up an office under this policy, unless the allocation is being made for the purposes of distribution of space other than among members of the Faculty of Law.

3 A full-time tenured faculty member who has given up an office to hold an administrative position within the Faculty of Law is entitled to reoccupy his or her office upon the end of his or her administrative activities.

4 Full-time tenured faculty members on sabbatical or other leave for a period not exceeding one year shall be entitled to reoccupy their offices upon return from leave. During the period of their absence, these offices may be temporarily reassigned by the dean. In the case of leaves taken for more than one year, the dean will retain the discretion to permit reoccupation of the office space by the returning professor, or to assign that professor another office.

5 The dean, on the expiry of his or her term, shall be placed at the top of the list of precedence for the purposes of office allocation.

6 Subject to article 5, the right to occupy a vacant office on a permanent basis shall be given to full-time tenured faculty members in order of seniority. Seniority shall be determined by the date of grant of tenure.

7 Where two or more full-time tenured faculty members have equal seniority on the list of precedence for office allocation, priority shall be determined by lot.
TO: Dean Macdonald 
FROM: Sarah Fleming

Although the question of reallocation of offices doesn't affect me personally (I hope), as I am happy where I am, some of the points raised in the penultimate paragraph of your memo touched still-sensitive memories of my own efforts to bring to an end the 'time' I served in Barry Paul's office.

1 I think the length of time a person has been in her present office should definitely be relevant (perhaps as a 25 per cent factor) – especially if the office in question is one of the smaller converted closets and washrooms in the shadow of the library on the west side of Chancellor Day Hall. Over the years these become progressively more depressing for their occupants.

2 I think service as 'full-time reduced-load' status should count equally with ordinary full-time status if (as in the case of Françoise) the person is present in the faculty each day for most of the day. Alternatively, as in my former case (when I was present only in the mornings) I agree that some allowance or discount should be made (of, say, 10 to 20 per cent).

3 I think that tenure or tenure-track does weigh in the balance, to some extent – perhaps even slightly more than the previous factor (for example, 20 to 30 per cent).

4 Ex-deans and, to a lesser extent, ex-associate deans and ex-institute directors should have some priority.

5 I forgot point 2 of your memo. When a professor resigns and then returns, I think years of service both times (though not the interim) should be cumulated. But if necessary, as a deciding factor between claimants of equal length of actual service, it should count against.

6 Let's not have any more committees to decide these administrative details. You've collected our views now. Make your decision and then tell us the reasons.

/adb
In allocating rooms, I should draw a sharp distinction between (1) allocating individual rooms that for one reason or another become available, and (2) redistributing rooms that have already been allocated and are currently occupied. In the latter case, which I appreciate is not that which now confronts the faculty, I believe we should adopt the conservative posture in boundary matters taken by the Organization of African States. We should agree that an extraordinary event, such as the arrival of a world-class senior professor or the rehabilitation of a former dean, should be necessary in order to effect a change requiring the expulsion of an incumbent.

As to point 1, you don't need me to tell you that the more factors you take into account, the more impressionistic it all becomes. While I am inclined to favour criteria that highlight status over those based on length of service to the faculty, for personal reasons, which I know I need not state, I should not like too much emphasis to be placed on academic rank: there are, after all, other indicia of seniority, such as years of teaching experience, reputation in a chosen field, and salary. Again, perhaps personal interests intrude when I say that length of service confined to the years spent at McGill is too narrow, especially, in the case of interrupted service, if limited to the years following a prodigal's return. Let me remind you that since we are talking about an initial allocation, there is no real question of vested rights' being disturbed if pre-prodigal years and years spent in an equivalent institution are taken into consideration.

As to the nice block of four offices previously occupied by our emigrants to the Centre, I believe (let me stress yet again a personal interest) that those who sign up well in advance so as to assist in the creation of a healthy organism in an outlying annex should be generally preferred, regardless of seniority, to those who come late on the scene after seeing that a viable unit is a clear possibility. Here you are trying to create a satellite community, not merely shuffling more or less fungible accommodation. There are times when 'first come, first served' is the appropriate distributional principle. This is one of them.

/1h/

UNIVERSITÉ MCGILL Faculté de droit 5 avril 1988

À: M. le doyen Roderick A. Macdonald
DE: M. le professeur Serge Lapierre
OBJET: Locaux
Veuillez m’excuser de vous envoyer une lettre manuscrite: c’est que je ne voulais pas que qui que ce soit, ni même ma secrétaire, n’en prenne connaissance. J’espère pouvoir compter sur vous pour en garder le contenu secret.

Je vous écris à propos des nouveaux locaux. Comme vous le savez, j’occupe le présent bureau depuis un certain nombre d’années. Mon bureau actuel, sans être fantastique, n’est pas ce qu’il y a de pire. Je demeure cependant convaincu que vous devez absolument m’attribuer un meilleur local. Il y a déjà longtemps que je vous ai fait part de mon désir de changer de local.

J’enseigne ici depuis fort longtemps. Même si vous-estimez qu’au cours de ces dernières années je n’ai pas contribué autant que les jeunes professeurs, je ne crois pas que vous puissiez ignorer mes contributions antérieures. Je considérerais comme un affront à mon honneur professionnel le fait de ne pas recevoir un meilleur local simplement parce que je n’ai pas été promu à un poste de Professeur Titulaire. Nous avons tous besoin du respect de nos collègues et de nos étudiants pour bien fonctionner dans un milieu universitaire. Le fait de ne pas recevoir un bureau correspondant à mon ancienneté porterait atteinte au respect qui m’est voué et aurait pour moi des conséquences négatives tant sur le plan professionnel que personnel.

Encore une fois j’insiste pour que ces remarques demeurent confidentielles. Je sais que votre discrétion est grande quand vient le temps d’attribuer des locaux. Vous pouvez me donner un nouveau local si vous le désirez vraiment. Si vous ne le faites pas, je saurai que vous avez prise la décision politique de diminuer mon rôle et ma réputation dans cette faculté. J’ai apprécié les années passées ici et j’espère que je pourrai en apprécier d’autres.

MCGILL UNIVERSITY  Faculty of Law  April 6, 1988

TO: Rod  FROM: Prof. C. Billington
SUBJECT: Office allocations and other perks

In my opinion your two criteria do nothing to promote excellence within this faculty. You are simply rewarding professors for not having had the talent to move up to a better school. Rank and length of service have no necessary correlation to academic merit and contribution. Your main object should be to reward quality and achievement. The best offices should go to the faculty’s best people. On the basis of objective criteria of past performance you and I both know who they are.
If you publicly reward professors for their real, tangible contributions you will be doing two things. You will attract and keep some of the better candidates for teaching positions. You will also start to squeeze out the deadwood. Let's face it, given our space problems, a good office is a substantial perk. Any such perks should be used as incentives to promote the type of behaviour you want within the faculty, and to prevent tenured professors from shirking on their duties. If we want to be competitive with other institutions we have to start being more competitive within our own faculty. A system of incentives will regulate the behaviour of the teaching staff more efficiently than any attempts to be 'fair' in the abstract. After all, you have to ask to whom you're being fair. The community we serve has a right to the best law faculty possible. Don't miss this opportunity to send a few signals.

cc: Prof. Sam Reisman
    Prof. Ted Campeau

MCGILL UNIVERSITY  Faculty of Law  April 6, 1988

TO: Dean Macdonald  FROM: Professor Pearson
     Professor Tremblay

SUBJECT: New offices

We're glad to hear that there's new space in the faculty, and a chance for some of us to switch offices. With five vacant offices, four grouped together across the road, now is the time to start dividing up the faculty according to specialty. For example, you could put all the civilians on one floor and all the common lawyers on another. Offices (and office location) are not just a private right. They are a public good which you must deploy to maximum advantage.

If you remember, we spoke to you last semester about the possibility of our being located in contiguous offices, or at least on the same floor. This could be a first step towards establishing a research institute. We are both working on similar projects on the law of obligations, and would find it very useful to be able to share ideas and resources easily. We hope you will make this one of your main considerations in assigning office space. There is a precedent for this. Others, such as Profs. Lindsay, Savard, Dupont, and Allan, have benefited from special arrangements which permitted them to work in close proximity with like-minded colleagues. That they have now been able to establish the Centre for Administrative Law and
Practice is proof that the whole faculty gains in the long run from this type of specialization and grouping.

/adb

MCGILL UNIVERSITY Faculty of Law April 7, 1988

TO: Dean M. FROM: Ted Campeau

SUBJECT: Offices

I think I've got the perfect solution to this office allocation question. Craig Billington and I have discussed his memo and I agree with him that we should allocate according to merit. But merit is too loose a standard and needs to be specified. If we're going to make progress on this issue, let's not reinvent the wheel – let's just perfect the criteria for merit we've already got.

I think we should decide on an ethical theory that can be deployed to tell us what we value. Then we should create a point system in order to accurately and fairly compare the work that professors accomplish. Isn't this what you do now in an ad hoc way for our annual discretionary salary increases? While it might take some time at the beginning to agree on basic allocational principles, to set up all the categories, and to assign points to them, once in place the system would provide a quick and easy reference for you and your successors.

Just to illustrate what I mean, publishing a book might be worth 100 points, an article in a major journal might be worth 75, a note or comment 50 (or for lesser journals 50 and 25), supervising a mooting team might be worth 40, and so on. The key would be for you to get all the things we value down on paper and to work out a theory that establishes their relative importance. Then you could totally eliminate both politics and arbitrariness from the office allocation process.

/sg

cc: Sam Reisman Craig Billington

MCGILL UNIVERSITY Faculty of Law April 8, 1988

TO: Professor Macdonald FROM: Professor Ratcliffe

SUBJECT: Sexual equality and tradition
It is because I know how much latitude you have in allocating offices that I feel obliged to comment on the criteria you set out in your memo.

I realize that you are attempting to avoid having to make subjective evaluations by listing criteria such as rank and length of service. After all, these standards are often used to establish a pecking order within an academic environment. However, by adhering to such considerations you are not avoiding subjective moral choice. Worse, you are perpetuating some of the system's traditional and hidden biases.

The teaching of law has long been a male-dominated field. Recently this trend has been changing, and you have been very supportive of female faculty members. But if you decide office allocations chiefly by reference to rank and long service, I can't help but feel that you will be reinforcing the discrimination that has prevented women from attaining the senior academic ranks or from establishing any great length of service within the university.

Your criteria belong to an old boys' system which is outdated. You were appointed dean in part to break the oligarchy which had been running this place for years. Here's a chance to use your decanal authority to act (as you put it) in the 'best overall interest of the faculty' so as to bring the distribution of choice offices more into line with our present reality. Give the office to our most junior female colleague, Lucie, and send a memo explaining clearly why you did. If you are afraid to go this far, then at the very least you ought to announce criteria that do not have a conservative bias and that affirm the kind of faculty we are trying to become.

/s/g

Me. B. George Meehan
Advocate
3872 Peel Street
Montreal, Quebec
H3A 1Y2

Dean Roderick A. Macdonald
Faculty of Law
McGill University
3644 Peel Street
Montreal, Quebec
H3A 1W9

April 15, 1988
Dear Dean Macdonald,

Re: Authority of Dean to Assign Offices

I am writing pursuant to your request for an informal legal opinion relating to your authority to allocate professorial offices within the faculty.

According to article 12.1 of the Statutes of McGill University, ‘[t]he Dean shall, under the direction of the Principal, administer the affairs of his Faculty, academic and executive.’ This is the only provision in the statutes granting a power to perform general administrative functions in the faculty. As you can see, it confers a very broad discretion. Moreover, this power is not limited in any way in any subsequent articles of the statutes.

