***Administrative Law*, W. R. Wade, Oxford: Oxford University Press, 1978. (4th edition) Pp. li, 855. $36 (hardback).**

***Administrative Law and Practice*, R. F. Reid, Toronto: Butterworths, 1978. (2nd edition) Pp. lxxxvi, 504. $65 (hardback).**

***A Guide to Judicial Review*, John Kavanagh, Toronto: Carswell, 1978. Pp. xi, 280. $31 (hardback).**

There is probably no surer sign of the academic respectability of a given legal discipline than a proliferation of commercially produced texts, manuals, and reporting services through which "systematic unity" and "doctrinal orthodoxy" are imposed on a previously "disorganized" field of study.[1] A recent example of this elevation (or reduction) may be seen in the complex of rules, roles and symbols which has come to be known as administrative law. Scarcely twenty years have passed since the first major text in Anglo-Canadian administrative law appeared[2] and less than ten have elapsed since the first Canadian treatise entered the market.[3] Yet today the student, teacher, practitioner and judge have no less than six United Kingdom and five Canadian offerings from which to choose.[4] Moreover 1978 has proven to be a vintage year: two standards, Wade, *Administrative Law*[5] and Reid, *Administrative Law and Practice*[6]

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[1]See generally Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977).

[2]deSmith, *Judicial Review of Administrative Action* (1959)

[3]Dussault, *Le contrôle judicaire de l'administration au Québec* (1969).

[4]In the United Kingdom one may choose from deSmith, *Judicial Review of Administrative Action* (3rd ed., 1973); Wade, *Administrative Law* (4th ed., 1978); Garner, *Administrative Law* (4th ed., 1973); Foulkes, *Introduction to Administrative Law* (3rd ed., 1972); Yardley, *A Source Book of English Administrative Law* (2nd ed., 1970); Griffith and Street, *Principles of Administrative Law* (5th ed., 1973).

In Canada there is Dussault, *Traité de droit administratif* (1974); Ouellette and Pépin, *Précis de contentieux administratif* (2nd ed., 1977); Mullan, *Administrative Law* (1973); Reid and David, *Administrative Law and Practice* (2nd ed., 1978); Kavanagh, *A Guide to Judicial Review* (1978).

[5]H. W. R. Wade, *Administrative Law* (4th ed.) (Oxford: Oxford University Press, 1978) li, 855.

[6]R. F. Reid, and H. David, *Administrative Law and Practice* (2nd ed.) (Toronto: Butterworths, 1978) lxxxi, 504.

have been revised, and a new entry, Kavanagh, *A Guide to Judicial Review,*[7] has appeared.

Yet there is little that is really new in the most recent model year. The revised editions may be longer and more expensive, but they reflect little more than a textual integration of the latest House of Lords and Supreme Court of Canada ruminations within an essentially static framework; and the one new contribution, purportedly adopting a fresh orientation in order to convey a more practical perspective, taxes the imagination to discover its novelty. Any serious student of the relationship between government and the courts, or of the institutional processes of decision by which democratic preferences are translated into public activity, will want to examine carefully each of these offerings, if only because they are the most recently available materials. But those engaged in a genuine search for understanding are likely to find few stimuli in these texts, for not only do the revised editions bear a remarkable similarity to their predecessors; they also bear a striking resemblance to each other. While this congruence may gratify a client who needs to believe that the law is certain, it is to the thoughtful lawyer or student extremely disconcerting. Surely the law of the market and the enthusiasm of competition ought to generate some substantial diversity of approach. Surely good legal minds from different continents analysing two constitutionally different legal systems ought to view the activity of government in distinctive ways. Surely the law is not so settled, static and self-evident that neither judicial opinion nor social scientific research can persuade us to rethink our assumptions or repostulate the concepts with which we analyze the problems of administrative law.[8]

Similarity among basic texts is not unique to administrative law. There is also but little divergence in the treatment by various authors of such subjects as property, torts, constitutional law, trusts, taxation, and company law. Yet, this should not prevent us from enquiring whether such uniformity is inevitable. Moreover, the very fact that we are able to talk of an administrative law, or of a law of torts, or of a law of property should lead us to ask initially how these classifications of subject matter arise.