However, a similarly broad grant of power is also made to Faculty Council in the General Regulations and Policies of the Faculty of Law. Article 7 of that document accords Faculty Council the ‘authority to deal with all matters which, under the University Statutes, may be properly dealt with by the Faculty of Law.’ Thus, there may be an argument that your administrative and executive decisions are subject to review or approval by the Faculty Council.

None the less, given past practice within both your faculty and others similar to it at the university, the dean appears to have an unfettered discretion in purely administrative matters. In fact, you will note, this power accorded to Faculty Council is set out only in the academic regulations of the faculty, and not in the form of administrative guidelines emanating from the university senate.

Finally, as you know, the professors at this university are not unionized. According to articles 1665a–1668 cclc, a contract of employment is a contract for the lease and hire of work. Unless you have made additional promises to individual professors your only legal obligations are to furnish work and pay wages. Thus, you also have absolute authority to decide office allocation questions any way you want without fear of a judicial challenge based on the provisions of the Civil Code.

My advice is to proceed in this matter under the assumption that your discretion is unfettered by the university statutes, the general regulations of the faculty, and the provisions of the Civil Code.

Trusting the above, is satisfactory, I am,

Yours very truly,

B. George Meehan

BGM/MS

ps – Aren’t you glad you have loyal alumni teaching as sessional lecturers whom you can count on for free legal opinions?
TO: Professor Edna Placet
FROM: John Wisdom, Gale Professor of Roman Law

SUBJECT: Getting seen and getting ahead

I hope you are reconsidering your decision not to apply for a new office. As I mentioned earlier, there is more involved in this process than simply a desire for new and better space. Even though you say you are quite happy with your office, you have to realize that your contentment will be seen as lack of ambition. When you make a demand for a better office (or a computer, or a research assistant) you are indicating to the administration that you feel you have made a significant contribution and are entitled to recognition. Within our rather insular little circle, the demands for and awarding of such seemingly insignificant amenities do not go unnoticed. Believe me, I have had thirty-five years of experience at playing faculty politics.

It may seem petty to act like this, but it’s all part of forging a career. If I may add, without sounding sexist, there is often a perception that women are less competitive and aggressive in the professional workplace. If you foster this view, you will be passed over for many other benefits, some of which might be of great value to you. Consequently, although it may seem unimportant now, the competition for this office might have a great deal of impact on how you are dealt with much farther down the road. It might also adversely affect other female colleagues in the future. I urge you to reconsider and put your name in the running for a new office.

John

TO: Dean R.A. Macdonald
FROM: Sam Reisman

SUBJECT: Office allocations

The following is my response to your solicitation of opinions on the subject of office allocations. I’m sorry to be so late getting back to you but I only saw the memo yesterday when I got back from a Liberty Fund conference. Anyway, I’m sure you won’t be surprised by what I have to say. Like Craig
Billington I see this allocation exercise as being essentially one of valuation which you, as dean, should undertake. I think, however, that Billington misses two key points. First, he has a thin conception of what it is that we are valuing in that he focuses only on past performance. Second, there are significant valuation uncertainties in any exercise like this. You could well be wrong in your allocation because you have imperfect information on tastes and preferences.

Let me start by reminding you that what you are really asking for in your memo is a theory of regulation. This takes us directly to agency cost and interest group theories. In a world of zero transaction costs and full agreement about faculty goals, all parties would subscribe to a complete contingent contract, which specified faculty policies for each possible future state of the world. Since that would be too costly, the parties will delegate discretion to the dean as an agent of all those who, as principals, have an intellectual stake in the faculty: professors, students, even alumni. Regulation might then be a response to the possibility of decanal misbehaviour, as where a dean seeks to advance his own interests and not those of the faculty. In some cases this might be desirable, but even then decisions about compensation (and offices are just one type of compensation) are one of the last places where decanal authority should be limited. If faculty members are given the power to set binding compensation guidelines, one would predict pure rent-seeking by professors, and the result would be a set of regulations that was not attuned to overall faculty goals.

Turning now to the substance of the question, I think public choice theory is where we should look for an answer. I've heard a number of discussions since my return and I'm struck by the consistency with which my colleagues fail to take into account an important factor; namely, the marginal utility of any given office space varies with the individual professor. There may be some professors, for instance, who prefer to work at home, and who would gladly exchange a large office for a smaller one if they were able to schedule their classes so that they need not come into the faculty two days a week. Again, certain professors require more space because they do a lot of work with graduate students or research assistants. Some would be willing to forgo a better office if they could have a particular secretary or their own computer, or if they could teach a particular course. In addition to all this, tastes change.

It is inefficient to deal with each of these issues separately: allocation of office space, course assignments, timetables, support services, graduate student supervision, etc., should all be treated together as tradeable commodities and balanced against one another in establishing a work environment for each professor that will permit him to achieve maximum efficiency. Of course, the basic point is to provide professors with the
correct incentives to do good work (too bad we can’t abolish tenure, by the way). Still, since non-salary benefits have idiosyncratic value, you can’t possibly have all the information you need to see how each member of the faculty values them. Professors who kvetch about your allocation, however you make it, should simply bargain with their colleagues to get better office space. Pretty well any object that can be legally exchanged is legitimate barter material. Given how many of these there are in a law faculty, unless you are incredibly biased (or are a life-tenure dean), the marginal advantages will even out. Here’s an example. We all know that Sheila is the best secretary in the faculty. If the person to whom she is assigned wants a particular office badly enough, he might wish to trade her for someone less dextrous in exchange for the office. More generally, there is no reason why professors couldn’t engage in outright cash buyouts of offices, research assistants, administrative positions, or other benefits. I certainly don’t see a justification for paternalistic barriers to alienability here. Moreover, we all know that this type of thing has gone on in the past within the faculty. I distinctly recall informal deals (‘I won’t apply for a sabbatical this time around if you make sure I get your office,’ etc.). Since it is obvious that this type of activity inevitably will continue under the table, we should recognize its benefits and legitimize it by bringing it out in the open. I’m tempted to send everyone a copy of Coase’s seminal article just so people see what the possibilities are.

As to the correct specification of incentives, I would argue that you should be careful not to place too much weight on past performance. The basic question should be, What have you done for the faculty lately? I agree, however, that your valuation calculus might well, as Billington suggests, have a significant ex post ‘settling up’ component.

The advantages of the system I’m advocating are pretty obvious: it provides the right set of incentives and allows us to bargain to a better distribution of non-salary goodies; and it doesn’t allow anyone in this faculty to rest on the publication of an article or two on the law of wills in the 1960s for their status in the faculty. Everyone will have to work hard in order to accumulate tradeable commodities. These policies will, I think, help us to achieve our goal of making this the best law school in the country.

/mb
TO: Dean Macdonald  
FROM: David Sangster, F.R. Scott  
Professor of Public and Constitutional Law

SUBJECT: Office allocation and academic freedom

I read with great interest both your memo on office allocation and a copy of Professor Dugas's reply which she forwarded to me for comment. In general, I endorse her position, but I would take it one step further: a committee should be established not only to draw up criteria but also to make the actual allocations. This second committee would not be an ad hoc committee like the first, but should be a standing 'judicial committee' of the faculty.

I strongly believe that this process should be entirely independent from the dean's office. A university is a centre for the creation of knowledge, for exposure to new ideas. Its very lifeblood is the academic freedom of its professors. In this light, the question how to allocate office space is not as trivial as it seems at first glance. Office space, along with support services, research assistance, travel and book allowances, and timetabling are the small things that comprise the environment each professor must work in. If the power to control all of these is concentrated in the hands of one individual, that individual can make life at the university intolerable for any professor with whom he happens to disagree. It is not necessary that there be any actual abuse; it is enough that there is a potential for abuse to chill academic freedom.

My suggestion, therefore, is that members of the faculty elect representatives to an ad hoc committee (a sort of legislature), which will establish criteria for assigning office space. These criteria will be, in turn, applied by another independent body (the judiciary) appointed by the dean (the executive). I know this sounds a lot like Montesquieu and Dicey, but, after all, aren't we a law faculty? Let's set a good example for the other faculties.

/ey

April 20, 1988

Dear Boss,

Too bad. It's not going to be easy to reallocate office space. For once you're out in the open and can't mask the faculty hierarchy behind pre-existing
bureaucratic rules. I'm not going to let you try to camouflage your power with this pseudo-exercise. Anyway, I bet we're not the real audience for the memo anyway. This is how you show the vice-principal what a good administrator you are, right?

By asking us to give you our feedback or suggestions on your criteria you are essentially co-opting us into accepting your final authority and discretion. You are trying to make us feel that we actually have had some say in a decision that affects us all, but that in reality is made solely by you. Every professor who passes on suggestions or comments will feel that she has participated. In effect, all she will have done will be to have passed over to you her power to have a real input in the allocation. Nowhere has anyone questioned your authority to take the initial decision to send the memo inviting suggestions.

This attempt to pacify the competing interests by creating an aura of participation is yet another example of the liberal lie that bureaucracy and democracy are compatible in action. Those among us who feel we have an interest in or an entitlement to a new office should be allowed to make the allocation among ourselves through debate and discussion. This may not be as expedient as your method, but it would no doubt be, to use your own words, less 'disruptive to the dynamic of the faculty.'

Of course, you have the power as dean to do what you choose, and I'm sure you will. I merely wanted to point out that your attempt to involve professors in faculty decision-making is disingenuous. Unless we have the full power to decide among ourselves what the 'best overall interest of the faculty' is, we have, in effect, no power at all.

Assuming you insist on making the decision yourself, in my opinion the only legitimate way to proceed would be to put everyone's name into a hat and have a draw. Games of chance are at least blind to entrenched interests. Force our Dicey maniacs like Sangster, Dugas, Rose, and Chouinard to play with dice that aren't already loaded.

Patrick

/adb

cc: All workers  
Dr Oscar Steinman, Vice-Principal (Academic)
The grapevine tells me that you are one of those people actively pursuing Sharon's office. Let's face it, by any possible criterion or criteria that the dean or a committee could come up with you are going to lose: you're relatively new here; you're not tenure-track; you haven't had time to assemble an impressive list of publications in meaningless journals. Plus, you haven't exactly been Dale Carnegie when it comes to influencing people and winning friends with your political agenda and abrasive style.

So I have a deal for you. I'm in the opposite position. I could easily get the office if I tried. Quite frankly, though, I don't particularly relish the thought of having to tolerate our old intellectual property expert on a neighbourly basis. So I'd like to stay put, despite the fact that my office is not the greatest. You clearly have the best secretary in the faculty, although most others haven't realized it yet. She has got experience on the same word-processing system I have at home and in my office, and on which I plan to write my next book. I am willing to put my name in the running for this office. You would withdraw yours, and instead apply for my present office which no one else will do. When the allocation comes through, we'll switch offices and secretaries. The dean won't interfere since this sort of thing has been quietly done in the past; moreover, he would fear the possibility of your crying the feminist wolf. This is something he will avoid at all costs.

You can't possibly exert the type of influence in the faculty that your ideology requires if you continue to be isolated in the attics of these buildings. So let's make a deal.

MCGILL UNIVERSITY  Faculty of Law  April 23, 1988

TO:  Dean R.A. Macdonald  
FROM:  Professor G. Rose  

SUBJECT:  Office allocation procedure:  
Our file 88-23-136

I find it puzzling that you are soliciting opinions on office allocation procedure. I also find your claim to an unfettered discretion unsettling.

The procedure used last year was based only on years of service and had nothing to do with rank. I can see no reason to change this. In fact, there are good reasons to follow this precedent. For one thing, it is certain. It worked without any major difficulties last year. In addition, it allows professors to plan their future moves. 'Seniority' is an objective standard that eliminates arbitrary and capricious exercises of power. Your approach
will only add to the competitive, back-biting element within the faculty. I see no merit in this.

Per: ROSE, DESJARDINS

TO: Prof. Sam Reisman
FROM: Prof. Cathy Ratcliffe
SUBJECT: Let's make a deal

Your behind-the-scenes offer to trade my secretary for floor space is an interesting one. In fact, I found it so interesting that I decided to share it with the rest of the faculty (and secretarial staff), and have circulated a copy of the memo with this response. I know you won't mind. If you are really committed to the kind of 'market' dealing you described, then you should be quite happy to make the market an open one.

By the way, thanks for the photocopy of Coase's seminal article. While I too have a certain nostalgia for the 1950s, perhaps you might want to trade it in for a more contemporary model – I suggest Martha Minow's ovarian masterpiece, 'Partial Justice.'

cc: All professors and secretaries

M. le doyen Macdonald
Faculté de droit

Le 24 avril 1988

Mon cher doyen,

Je suis désolé d'apprendre que certains collègues vous harcèlent pour obtenir de nouveaux locaux. Je trouve dommage qu'ils ne savent s'en remettre à votre bon jugement. Soyez assuré de mon support dans votre décision quelle qu'elle soit. J'ai un immense respect pour votre perspicacité, votre sens logique et vos capacités d'administrer. Dans cette faculté, personne d'autre que vous ne pourrait en arriver à une décision aussi sage.

J'espère que vous n'agoniserez pas trop longtemps et que votre décision sera rapide. De toute façon, la majorité des professeurs acceptera votre décision quelle qu'elle soit. Si je peux me donner en exemple, ma con-
fiancé envers votre leadership ne fut en rien diminuée par votre décision de ne m'accorder qu'une très minime prime du mérite l'an dernier. Bon courage.

Albert Arsenault

McGill Law Students Association
Association des étudiantes et étudiants de droit de McGill
Chancellor Day Hall, Room 4

April 25, 1988

Dear Dean Macdonald,

It has come to our attention that, in addition to the four offices in the annex, Professor Sharon Eaton's office will become available for reassignment upon her departure. As you know, our association desperately needs more space. At present our premises in the basement of Chancellor Day Hall are far from adequate. A new office in the main part of the building would provide a focal point for student activities, and by extension would improve the quality of life for students by freeing space for a video-game and pin-ball room in the basement. Moreover, this initiative would be very well perceived by those students who are always complaining about professors' being isolated in their offices. An added bonus is that a games room would generate enough profit for us to put in a computer that could be used to produce the Quid Novi more cheaply, and thereby reduce the subsidy you have to give it.

These considerations should be examined and weighed against the supposed benefits of merely reallocating the vacant office to another professor. While we don't claim that in office assignments the claims of professors should always be subordinate to ours (although, as you know, in France almost no professors have office space at their faculty), we do not think that the purposes for which professors have offices - to do research, to meet with students, to have private space for reflection and study - require the assignment of any particular office. An office pecking order is extraneous to the basic purposes of office-holding, and is rather a surrogate for a merit claim, or a prize.

Our view is that once seen in this light, and assuming that all professors actually have an office, the allocation of offices must reflect a balancing of all interests in the faculty - professors, students, administrators, secretaries, librarians, and even cleaners. We are confident that in any such balancing, the law faculty as a community would be best served at this time by allowing the association to take over Eaton's old office.
Sincerely,
Louise Blanda
LSA President

ps—I know that you have already sent a memo to the professors intimating that you will be allocating this office to a faculty member. But you didn’t actually make any promises, and therefore you should not let this preclude you from giving it to us. Besides, moving the LSA in lets you avoid having to choose among professors.

UNIVERSITÉ MCGILL  Faculté de droit  25 avril 1988

À: Barry Paul  de: Richard Tétrault

OBJET: Votre nouveau bureau

La discussion de table de la semaine dernière au Faculty Club m’a fait beaucoup réfléchir. Je sais que le processus d’allocation des locaux vous enrage. Je crois cependant que prétendre avoir un ‘droit contractuel’ à un bureau particulier, ne vous mènera nul part. Votre bureau actuel fait tellement pitié, que tout nouveau bureau serait une amélioration. Je ne serais pas surpris que le doyen vous offre le bureau du collègue qui obtiendra le bureau du professeur Eaton. Vous pouvez certes réclamer un bureau de qualité, mais je ne crois pas que vous ayez droit à un bureau en particulier.

De toute façon, Barry, les gens s’en font trop avec les structures décisionnelles de la faculté. Ils croient que les règles d’allocation des bureaux, qu’elles soient du doyen ou d’un comité, sont des structures nécessaires, voire historiquement inévitables, pour administrer cette institution. Mais selon moi, ces règles n’existent que parce que nous croyons en avoir besoin. Je suis sûr que le doyen reçoit des lettres expliquant de quelles règles nous avons besoin et de quelle façon il faut les créer et les appliquer.

Quel est le but de cet exercice sinon de continuer le raffinement d’un tic-tac-toe rationaliste ou de justifier notre besoin de règles encore plus nombreuses? Nous savons que le doyen contrôle la situation. Il allouera les locaux selon ses sentiments du moment. Si, ce jour-là, il est en rogne envers les francophones, les civilistes, la vielle garde ou les féministes, le résultat sera différent. Plus spécifiquement, s’il est en rogne avec vous ou tout autre prétendant ce jour-là, le résultat sera différent. Même si ces facteurs étaient neutres, il demeure qu’il devra donner son interprétation personnelle des critères que nous lui imposons.

Ne vous souciez donc pas des règles à créer. Voyez plutôt à découvrir le
moment où le doyen décidera et tentez d'être alors en bons termes avec lui. Allez le voir et soumettez-lui votre dernier article et plaignez-vous de votre salaire. Il ne peut probablement pas vous offrir un meilleur salaire, mais il risque de vous donner un meilleur bureau pour compenser.

Fiez-vous sur moi: les règles (et surtout la notion d'obligation contractuelle) vous fersons perdre votre temps. Travailliez à influencer la 'psychologie' du doyen.

/Im

MCGILL UNIVERSITY Faculty of Law April 26, 1988

TO: Rod FROM: Ray Marcil, Fern G. Kennedy Professor of General Jurisprudence

SUBJECT: Office allocations

It seems to me, as a labour law professor, legal theorist, and, like you, an Eden expatriate, that there are two wrong ways of looking at this problem. The first is to see your decision through the lens of labour law; the second is to let our colleagues tell you what the issue is or what the interests in conflict are. Since I'm trying to get some ideas straight for my new seminar next year on employment law, I hope you'll indulge me with this preliminary course outline which I'm trying to sneak by you as a memo.

To begin, let me make a general point about many of our colleagues. My bet is that (1) you're getting lots of memos, and (2) most of them are rule-of-law variants. This is to be expected. We're university professors so we cherish the written word and pride ourselves on our linguistic ability. Other organizations (say an organized medical clinic) would, I'm sure, generate less paper and more conversation on an issue like this. As for the rule-of-law focus, the answer is equally obvious. If all you have is a hammer, every problem looks like a nail; and we both know how much contemporary legal education has hammered home legalism as a political ideology. In other faculties at McGill (for example, Social Work), the dominant themes would be reconciliation and accommodation, not confrontation, adversarialness, and claims of right. Let me pursue these complementary aspects of paradigm law-professor behaviour by developing the two points I made in my first paragraph.

I suggest that it is inappropriate automatically to analyse your managerial problem in terms of labour law theory, for then the assumption is that we should look to 'law' (rules, procedures, institutions) for the appropriate
characterization of the issue, and to ‘adjudication’ for the mechanics of its resolution. Much of labour law was developed in reaction to the demonstrated inability of management and workers to compromise and cooperate. As a result, the attribution of ‘rights’ under a collective agreement and their enforcement through the ukase of an arbitrator’s or judge’s decision became our dominant model. But here in the university the setting is, presumptively, one of collegiality and co-operation in our attempts to achieve a common goal of academic excellence. Because you are not our employer, and because you must ultimately return to our ranks, you are in fact the most appropriate person to manage the process by which we actually decide how to allocate office space. In other words, don’t try to make over this faculty into either a free-standing political state or a public bureaucracy.

If I could sketch a rough model of the way to think about this problem I would propose a four-square matrix derived from Meir Dan-Cohen’s work on the legal theory of organizations. In this matrix, the diagonally opposite pairs would be individual and state on one axis, and community and organization on the other. To me, any firm dividing lines between public and private or between person and polity are mistaken. The term ‘individual’ is a conventional shorthand for the congeries of complementary but partial selves that we constantly redefine ourselves to be. Just as a polity is composed of several individuals, an individual is composed of several persons. You are at once son, husband, father, lawyer, friend, professor, dean, and much more. To subsume all these multiple selves into institutional role-fetishism is to be unfaithful to all the other persons the Principal assumed he was going to get when he appointed you. Rather than see the office allocation exercise as a problem of labour law, you should see it more as a problem of family law. In fact, I would argue that intra-organizational problems are always problems of affection more than problems of alienation.

This brings me to my second point. If this is indeed a problem of family law, how do you transform the claims of love, envy, sorrow, and joy and the inarticulate sentiments of hope, vulnerability, autonomy, and trust which we all live daily into a parable of moral growth? In other words, how do you use this exercise – which rule-of-law types would see as utterly inefficient and destabilizing to professors – into an opportunity for us to reflect publicly upon those things we value? At the same time, how do you prevent any such exercise of self-reflection from sticking the institution with a set of fixed rules and procedures which lock us into the political agenda of the momentary faculty majority in May 1988? To suggest an answer to these questions, let me rehearse a problem I use in my ‘Saving the Appearances’ seminar.

Imagine two siblings squabbling over the sharing of a chocolate bar.
They invoke the authority of their parents to get a decision. But the parents refuse to cut the candy, and instead reply, ‘Oldest cuts, youngest gets first choice.’ Here, the parents have ‘solved’ the problem not by imposing a solution, but by suggesting a structure within which their children could solve it themselves. Of course, a faculty is more complex in that there are more than two claimants to satisfy and there are many prizes. So, we might ask, what happens, as in the office allocation situation, when there are several parties to a conflict (that is, if there are three or more siblings?) One plausible answer would be to buy a box of Smarties. That is, reshape the problem into a form that lends itself to a solution that is within the moral and intellectual grasp of the affected parties.

Your role is not to make yourself the centre of the controversy by deciding either criteria or entitlement. Your office is to think creatively about how we can conceive of the problem as a metaphor for discerning when faith in explicit rules and adjudicative due process becomes idolatry. For I deeply believe that the way in which we understand and live out the public and external normative universe we share with our students flows directly from how we understand and live out the private and internal normative universe we share with each other as colleagues and with our various selves.

/MG

MCGILL UNIVERSITY  Faculty of Management  April 26, 1988

TO: My other dean  FROM: Prof. Yablonsky

SUBJECT: Office allocation in the Law Faculty

I think that my unique position – holding a cross-appointment between this faculty and the Faculty of Management – allows me to give you a fresh perspective on your latest problem. After all, what you have here is simply a classical management dilemma. I could give you a short reading list – Downs, Self, Wilson, Olson – but you’ve got better things to do. So I’ll summarize the latest thinking in the field.

My colleague on the other side, Henry Mintzberg, has just published a book called Structure in Fives: Designing Effective Organizations. Mintzberg would categorize the law faculty as a ‘professional bureaucracy.’ Its chief characteristics are an operating core of professionals, duly trained and indoctrinated but with considerable independence over their own work, both in the classroom and in scholarly enterprises. In general, they maintain closer contacts with their clients (their students and legal audiences) than with their colleagues. Mintzberg argues that the profes-
sional bureaucracy relies for co-ordination on the standardization of skills and its associated design parameter, training, and indoctrination. In other words, law professors have received a body of training which, within broad guidelines, teaches them how to proceed in the classroom and in their research. But within each of these areas, since there is a wide scope for judgment, there is much independence.

The professional goal of contributing to the advancement of learning is the function that the essentially bureaucratic structure of these organizations is meant to serve. Certain standards exist to predetermine how the structure is co-ordinated. The standards in professional bureaucracies are determined more by the power of expertise, professional experience, and other forms of self-regulation, as compared with other models with obvious centralized and hierarchical structures wherein experts make decisions and underlings enforce them. Thus, the professional bureaucracy is highly decentralized. It is the most democratic of Mintzberg's structures. This is not to say hierarchies don't exist. They do. In professional bureaucracies, however, pecking orders are based on expertise and experience. And notwithstanding these hierarchies, much power remains concentrated at the bottom, with each professional.

Administration of this type of structure has its difficulties. Given this decentralized tendency towards democracy, the professionals will seek not only individual control over their work but also collective control of administrative decisions that affect them – through committees, for example. Thus, active professors will exert more influence. However, there are consequences to collegial attempts at control. First, the administrator will spend much time handling disturbances in the structure. This certainly isn't new to you! But seldom will you be able to merely impose unilateral solutions. Direct attempts at control by you or any other administrator may result in your demise. You will have to use indirect methods of control and mediation that in the final analysis are very powerful. For example, you are going to have to negotiate solutions for antagonistic professors. This increases your power.

The second consequence is a result of the fact that you are functioning at the boundary of the organization, between your colleagues and the university administration, the students, the government, and the public. You have to buffer your colleagues from certain aspects of society which they would rather not deal with, thus allowing them to function effectively and independently. This makes them dependent on you if you are an effective administrator. For example, if you are a good fund-raiser – getting research grants, chair endowments, and research facilities – the professor's time can be spent on research, writing, and teaching, instead of soliciting grants herself or supplementing her income through outside commissions.
Mintzberg concludes that 'power in these structures does flow to those professionals who care to devote effort to doing administrative instead of professional work, especially to those who do it well. But that, it should be stressed, is not laissez-faire power: the professional administrator keeps his power only as long as the professionals perceive him to be serving their interests effectively.' As a result, strategy is a function of the relation between individual professors and the administrator. No one strategy is correct under all circumstances. Your power as dean depends on how well you've allowed the rest of your colleagues to function as so-called academics. It does not depend on how 'ethical' you've been, how 'compassionate' you've been, or even how 'consultative' you've been.

My point, then, is a simple one. The amount of 'decanal discretion' you have in each individual case depends on a bottom-line judgment by your colleagues on how good a dean you have been. This can be empirically tested. If you seek some confidential opinions on this question, especially with respect to the principal players involved, the answer to the question of the best means for allocating offices – at this time and in these circumstances – will follow.

/mlm

MCGILL UNIVERSITY  Faculty of Law  April 27, 1988

TO:  Dean R.A. Macdonald  FROM:  Prof. Andrea MacIntosh
SUBJECT:  Distributive justice

I don't want you to think that this is just another pitch for a new office. I have a feeling that you have been receiving even more answers to your memo than those you mentioned last Tuesday at lunch. No doubt everyone has reasons for believing he or she has the best claim to Eaton's office or to one of those at 3647 Peel.

I've been thinking about your problem of deciding this in a 'fair' way. To most people, 'fair' will inevitably mean 'in their interest.' This is bound to happen no matter how you frame the decision. Most of our colleagues adhere implicitly to a view of society in which the public good is simply the aggregate of private right. For this reason you can draft three volumes of rules, but in the end will be accused of exercising your discretion in one's or another's favour. More, even the decision to let a committee draft the rules (no matter how the committee is chosen, no matter what these turn out to be, and no matter how they are brought into force) will be seen by some as partisan.
I hope you will consider the points I made at lunch about constitutive communities. While I'm not as theological as Ray Marcil on this question, I nevertheless believe that whatever process you decide upon must be enfranchising: you have to help each of us not only to see the big picture which you live daily (call it the overall interest of the faculty if you want) but also to recognize that needs and circumstances of each individual at a far more focused level than any fixed set of decision-making criteria would allow. I made all these points on Tuesday, but I have thought of a few nuances I would like to share with you now.

Some colleagues will suggest that allocations should be made on the basis of ‘contribution.’ This may be perfectly well and good, but how does one define contribution? At a purely formal level, considering that each person is a professor hired to teach, research, and publish, these would be the gauges of contribution. But contributions are made in other respects. Professors who represent a minority viewpoint make a certain contribution. So do those who play a very public role in the community, and who may not have time for some of the more traditional teaching activities. If you want to extend the argument further, those professors among us who are raising small children are making a contribution to the community at large, which, although you are not obliged to reward, you should at least not attempt to penalize. So the notion of ‘contribution’ is a very broad one. Every one of us is making his or her own contribution.

Patrick seems to think that the way to recognize and value these diverse contributions is to refuse to weigh them. Treat us all as equals and toss a coin. I actually agree with him that there are times when deliberately invoking chance can be liberating. This is not one of them, however, for chance is not a richly participatory process. In fact, it displaces one of the very questions we seek to address to the realm of the arbitrary: Who counts? We still have to work through difficult questions of ethics in order to determine who should be entitled to draw a straw. The question, for example, whether visiting professors, research fellows, students, secretaries, and administrators should participate requires us to weigh the criteria we value and seek to reward as much as the allocational decision itself. So tossing a coin will not solve our conundrum.

Moreover, if you take upon yourself the task of making these assessments you are disenfranchising us. Already in our relationships with each other, in what we do and what we expect of ourselves, we are generating a normative order. Your job is not simply to recognize this; it is to assist us in recognizing it. Arguments of efficiency and expertise are only valid when legitimated. We rely on you to keep open our choice whether to accept them. Conversely, we also rely on you to ensure that our freedom from ‘the tyranny of technique’ which these arguments imply does not expose us to a ‘tyranny of rhetoric.’ For history teaches that radical
democrats often are demagogues who substitute oratory for economics in the competition for legitimation. A dictatorship of the proletariat is always at risk from those who generate its dicta.

You will have to assess all of these considerations in deciding how we ought to decide. You will also have to evaluate whether other benefits have up until now been distributed fairly. You could then use this office allocation exercise as a way of helping us consider past inequities. In structuring our deliberations, you will have to do a great deal of choosing and weighing. This is really what your discretion to 'decide in the best overall interest of the faculty' involves. Your job is not to decide for us, but to help us develop our own grammar of democracy. No one will come up with the same list of considerations as you will, but then no one else is dean. To continue the metaphor, as long as you are willing to have us reject or modify your subjunctives, gerunds, or pluperfects we are willing to let you propose the initial Esperanto. That's why we selected you.

Let me close with a concrete suggestion. Patrick has already circulated his memo, and others are floating around the faculty. Why don't you send a follow-up memo setting out your revised views, inviting colleagues to distribute their memos publicly, and calling a faculty meeting to discuss the question? We tell our students to review their exam scripts with us as part of the learning process. If you're serious about using this situation as a vehicle for collective reflection, let's get the various proposals on the table and deliberate about them.

/ ay

MCGILL UNIVERSITY  Faculty of Law  April 28, 1988

TO: R.A. Macdonald  FROM: William Thompson

SUBJECT: Democratizing the faculty

I believe in direct democracy. I'm also a straight shooter so (unlike some of the more junior professors here) I'll tell you what I really think. Fifteen years in practice and ten in politics makes me particularly resistant to academic bull like Patrick's 'open letter.'

You should send another memo asking all of those who want any of the vacant offices to indicate which one or ones they want in order of priority. Then print up a ballot for each office and let the whole faculty vote on which prof wins. Neat, clean, and out in the open. No special pleading behind the scenes. No secret deals. No garbage about 'institutional values' or 'community of scholars.' No self-interest parading as philosophy. Let the chips fall where they may. That's democracy.

/ hh
TO: Rod Macdonald  
FROM: Sandra Greenwood  
SUBJECT: Office allocations

As you know, I'm not usually a memo-writer on matters like this. Memos are just too short and too episodic to say anything worthwhile. But I'm working on a paper called 'Normative Order in the Administrative State' for a conference next fall and your problem is a perfect illustration of what I've been trying to get at. I now also see why I can't seem to write a standard discursive and heavily footnoted paper to make my points. The law faculty is just like an administrative tribunal - its normative order is partly legalistic and authoritarian and partly organic and authoritative. Its normative order is also partly given and partly constructed (le donné et le construit).

The type of decision you now confront is institutional in all senses of the word. So the first question we should ask is 'What can institutions know?' Notice that I am not asking 'What can individuals know?' If administrative lawyers have come to understand anything these past few years, it is that much individual knowledge is institutionally determined. External social order is partly achieved by sanctions (legal penalties, social shame, guilt), but also requires an internal social order arising from the generation and performance of institutional roles whose fulfilment consists in the apprehension and application of institutional knowledge. So when we disagree about principles of justice, or the distribution of offices, we frequently are echoing conflicts in institutional knowledge.

An institution is not merely an instrument of individuals or of communities. What Sandel and Durkheim say about communities is applicable to institutions: 'community' describes not simply a relationship that people choose, but an attachment they discover; not merely an attribute, but a constituent of their identity. Like Mary Douglas, I would argue that individual moral choice is possible only because the big moral decisions have already been made for us by our institutions.

In the context of your present dilemma this means that our assumptions about what constitutes a university or a faculty, about why we create these structures which are intended to celebrate individuality by compelling us to think collegially, and about how the conditions necessary for altruism develop are not freely chosen. Neither you nor any one of us comes to the problem of office allocation unconstrained. We are trained as lawyers so that we understand administration as lawyers would; we are employed as professors so that we understand administration as professors would.
can’t fundamentally change this, nor should you try. I hope this is what you mean when you say that you won’t do anything ‘disruptive to the dynamic of the faculty.’ A normative order is institutionally generated; institutions are not the product of their own normative order.

/université mcgill faculté de droit 30 avril 1988

À: Rod
DE: Prof. Pierre-Georges Chouinard

OBJET: Attribution des bureaux

Nous aurons tout entendu dans cette discussion sur l’attribution des locaux. Ce qui m’inquiète ce sont ces déclarations à l’emporte-pièce qui font la louange de votre discrétion et des diverses formes de hierarchies administratives. Mais pendant que l’administration s’auto-justifie et s’accorde moultes indulgences pleniéres, on oublie les individus que sont les professeurs. Nous avons des droits qui sont supérieurs à toute considération dite institutionnelle. Je vous réfère aux études de Léon Duguit, Jacques Chevalier, et Maurice Hariou, administrativistes français exceptionnels qui sont négligés ici en amérique du Nord. Dommage que nos collègues sont séduits par les débats infantiles aux Etats-Unis et qu’ils ignorent les aperçus européens.

Vous n’y étiez pas lorsqu’à la fin des années soixante nous avons renvoyé deux doyens parce qu’ils croyaient que leur vision de McGill était plus importante que les droits des professeurs. Je n’ai jamais entendu l’expression ‘le bien de l’institution’ répétéesi souvent que depuis quelque temps, sinon peut-être lorsque nous avons commis l’erreur d’admettre des étudiants au sein du Conseil de la faculté. ‘Le bien de l’institution,’ ‘l’intérêt supérieur de la faculté,’ ce ne sont là que des mots polis pour imposer aux professeurs les plus récentes plateformes de la gauche. Votre rôle est de préserver le statu quo des incursions du ‘bien commun.’

Je m’attends à ce que toute décision à propos des locaux soit prise en conformité avec la procédure juridique appropriée dans le respect des droits acquis. En tant qu’avocats nous défendons la primauté du droit. Il nous faut mettre en pratique ce que nous prêchons.

/hh
Rod,

I imagine this whole business of office allocations has been occupying a lot of your time lately. I know that when I was dean it was probably the single most contentious issue that I had to deal with. Since you are no doubt being bombarded with everything from claims of rights to calls for anarchy (and I could guess who is saying what!), I thought I might give you some unsolicited – I don’t want the office – advice.

I’m not sure how you’re going to decide who gets either Sharon’s old office or the other four offices across the road. But frankly, I think you’re better off making the decision for yourself—committees just take too long to arrive at solutions which ultimately are no better than what you would have decided in the first place. On the other hand, however the decision is made, you have to keep one thing in mind: it’s not whether justice is done, but whether it appears to be done. If things look fair, you should be ok.

As for Patrick’s memo, you can’t lose. Treat him the way I did. You play the oppositionist. Propose a totally off-the-wall solution that requires Patrick to act like he is the ‘dictatorship’ he ostensibly despises. For example, ask him to take charge of the process and let everyone (especially students and secretaries) know that you’ve informed the vp of your delegation of authority. Or put the onus of acting non-hierarchically on him: publicly acknowledge his memo, and then ask for volunteers to switch offices with the Law Students Association.

As for the other suggestions you get, manage them according to where they come from. I expect that someone like Françoise will call for a committee. If you feel you have to give in on this, keep it under control. Instead of letting the committee make the decision, let them draw up the criteria. Criteria, after all, can be manipulated one way or another to justify whatever decision you ultimately make. Or, if you decide on the criteria yourself, make it look like you based them on the responses you’ve gotten from colleagues.

If you have to give someone an office that you think he or she will be less than pleased with, intimate that the criteria strictly applied would have resulted in an even poorer allocation. Or you can give the person a choice between that office and a couple of even poorer ones—that would make the person feel that you dealt with him or her fairly.

Take a long time to decide. Ask everyone for opinions every chance you get. Send a couple of follow-up memos. This will give the impression that the decision wasn’t arbitrary or taken precipitately. If you make it look like
you've lost a few hairs over the allocation, people will accept the decision. That is the key, Rod. Ultimately, your actual decision is less important than the way in which people perceive it was made.

Max

ps – As I reread this note it seems to me that I'm sounding a bit too cynical. I don't suggest that you should always manipulate the faculty. For example, the staff appointments process requires a much higher degree of candour and openness. But office assignments are hardly of the same order of importance. You don't expect every case to reach the Supreme Court, and you don't expect customs inspectors at Mirabel Airport to be of the same calibre as members of the Immigration Appeal Board. Good administration means knowing which issues are important and which are not. Don't waste your time (or ours) on trivialities.

MCGILL UNIVERSITY    Faculty of Law    May 4, 1988

TO:  Dean Macdonald    FROM:  Marie Houle, Administrative Assistant and Area Personnel Officer

SUBJECT:  Offices

Dear Dean Macdonald:
I've been thinking about your memo soliciting requests from professors for the new office space. I hope it was just an oversight that you did not extend the same invitation to members of the faculty's administrative and secretarial staff.

I'm sure that you are aware that my job as your administrative assistant makes certain demands in terms of space. I have a computer, a small safe, filing cabinets, and shelves of documents and record-books. To run business efficiently I need space for all of this equipment. In short, I hope you will seriously consider allocating me a larger office. I would then be able to function more efficiently than in the renovated closet off your office in which I now find myself.

I don't want to sound too aggressive in my next remarks, but I feel very strongly about this issue. Knowing the kind of person you are, I am sure you will understand my concerns. It is a fact that the majority of the support and administrative staff are female. Most of us are products of a more stereotyped society. We're not 'upper management,' although some of us are certainly talented and efficient enough to merit it. Still, we play...
an important role in the running of the faculty. Yet, given that the faculty is housed in an old house, we are by and large relegated to back rooms and re-done cupboards. You talk about sexual hierarchies in your courses. Well, our situation is a pretty good example.

It's obvious that we are not the same as professors and that our claims can't weigh the same. But we are a part of this institution and our commitment to its goals is no less sincere. I think we deserve to participate in any discussions about how the faculty's physical resources should be distributed. I think we should have standing (?) (is this the right legal word?) to make our case for receiving the vacant office.

Personally, it would be a tremendous help to have more and better space. But it would also be a morale booster and a public recognition of our contribution. If you feel you can't give Professor Eaton's old office to me, then give it to Jennifer Levy as a means of upgrading the Students Services department. I know your professors are very important to this faculty, but they all have better offices than we do. It wouldn't hurt to let them stay put for another year or two.

Marie

MCGILL UNIVERSITY  Faculty of Law  May 4, 1988

TO: Dean Roderick Macdonald  FROM: Stanley Veltman
SUBJECT: Barry Paul

I've just finished a long conversation with Barry Paul pertaining to his office space. Since we're very close and have been since he was one of my students here in the late 1970s, I hope you don't mind my offering you my thoughts on the situation. Essentially, this is not just a political (or distributional) problem; depending on your arrangement with Barry, it may also be a problem of adjudication. I acknowledge that, in the abstract, allocation and adjudication are incommensurable. But Max may have already taken the necessary political decision and adopted private contract as an allocational principle. Wouldn't that be the upshot of his promising Professor Paul the office last year? In other words, if he has allocated rights by contract, I suggest that you can't now trump them with political argument. While 'new property' may be contingent in the sense of being socially created, 'old property' is not. It is derivable directly from the concept of human agency.
Yet I see your difficulty. Even if by rights Barry may be entitled to the office, this process shows how rights decisions are distributional. Treating Barry's claims as prior totally ignores the distributional or allocative aspects of the decision you will eventually have to make. That a judge restricts herself to judging between competing claims of rights is appropriate in a breach of contract or tort action only because of other prior constitutive practice conferring upon courts responsibility for distributing public benefits in such cases exclusively by recognizing rights and correcting wrongfully caused disequilibria.

But where prior constitutive practice is ambiguous, and where even the scope of the purported contractual commitment is uncertain, you are put in a position of yourself having to make the decision to adopt (and justify to us) 'rights rhetoric' as an allocative principle. Since Fuller, we have been conscious that 'pure' adjudication is not suitable for allocating economic resources. These 'polycentric' sorts of problems require a considerable degree of transformation, often by contract, before they become amenable to adjudication. Only you and Barry know whether Max concluded a contract with him. If he did, don't try and save the situation by making 'property rights' contingent. We on the faculty will be more tolerant of an initial mistake in allocating by 'private contract' than we will of any attempt to correct that mistake by undermining the idea of acquired rights. The integrity of the process and the mutual trust that comes from respecting promises must outweigh the fact that the substantive result in this one case could be less than optimal.

MCGILL UNIVERSITY  Faculty of Law  May 6, 1988

TO: Dean Macdonald  FROM: Prof. Paul Willard

SUBJECT: Office allocations

With respect to the recent uproar over the distribution of professorial space in the faculty, I thought you might like to read parts of a recently published article on the theory of legal normativity, which I am also circulating to all colleagues. It was published in French so I hope you'll forgive my crude attempts at translation. I know the point of the piece will be clear to you. Please bear with me as to its length:

Current theoretical views of legal normativity typically emphasize the importance of the question: what constitutes the sources of law? Moreover, contemporary jurisprudence treatises reflect, at least superficially, a reasonably catholic conception of these sources in which legislation, judicial decisions, and custom all
achieve recognition. At the same time, however, these treatises tend not to enumerate or differentiate the particular normative properties of each source. All are described as having a common logical structure, namely the explicit, propositional form associated with legislative enactments. In other words, most modern legal theorists see the essence of law as discrete legal rules authoritatively stated by an official source.

Not surprisingly, the quest for a common logical form leads to some rather interesting reconceptualizations of traditional sources. For decisional norms, it requires that each judgment be understood as propounding a single legal proposition — the *ratio decidendi* — at least theoretically capable of expression as an immutable precept. For customary norms, this demands the transformation of action into language through such strategies as the requirement that customs be judicially or legislatively recognized in order to be binding. Even though non-statutory forms of legal normativity like cases and custom initially are identified by theorists as constituting sources of law in their own right, their role in the legal system ultimately is reduced to that of antecedents to norms.

Nevertheless, the distinctive logical properties of different sources of law may be derived by reversing the strategies which theorists adopt in order to assert their uniformity. Imagine a typology of legal norms built upon two axes. On a first axis, reflecting their mode of elaboration, norms may be distinguished according to whether they are explicit or implicit. On a second axis, reflecting the nature of their normative meaning, norms may be distinguished according to whether they are formulaic (canonical, propositional) or inferential (approximate, metaphorical). The resulting typology could be represented as follows:

<table>
<thead>
<tr>
<th>Legal norms</th>
<th>Mode of elaboration</th>
<th>Nature of normative meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Institutional</td>
<td>Transparent</td>
</tr>
<tr>
<td></td>
<td>Interactional</td>
<td>Mediate</td>
</tr>
<tr>
<td></td>
<td>Explicit and formulaic</td>
<td>Explicit and inferential</td>
</tr>
<tr>
<td></td>
<td>Implicit and formulaic</td>
<td>Implicit and inferential</td>
</tr>
</tbody>
</table>

For present purposes, a norm may be said to be explicit when it emerges from an institution, such as a legislature or a court, recognized as having authority to state the norm. It follows that explicit norms will always have properties of conscious elaboration: defined procedures for their creation or recognition; a symbolic, typically linguistic, vehicle for their expression; and a distinctive methodology like
the canons of statutory construction as announced in judicial proceedings for their interpretation and application. The distinction between formulaic and inferential norms is harder to state. Where a norm claims to be self-evident and transparent, namely, where it is expressed ritualistically or as a proposition, it can be considered to be formulaic. By contrast, where a norm cannot be reduced to an invariant canon or rite, it may be said to be inferential.

Of course, in rendering what are essentially two continua as intersecting lines of demarcation, a certain arbitrariness is inevitable. Nevertheless, if one focuses on the ideal types suggested by these categories rather than upon the precise location of the frontier between them, salient properties of each come into relief. These properties emerge even more clearly when legislation, cases, and custom are located in this typology. The following presumptive correlations may be advanced: formulaic/explicit – statute; formulaic/implicit – customs and trade usages; and inferential/explicit – judicial decisions. The fourth category, inferential/implicit, suggests an additional distinct type of legal norm which is not often recognized by theorists as a source of law. This category would include such general and overarching norms as the concept of public policy, the principles of equity, the presumptions of the common law, and, most significantly, the tacit presuppositions of communities of interpreters.

While this four-square typology obviously does not exhaust the possibilities for characterization of legal norms, in offering an alternative to the formal typology presented in sources-of-law theory it does suggest the important function of non-statutory norms. That is, it does not lend itself to the easy reconceptualization of all legal norms as explicit and formulaic. Moreover, the typology is grounded in a view of legal normativity under which the process of legal justification need not depend on the availability of a pre-existing closed set of valid norms, identified in advance by an authoritative institution. To illustrate this point, consider the situation of a dean confronting two professors, each of whom covets the same vacant office. Presumably, these professors would make the following kinds of claims and representations:

1 I’m older (or I have a more senior rank, or I’ve been a member of the faculty longer).
2 Last year I was promised that I would have first claim on any new office.
3 Others have had first choice of secretarial help so I should have first choice of office space.
4 According to the system at the University of x, I should get first choice.
5 I’ll look foolish in the eyes of my colleagues if I don’t get first choice of office.
6 According to the principles set out in all the business administration textbooks, I deserve the office.
7 To maintain consistency with the allocative principles adopted last year, my claim would have to be judged to be meritorious.
8 I get better teaching evaluations and publish more articles, so I should be rewarded with the first choice.
9 Offices must be allocated so that professors who work well together are contiguous to each other. In these nine statements one can see an appeal to nine different types of argument and justification: to status or seniority; to prior agreement; to fairness or equity; to practice elsewhere; to social context grounded in consequentialist reasoning; to expert opinion; to precedent or past practice; to some general social usage or substantive a priori claim; and to the integrity of institutional arrangements. In fact, the only major argument not raised is the appeal to some authoritative, pre-existing, legislative rule.

This paradox suggests two further questions about legal normativity. First, must all the different types of normative statements advanced by litigants and acted upon by agencies be understood only as arguments to be deployed in interpreting statutes? Second, do some specially packaged types of argument conclusively control legal decision in that they exclude appeals to other types of norms?

Consider the first question. In the office allocation problem, it is apparent that most of the potential types of legal argument canvassed are grounded in normative claims which are neither formulaic nor explicit. These claims are, moreover, not mere arguments in interpretation of formulaic and explicit norms, but they are substantive and independent norms derivable from institutional practices and structures. Of course, formulaic and explicit legal norms have a presumptive claim to attention, especially where decision-making itself is institutionalized. But this presumptive claim flows only from the fact that they are most easily identified as operative norms by institutions and officials. In other words, simply because statutes and regulations are the most visible administrative law norms, they do not command that all other normative discourse be parasitic upon them.

This last point suggests why implicit and inferential norms persist even in highly institutionalized normative systems. Formalizing a norm and rendering it explicit through the legislative form does not fundamentally alter its function as a vehicle of argument and justification in individual cases. Implicit norms will continue to arise either directly from interaction between a bureaucracy and its clientele and the demands of administering a statute, or indirectly through the interpretation of norms already made explicit. The persistence of all types of normativity notwithstanding the existence of a statute is often overlooked because properly crafted formulaic and explicit norms will be instrumentally apt over the vast range of cases. Easy cases occur when all non-statutory norms cause no conflict or conscience for officials or courts. By contrast, hard cases are those in which norms conflict. Within a bureaucracy, conflict arises because interactional implicit norms, as well as inferential and explicit norms in certain of their potential formulations, point to conclusions at odds with previously accepted agency understandings of formulaic and explicit norms. Precisely because of the inferential and implicit nature of these norms, a source-based criterion of validity can neither determine (as an a priori matter) the bearing of these other norms, nor can it lexically order their persuasiveness in any given instance.
The second major question about legal normativity, whether institutionalization typifies law, can also be explored through analysis of the office-allocation example. Imagine a disagreement about offices both before and after the drafting of a set of guidelines. Before the guidelines, substantive arguments about equality, or about opportunities to create effective working relationships, or about how many rewards should be given the meritorious would predominate in discussions between professors. Much less thought would be given either to formal arguments (that is, the self-conscious attempt to discover and state a previous practice) or to decision-making procedures (voting, tossing a coin, and adjudication).

After the rules, formal argument emerges. The process of drafting naturally leads to more specific attention to abstract principle and to definable claims. But rules also serve a surrogate function. They permit personal argument to find expression in impersonal language, thereby displacing potential individual conflict; they also provide a point of access to predigested argument. In this sense, the negotiation of a system of rules often reveals the underlying common interest of parties and various inferential and implicit norms not previously recognized. Conversely, the process of deriving formulaic norms may reveal an absence of common interest. Some faculties apparently need formulaic norms to realize they are not really a faculty.

Even though the exercise of generating formulaic norms focuses attention on minimum standards of behaviour, it does not, in itself transform normativity. Such a transformation can occur only if it is also assumed (in my view, incorrectly) that sources of law are a priori lexically ordered, normative vehicles. Moreover, this exercise does not necessarily lead to institutionalization of norms or to normative explicitness. No doubt a legislative instrument may provide for a decision-making forum or procedure, as may a contract. Further, any given normative system may presuppose an agency such as a court, to which, in the absence of some other direction, such a decision-making task is assigned. But to assume that such a specialized body is a prerequisite to legality mistakes explicitness for law. People accepting a system of rules presumably attorn to its formulaic terms as well as to inferential norms. They may also look to explicit norms arising in analogous contexts. Thus, disputing professors may look for guidance both to their understanding of God’s covenant with Moses and to the rules of athletic clubs for the assignment of lockers. Typically, they would not then assert that it is the institutional character of the latter normative structure which renders it legally persuasive.

Although modern theories of legal positivism embrace subtle (and complex) versions of what are ‘primary law applying organs,’ they all presume that a legal system must have norms establishing such organs and that such organs must apply norms of the legal system. Yet, if one accepts the plausibility of the suggested typology of norms, there is no reason for conceiving institutions differently from norms. Some institutions are explicit; some are not. A court may well be an explicit primary institution, formulaically conceived. By contrast, the judgments of
propositionally but customarily defined parents or elders may well be deferred to, but they are not explicit institutions. Again, consensual mediation and arbitration may well reflect a recourse to an explicit institution; yet the mediation itself remains an inferential process. Finally, in considering the opinion of one's community or peers one is returning to a concept of inferential and implicit institutionalization.

The prima facie implausibility of the claim that elders, mediators, and a community can be institutions clearly reveals the pervasiveness of formulaic explicitness in all aspects of legal thinking. Yet it is precisely when conflicts in institutional competence emerge that the role of these competing ‘institutions’ becomes most apparent. In other words, a law-applying institution is best understood not as a decision-making body. Rather, it is a metaphor for interpretation. Implicit and inferential institutions persist because they reflect implicit and inferential norms. It follows that no explicit and formulaic institution such as a court can claim a monopoly over the right to recognize legal normativity.

The point is, what sources of ‘law’ and what decision-making ‘institutions’ in this faculty are you going to recognize as valid or legitimate? Are only explicit, formulaic norms set down in rules and regulations drafted by a committee going to be valid, or will past customs and practices that are implicit and inferential but certainly not as black and white going to play a role here? Are you going to hide behind formally constituted authority and proclaim, like Richard Nixon, ‘after all, I am the President,’ or are you going to submit to the judgment of other informal faculty institutions?

You should also think about the consequences of your decision, for I can’t believe that you want this process to be understood only as a precedent. I can’t believe that you prefer to delegitimize our carefully nurtured informal institutions by arrogating final authority to yourself. I, for one, do not want to buy into a system where Cathy will be perceived to be bound by your normative assumptions when she eventually sits behind the grand oak desk in Room 18. This will happen if you act as if you are the sole arbiter of normativity in the faculty.

The tone of my memo and these last observations make my own position clear. We don’t need to sacrifice over a hundred years of history by gradually codifying every single rule in this place. You know this more than anyone else in the faculty. I say ‘more than anyone’ because you are the dean, and because, prior to your assuming office, you wrote the article I’ve just translated.

/ay

cc: All colleagues
NORMATIVE ORDER IN THE ADMINISTRATIVE STATE

MCGILL UNIVERSITY  Faculty of Law  May 10, 1988

TO: The dean  FROM: Associate Dean Campbell
SUBJECT: Office politics

When you asked me to serve as associate dean I never thought that listening to the self-interested bleating of my colleagues came with the office. But since you’ve passed all these memos on to me and asked for my opinion, let me tell you how I’d do it. First, I would not circulate the memos and hold a faculty meeting as Professor MacIntosh suggests. I agree with her that we are engaged in political discourse, but we need more preprogrammed right-wing harangues from Billington, left-wing diatribes from Patrick, irrelevancies from Thompson, and agonized soliloquies from Lapierre like we need a hole in the head. Besides, we get them twice a year at our marks meetings anyway.

Second, I think Thompson’s idea of voting is as off-the-wall as Patrick’s proposal that we have a draw. What are we voting on? This is a highly complex decision process with several variables. It does no good to say ‘let’s vote’ unless we decide on the electoral rules: do we want multiple ballots? single transferable ballots? majority rule? a plurality system? Instead of using arguments about voting procedures as surrogates for arguments about what values we wish to sustain, we should directly address these ethical questions. I’m on all fours with MacIntosh here.

As you well know, there has always been a hierarchy in this faculty which has been accepted and respected. The allocation of offices is an ostensible measure of where one stands in the institutional pecking order. Clearly, you have the best office. Then comes my office and that of the other associate dean. The five large offices around ours have generally been reserved for those professors who by most indicators will take our positions. The eight offices which are beautiful but less proximate have always gone to past deans and visiting scholars of repute. The dozen or so intermediate offices, fairly nice and proximate (of which Eaton’s was one) were to go to the up-and-comers regardless of anything else. We need to continue to encourage people to take on administrative responsibilities in this place, and to reward them with non-salary perks. The other offices you can allocate any way you please.

That Eaton got the office in the first place was a slip by Max. She was going nowhere. You must redress this mistake by giving the office to a junior professor who is clearly a future decanal candidate—someone like Alistair or Cathy. From an institutional perspective there is nothing wrong
with reinforcing the arrows to the top. It encourages role-playing and that healthy degree of professorial self-deception necessary for scholarly efficiency. With this current allocation exercise chance has smiled upon you. Act now to get the message across unequivocally.

/AR

MCGILL UNIVERSITY  Faculty of Law  May 11, 1988

TO:  Professor Dugas  FROM:  Roderick A. Macdonald
   Professor Paul  
   Professor Pearson  
   Professor Placitt  
   Professor Ratcliffe  
   Professor Tremblay

SUBJECT: Office allocation

I have determined from your responses that you are among the faculty members most interested in moving into Professor Eaton's office. Unfortunately, the age of our facilities and our location in two old houses makes every office unique. If we occupied a new concrete bunker like some faculties, where all offices are more or less the same, we might not have to face dilemmas like these (or at least the parameters of the dilemma would be significantly reduced).

As you have all acknowledged, my decision is not an easy one, and will necessarily be the product of my considering a variety of factors. Let me begin, however, by excluding a few. This type of decision cannot be made solely on the basis of purported contractual claims since it affects the faculty as a whole. Any dean will attempt to respect the promises of her predecessors, but not all promises constitute binding contracts. Again, this exercise cannot be seen as an opportunity to redress past wrongs or refight old battles. Bluntly, the decanal business of determining office entitlement cannot be allowed to become the professorial business of proving moral superiority.

Most of the memos I have received reflect an understanding that rank, length of service, and academic merit are expected to play a role in the ultimate decision. Of course, definitions of 'merit' differ from party to party. These criteria will be difficult to apply because of the range of relevant considerations and the number of interested candidates.
Therefore, the final decision should in no way be considered a definitive statement of worth or relative merit in the faculty.

I should also like to respond to the proposal that colleagues should be automatically grouped according to specialty. While this might be a good idea in principle (especially if they are members of a centre or an institute), in practice it is fraught with difficulty. For example, how does one determine specialty? Civil law/common law? Theory/black-letter law? Private law/public law? Conservative/liberal? And what does one do with a colleague who teaches in more than one field? There are so many permutations that this is an impossible criterion to use honestly.

Of course, the same may be true of my claim to have authority to act in what I consider to be the best interests of the faculty. The number of factors to be weighed, it could be said, effectively permits me to do what I want. Yet I hope you will give me as much credit for integrity here as you do in recruitment matters.

One last point. The process of allocating even one new office will create a domino effect, freeing other offices as professors are reshuffled. With five vacancies this year there are bound to be other good offices available. Please be assured that I will take into consideration your comments and preferences in reallocating any space that becomes available as a consequence of reassigning these five vacant offices.

RAM / lc

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UNIVERSITÉ MCGILL  Faculté de droit  11 mai 1988

À: M. le prof. Serge Lapierre  DE: Roderick A. Macdonald
OBJET: Attribution des bureaux

STRICTEMENT CONFIDENTIEL

J'ai préparé une note de service sur l'allocation des bureaux qui sera distribuée à tous les collègues qui désirent obtenir le bureau du professeur Eaton, mais j'ai cru qu'il serait sage que je réponde personnellement à votre note du 5 avril dernier. Je n'ai encore pris aucune décision sur l'attribution du bureau du prof. Eaton et j'hésite entre vos représentations et celles de vos collègues. Je me permets cependant de commenter les points que vous avez soulevés et d'attirer votre attention sur les nombreux facteurs qu'il me faut considérer.

Je m'inscris en faux contre votre commentaire à l'effet que le rang ne devrait pas être pris en considération. Il serait injuste, par exemple, que
mon prédecesseur, qui fut doyen pendant 10 ans, passe après un professeur qui n’aurait qu’une année d’ancienneté de plus que lui et qui n’aurait jamais été doyen. Si nous engagions un professeur de renom tel que l’ancien premier ministre, je ne crois pas, non plus, qu’il serait acceptable de lui donner, par exemple, le bureau du prof. Paul pour réserver à Barry un meilleur bureau sous prétexte qu’il a plus d’ancienneté.

Je ne suis pas convaincu non plus, que la durée d’occupation de votre bureau actuel soit un facteur déterminant dans votre cas. Si je me souviens, on vous avait offert le bureau du professeur Chouinard mais vous avez préféré garder votre bureau actuel. On ne peut tenir compte de la durée d’occupation sans tenir compte des offres de bureaux refusées.

J’ai discrètement contacté plusieurs collègues qui désirent changer de bureau et aucun n’est intéressé par le vôtre. Bien sûr, je ne leur ai rien dit de votre intérêt pour le bureau du prof. Eaton. Vous voyez l’ampleur du problème que j’ai à résoudre. Je ferai de mon mieux et tenterai de tenir compte de toutes les représentations que j’ai reçues. Je mesurerai aussi les conséquences pour la faculté à plus long terme.

RAM/lc

MCGILL UNIVERSITY  Faculty of Law  May 12, 1988

TO: Prof. B. Paul  FROM: Dean R.A. Macdonald
SUBJECT: Offices

PERSONAL AND CONFIDENTIAL

As promised, I am writing to follow up on our conversation yesterday concerning my memo to you and other colleagues wishing to move into Sharon Eaton’s office. I know you feel that you have an entitlement to this space because your present office is inadequate, but there are other people with better claims. While I did acknowledges Max’s commitment to you and did undertake to assign you nicer premises as soon as I could, I did not promise (and could not have promised) you Eaton’s office last summer since I didn’t know then that she was leaving. Moreover, any one of the offices currently occupied by Professors Placitt, Ratcliffe, Dugas, Pearson, and Tremblay is preferable to where you are now.

I am disturbed by your suggestion that you are being treated unfairly by McGill, since my records indicate that your salary is significantly higher than those of your contemporaries, that you have received money for travel and research assistance greatly in excess of the faculty average, and
that you have been assigned only those courses you wish to teach (a highly unusual arrangement for first- and second-year professors).

I will do my best to upgrade your office this time around, but I am not in a position to assign Eaton’s office to you. Please let me know your ranking of the offices of the other professors listed in my memo of 11 May. I shall attempt to arrange things so that you get one of your preferred offices from this list, once I have finally determined who will be offered Professor Eaton’s present office.

RAM / lc

MCGILL UNIVERSITY  Faculty of Law May 13, 1988

TO: Dean Macdonald FROM: Prof. B. Paul

SUBJECT: Offices

PERSONAL AND CONFIDENTIAL

I appreciate the various considerations which you must take into account by virtue of your position, but I can’t accept that these factors trump my claim to Eaton’s office. A promise, even a promise by your predecessor, is after all a promise.

Either you have disregarded your acknowledgement of the promise Max made in his letter offering me a position at McGill, or you never meant to keep it in the first place. I have no intention of acquiescing in your decision to break promises made by ranking the offices you mention or otherwise indicating a second choice.

I think your decision cannot rationally be justified, and therefore if you do not change it I intend to file a grievance.

/mb

MCGILL UNIVERSITY  Faculty of Law May 14, 1988

TO: Dean Roderick A. Macdonald FROM: Richard Mason, Retired Justice-in-Residence

SUBJECT: Office allocations in the Law Faculty
Dear Dean Macdonald,
I know how badly you must be feeling about this office allocation problem. After twenty years on the Court of Appeal I've had my fill of playing zero-sum games. Would it help matters if I gave up my office? I don't need such a big place anymore, and as long as I have sufficient room to store my books and files, I would be happy. The faculty, and you in particular, have been very kind to me since I left the bench last December. Please feel quite at ease in taking me up on this offer so that I may begin to repay that kindness.

Richard

May 15, 1988
PRIVATE AND CONFIDENTIAL

Professor Barry Paul
Faculty of Law

Dear Professor Paul,
Re: Your Grievance Dated May 14, 1988
I have received your grievance and am presently looking into the file. Please forward to my office within twenty (20) days all documents you wish to have considered as well as the name of your nominee to the arbitration panel constituted under section 11 of the Regulations Respecting the Employment of Academic Staff.

Yours sincerely,
Oscar Steinman
Vice-Principal (Academic)

OS/SSC

STRICTLY PRIVATE AND CONFIDENTIAL

TO: Dean R.A. Macdonald          FROM: Oscar Steinman
    Faculty of Law                 DATE: May 15, 1988
RE: Grievance of Professor Barry Paul

Dear Rod:
I have now received Professor Paul's notice of grievance. Between his letter
and our phone conversations, I have a fair idea of what happened. I
suppose that we should expect this kind of outcome from a law faculty. I
advise you not to be overly concerned, especially since Paul has asked
Professor Rose to act as his adviser. As long as you have documented all
the steps you have taken, and as long as these make the decision appear as
thoughtful and fair as I know it was, it will be difficult for the Grievance
Committee to find your decision to have been arbitrary, discriminatory, or
unreasonable. My experience is that grievance committees very rarely
substitute their opinion for a dean's, unless there has been some blatant
injustice. Technical arguments of procedure are much less persuasive than
evidence of substantive unfairness. Call me any time if something comes
up.

Oscar

os/ssc

ps – Have you kept a diary of this matter or any 'notes to file?' If so, I
wouldn't mind seeing a summary.

MCGILL UNIVERSITY  Faculty of Law

May 17, 1988

TO: Dr Oscar Steinman
    Vice-Principal (Academic)
FROM: Roderick A. Macdonald

SUBJECT: Grievance of Professor Barry Paul

STRICTLY CONFIDENTIAL
Thank you for your memo of May 15. Unfortunately, I haven't got a
formal diary relating to this issue. I do, however, have half a dozen
scribbled notes summarizing conversations and meetings with colleagues,
etc., which I've retained as 'notes to file.' But the major difficulty is that the
bulk of the faculty discussion of this issue has been informal, and has taken
place most often out of my presence. For example, I'm sure it's mooted in
the Common Room, at our table in the Faculty Club, in the privacy of
individual offices, and in ordinary corridor small-talk. It would be
impossible to reconstruct these dimensions of faculty decision-making for
the Grievance Committee. I guess all I can do is get some of them into the
public domain via a faculty meeting. At any rate, here is a summary of my
'notes to file' record.
April 4 Discussed Paul's memo of April 3 with him for 20 minutes; he seems generally disaffected and talked a lot about Eaton.

April 9 Saw George Meehan today; explained situation and asked for an opinion. He said that this is now the main topic of Common Room conversation and that Paul is lobbying hard; said Paul seems to have a lot of support.

April 22 Had lunch with Macintosh, who says Patrick's memo has had no impact. She also said people are getting tired of Paul's constant haranguing about 'his' office; she thinks Paul had a crush on Eaton.

May 6 Lapierre came in for a long talk; he's really burned out and despondent about his teaching evaluations. He needs an ego-boost; maybe the office would do it.

May 12 Was in Common Room today; lots of talk about offices. Paul walked in and conversation switched; later Willard said that Paul is becoming a pest.

May 15 Greenwood stayed after end-of-exam student party; she's concerned about Paul and thinks the real problem is that there are two fragile egos here – Lapierre and Paul; says I should get them together in my office so they can 'confess' what's really at stake privately.

May 16 Had a long talk with Ray Marcil; he thinks this process has been very healthy for the faculty. He suggested putting this on agenda for the marks meeting on May 27 and circulating a memo of my own first; he thinks that people will drop legalism and talk trust and mutual support if I stage it right.

This is all I have noted. Hope it's useful.

RAM/Lc

MCGILL UNIVERSITY  Faculty of Law May 24, 1988

TO: All colleagues
All administrative heads

FROM: Roderick A. Macdonald

SUBJECT: Office allocation

I am writing to advise you that I have booked the Council Room at the Faculty Club prior to the marks meeting at 4:00 next Friday in order that we may discuss the office allocation question. Contrary to rumours you may have heard, I have not yet assigned Eaton's office to anyone. To assist us in our deliberations, Professors Dugas, Fleming, Billington, Pearson, Reisman, Sangster, Marcil, MacIntosh, Thompson, Greenwood, and Chouinard have agreed to let me circulate their memos to me. Those
memos are attached. I believe everyone has already received documents from Patrick Pettigrew and Paul Willard as well as copies of an exchange of correspondence between Professors Reisman and Ratcliffe.

When I sent the original memo at the beginning of April I assumed that my authority to assign offices as I thought best was unquestioned, and that all I needed to do was canvas opinion as to who was interested in moving into the vacant offices. In seeking feedback about the appropriate standards to apply I was also assuming that the process of decanal allocation was not controversial; that is, I did not for a moment think that my judgment about the 'best overall interests' and 'dynamic' of the faculty needed either explicit justification or general explanation. Yet most memos seem to suggest that this is not the case. I hope, therefore, that all professors will take the opportunity on Friday to make their views known.

What seems to emerge from most of the responses I received is what I would call an instrumental view of faculty decision-making. Neither the substantive distributional criteria (rank, length of service) nor the process (decanal discretion, third-party adjudication) are seen as primary; rather, it is the values we seek to promote — values I attempted to capture in the expressions 'best interests' and 'overall dynamic' — which come first. The formal argument runs roughly as follows: We should begin by clarifying values; then we can develop substantive norms, and finally design appropriate decision-making procedures. Let me try to show why I think the problem is more complex than this linear view of ends and means suggests.

In my view, we cannot treat our institutions and social arrangements as serving only one end. The multiple ends they serve are not independent of each other. An institution is not simply a machine that can be designed from the ground up for a particular purpose. Lon Fuller once addressed this idea by asking whether it would be realistic to design a new sport or game by first asking what 'pleasures' we wish to derive from playing it and then deducing its scoring rules and principles of play from that list of pleasures. The instrumental view that treats only ends as being subject to political debate and means as merely technical (and, consequentially, capable of evaluation only on an efficiency criterion and not on a moral criterion) is wrong.

An institution is not a mere instrument about which we can ask, as severable questions, 'Is its purpose good?' and 'Does it achieve that purpose well?'. The best we can do is to ask of an institution whether it contributes to enriching our lives. I believe that we cannot, as a completely a priori matter, rank our institutional goals. We need to see what impact the adoption of one set of goals may have on the financial and other resources we will have to expend in order to achieve it, and on the ordering processes we have available to us (and wish to preserve). At the
same time, I do not think that there is a dichotomy between value preferences and procedural design which tracks that of ends and means. We come to understand our ends not just as abstracted preferences but as structures that influence the choice and design of our institutions and processes. We then experiment with these institutions and processes over time in a continuing effort to achieve our initial statements of ends and goals, recognizing that at the same time they are reshaping our perception and choice of possible ends.

A second idea that seems to emerge from some memos is deeply legal. A number of colleagues insist on the importance of maintaining a realm of faculty interaction which is fundamentally legalistic. That is, they believe that faculty normativity is public normativity and that public normativity can be legitimate only if it rests on legalism. In my view, the events of the past two months suggest exactly the contrary. In this allocation exercise I have come to see the value of compelling each of us (professors and administrative heads) to participate actively in choices that shape our self-perception. We cannot rely on a structure of a priori rules to relieve us of our responsibility for treating each other with compassion and understanding. There may be a place for explicit rules on the margins here, but I am sceptical about whether the rules we enact (rather than those we live) can be used to erect a meaningful boundary between our private and public lives. Our several private identities which together comprise our public selves – identities as members of a family in our own homes, as members of a professorate debating our relationships with each other, and as teachers and scholars performing before our classes – can perhaps be distinguished, but they cannot be separated. Especially in this intermediate field of essentially collegial interaction which lies between the predominantly tacit normativity of the family and the predominantly explicit normativity governing our relationships with our students, we have the opportunity and the privilege to create and to re-create a rich and complex normative order which permits us to know better the law we purport to teach. The appeal to legalism cannot do justice to the problem of office allocation any more than the appeal to the mysteries of decanal fiat.

I look forward to discussing these and other issues relating to office allocation on Friday.

RAM/1c

Encl.

DECISION OF THE MCGILL UNIVERSITY GRIEVANCE COMMITTEE
Decision No. 88-36: June 16, 1988

The Grievance Committee (the committee) was asked to sit in connection with a grievance relating to the allocation of professorial offices made by Dean Roderick Macdonald of the Faculty of Law. A grievance was filed by Professor Barry Paul of that Faculty on May 14, 1988 claiming that the decision not to assign him the office previously occupied by Professor Sharon Eaton (Room 22 of Old Chancellor Day Hall) is void for being arbitrary, discriminatory, and unreasonable. All documents were filed by 1 June, and a hearing was scheduled for June 11, 1988.

The committee gains its jurisdiction to hear this matter by virtue of the sections 11.5 and 11.6 of the university regulations. The relevant sections are as follows:

11.5 If a member of the academic staff believes: (i) that he has been unfairly treated by the University in regard to the interpretation or application of University policy in so far as it relates to his academic career and to his working conditions, or (ii) that he has been subjected to arbitrary, discriminatory, or unreasonable actions taken against him by the University, either by act or omission, he may make a formal complaint, either orally or in writing, to his immediate superior.

11.6 If any complaint made under article 11.5 is not settled to the complainant’s satisfaction within twenty (20) days of its filing, the complainant may bring the matter before the University Grievance Committee.

The procedure set out in section 11.6 has been duly followed by Professor Paul. The committee heard the grievance on June 12, 1988, rather than on 11 June owing to a prior commitment for another client at Superior Court by Professor Paul’s adviser, Professor Rose. Dean Macdonald was not accompanied by an adviser.

In assessing any complaint, the committee may look at all documentation relevant to the case. For these purposes the committee has assembled as evidence a series of memos and letters exchanged within the faculty on the subject of office allocation. Although not all memos were entered in evidence (some being confidential), both Professor Paul and Dean Macdonald agreed that those submitted give a fair picture of faculty opinion.

It is Professor Paul’s contention that the letters and memos demonstrate that the dean was unfairly swayed in his decision by extraneous factors, and that some type of ‘attitudinal bias’ kept him from honouring the faculty’s contractual obligations. The dean, for his part, asserts that the documents serve to underline a general understanding within the faculty that the matter of office allocation is essentially one of administration, and ultimately lies within his discretion. He claims that he routinely seeks
advice from professors on matters of decanal prerogative (allocation of secretaries, committee assignments, timetabling, etc.), but that the process is consultative. He also suggests that the memos show the lack of consensus as to systems of decision-making, and that within a community such as the Faculty of Law, granting the dean a broad discretion in such matters is the only way adequately to address the needs and concerns of the faculty as a functioning unit. Finally, he denies that he or his predecessor ever explicitly promised to assign Professor Eaton’s office to Professor Paul.

The issue for the committee to decide, simply put, is whether the dean’s decision was a fair one. The analysis of this question can be broken down into issues of procedure and of substance.

The committee was favourably impressed with Professor Rose’s arguments about procedural fairness, and much of the following paragraph is adapted from his memo. Procedural fairness is something which has been widely accepted in our society as a requirement for decision-making by all public officials. This idea is based on the notion that individuals within a community have rights to participate and to have their views considered and weighed in any process of decision-making. Guidelines are often drafted to set out strict procedural requirements guaranteeing this participation, even when, substantively, a wide discretion is exercised. We find that even though it is not required by faculty regulation, an opportunity to participate in decision-making about office allocations is required by the notion of procedural fairness.

Was such an opportunity given to Professor Paul? In the case before us, the discretion of the dean to administer the faculty is established by the very broad terms of the University Statutes. The greater an administrator’s discretion to choose a decision-making model, the greater the obligation to put into place an adequate procedural scheme. Substantive discretion and procedural licence are inversely correlated. Here we have a dean claiming broad authority (whether such authority in fact exists we examine below), but soliciting input both as to decision-making procedure and criteria to apply. The assortment of memos and opinions received by the dean goes to illustrate that efforts were made to consider as many aspects of the matter as possible. The dean’s attempt to recast the problem and seek follow-up memos also indicates a concern for ensuring participation. The fact that he called a faculty meeting on this issue after the grievance was filed and had not yet finally allocated the office at that time also creates a presumption of procedural fairness.

The second matter raised by Professor Paul is one of substantive fairness. Consideration of this point would lead us to a review of the decision on the merits. This type of inquiry should be more limited than one on procedural grounds since it is possible to come to several different decisions on the merits without any one of them being ‘unfair.’ Essentially, Professor Paul
is not really attacking the dean’s substantive judgment; he is attacking the dean’s characterization of the issue. For Professor Paul the issue is one of contractual entitlement. For the dean the issue is one of office allocation. On the evidence submitted, we see no basis for upholding Professor Paul’s claim to be entitled to Professor Eaton’s office. His letter of offer, which he submitted, states only, ‘May I conclude by saying how delighted I am to be able to make this offer. I know you have much to contribute to the law teaching community and you may be assured that I will do all I can to provide you with attractive surroundings to pursue your career with us.’ We do not find this to be a promise to assign Professor Paul to Professor Eaton’s office.

If this letter is taken simply as a commitment by Dean Macdonald’s predecessor to provide a ‘good’ office for Professor Paul, does this require the decision Professor Paul seeks? The possibilities for allocating a good office are several. Moreover, there are several fair outcomes to any process involving Professor Eaton’s office. This point is well illustrated by the memos and letters filed with us, many of which suggest different decision-making systems. Each system can yield different results. The system chosen by any one person will depend upon background assumptions about the relationship of the individual professor to the faculty and the role of the dean in mediating that relationship. The decision taken by Dean Macdonald reflects his own considered views on the way in which the faculty should be ordered. If we choose to change his decision, we would be merely replacing one fair method of ordering with another.

Since the committee does not find Dean Macdonald’s assumptions about his relationship with his professors and about the decision-making process such a relationship implies to be either arbitrary or unreasonable, we see no reason to overturn his decision on the merits. Moreover, discrimination or personal bias against Professor Paul was not formally alleged, and we see no evidence of it. Finally, the follow-up memos convince us that Dean Macdonald had heard and reviewed all of the material submitted to him before making his decision. We find no unfairness in the procedure by which he then allocated Professor Eaton’s office.

There is a further point. Whatever decision this committee takes will necessarily be grounded in an incomplete understanding of what Dean Macdonald calls the ‘dynamic of the faculty.’ If we simply substitute our view for that of the dean (assuming that we disagree with him) we are in fact saying that only those substantive norms which can be explicitly formulated and brought before us belong in the decision-making processes of the Law Faculty. It would be presumptuous of us to make such a claim. Unless there is no reasonable way in which Dean Macdonald could have refused Professor Paul’s claim, or unless the decision is clearly contrary to explicit faculty rules and regulations and the dean refuses to
show us other implicit features of faculty normativity to justify his decision, we do not think it is appropriate to interfere.

As a result, the committee dismisses the grievance of Professor Paul and upholds the decision of Dean Macdonald not to allocate Room 22 to Professor Paul.

Signed: Dr Jean Rivest, Chairman,
Department of Sociology
Dr Margaret Tapp, Professor,
Department of Electrical Engineering
Dr George Antakis, Professor,
Faculty of Dentistry
Dr O. Steinman, Vice-Principal (Academic)

cc: Professor B. Paul, Faculty of Law
Dean R.A. Macdonald, Faculty of Law

July 14, 1988

Dear Boss,

Now that the relevant players are all snugly ensconced in their new offices, with visions of merit pay, publications, and judicial appointments dancing in their heads, I thought I might offer a few post-game comments.

We cannot separate how decisions are made in this faculty or in any functioning administrative organization from the fundamental and unconscious political, sociological, and economic assumptions upon which the organization is erected. Once this is acknowledged, the interesting question becomes how these the basic assumptions are manifested and 'legitimated.' Looked at in this light, those opinions you solicited are nothing more than x number of ways to express, politically reinforce, and tacitly acquiesce in your power. For the most part, the opinions are destined to be variations on the same theme. It's like different strategies in a chess game: open, attack, and defend as you wish within the framework of the game, which is accepted without question. Why should the king be worth more than the queen? Answer the latter, and rule-making in your Law Faculty Empire takes on a different perspective.

Let me stress that I did not for a moment doubt your simple-minded sincerity in making the request of us. In your mind, you were just asking for help in making a decision. I'm sure that you, as well as most of the rest of the faculty, have never doubted that the decision was really yours, which is understandable. You, like all the members of this faculty, were trained at a law school, which was boot camp for legitimation of raw power. You
were the product of the process, the conditioning which you could not escape.

As law students, we were immediately made aware of the hierarchical ordering of the law school. The dean could invoke fear in the professors by trotting out bad teaching evaluations (oh, how stupid we were as students, thinking these would be liberating). The professor could invoke fear in the students by asking questions to which we were certain not to know the answers, or by assigning amounts of work we could not possibly finish. Those few students who received top grades were admitted into the upper echelons of the law school life—the journal and the mooting teams—where they could then do twice as much work to stay there. One’s rank within the system as assessed by these criteria was hierarchical, and was accepted and legitimated by all of us. We found our niches (and happily, I might add).

Years later, we applied for teaching positions, and we quickly learned it was necessary to satisfy the conventional norms of academia in order to get hired at the best faculties (which we, of course, assessed hierarchically!). Incumbent professors would do anything to maintain the ranking of their schools, and they looked at new applicants with only academic standing, law journal experience, and publications in mind. We then became locked in a fierce struggle for tenure, dependent on vague criteria, which essentially added up to pleasing ‘colleagues’ at all costs, and especially pleasing the dean.

As a result, it comes as no surprise that we were all so quick to reply when unconsciously asked to legitimate and affirm your power to decide where we would spend the large part of our waking hours that is devoted to this enslavement. We all know where we fit in this little administrative empire of yours. Your office assignments only confirmed a set of expectations which we all accept, but which few of us are ever capable of identifying, let alone questioning. Moreover, it is not surprising that, not just in this case but in any administrative or normative order where lawyers get involved, that hierarchies are invented and then ‘sold’ as naturally occurring and politically justified. From existence to necessity; from necessity to desirability. The false-consciousness continued ad nauseam.

Law firms, government agencies, and large private corporations confirm the hierarchies of law school. All the buzzwords we traditionally associate with this type of normative ordering—the Rule of Law, Rules, Regulations, Decanal Discretion, Due Process, and the like—are wrapped up to varying degrees in this larger white, male, upper-middle-class, market-driven law school ideology which we accept as the tune to which we all must dance. Even people as intelligent and articulate as law professors (and especially poor old Barry Paul, who thought that more law would overcome the arbitrariness of law) have been unable to resist the music.
Show some real leadership for once. Resign.

Patrick

All workers

cc: Dr Oscar Steinman, Vice-Principal (Academic)
    Professor Charles Paton, Secretary, Canadian Conference of Lawyers for Social Democracy