The need to conceptualize and characterize inheres in all human activity, legal and non-legal. Classification (conceptualizing and/or characterizing) is so fundamental to thought and expression that we often fail to acknowledge the classification which takes place even as we talk. In perceiving phenomena, naming objects or constructing sentences we are engaged in classifying; yet the lawyer often operates as if this process

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[7]J. A. Kavanagh, *A Guide to Judicial Review* (Toronto: Carswell, 1978) xl, 280.

[8]See generally C. D. Stone, *Towards a theory of Constitutional Law Casebooks* (1968), 41 So. Cal. L.R. 1; W. L. Twining, *Is Your Textbook Really Necessary?* (1970), 11 J. Soc. T.L. 81.

involved no personal evaluation of or commitment to the system of classification thereby adopted. While a lawyer appreciates that he may be required to exercise his judgment in deciding if a particular problem should be argued in status (administrative law) or in contract, he rarely acknowledges that acceptance of a category called "contract" involves a judgmental choice.[9]

One important reason for this lack of awareness is the fact that our law (including administrative law) began and remains a lawyer's law. Rather than attempting to postulate as *a priori* a theoretical structure into which all legal issues may be slotted, we have preferred to elaborate our fundamental public law through the resolution of specific disputes. Judges have evidenced a marked reluctance to synthesize or systematize overtly, preferring to invoke ideas such as "the nature of things" to justify their conceptual choices. The legal profession has not been required to analyse the reasons why certain doctrines develop or to accept any personal responsibility for the development of an underlying theory of any branch of the law. Textbook writers are guilty of a similar abdication.[10]

If the purpose of the textbook is simply to report the reasons for particular decisions in particular cases and to sort these judgments into the categories reflected by the verbal formulae employed by the courts (that is, if doctrine is conceived as nothing more than recent legal history) then a failure by writers consciously to articulate and justify their theories would not be serious. But apart from the fact that few textbooks claim to have such a limited purpose, it is questionable whether any text could be so restricted in orientation. Often authors are able *to create* a branch of the law. The role of Holmes and Langdell in the creation of a general theory of contract has been well documented.[11] Similarly, the influence of deSmith in convincing the Anglo-Canadian world that a unified theory of judicial review of administrative action could be developed has not gone unnoticed.[12] That we should treat *certiorari* as an aspect of administrative law rather than of remedies, or that we should conceive of jurisdiction as other than a problem of civil procedure, is a tribute to the polemical success of the late Professor deSmith.

Moreover, in addition to its "subject-matter" creating function, the legal text also serves a paradigmatic function within the branches thus created. While purporting merely to report what judges do, a text also

[9]For an evaluation of various theories of classification and their potential impact on law reform see the essays in J. A. Jolowicz (ed.) *The Division and Classification of the Law* (London: Butterworths, 1970).

[10]A general discussion of this idea is contained in Stone, "Existential Humanism and the Law" in *Existential Humanistic Psychology* (1971).

[11]Gilmore, *The Death of Contract* (Columbus: Ohio State U. Press, 1974).

[12]Wade, *Administrative Law* (4th ed.) (1978) Preface.

sorts the meanings they attach to their expressions into sub-concepts and issues, elevates certain phrases to the status of doctrine, and institutionalizes a vocabulary within which subsequent decisions can be rationalized.

A final function performed by all texts is to reduce the law to formulae which reflect a logical, deductive ordered system within which the justification for decisions can be presented syllogistically. The symbolic function of such reduction becomes apparent when one examines the principal areas treated in administrative law. No student of judicial review would disagree with the view that terms such as "jurisdiction", "right/privilege", "natural justice", and "abuse of discretion" serve much the same function as "reasonable man" in the law of torts, "consideration" in contracts and "intent" in the criminal law. Our texts allow us to pack all the truly difficult questions into one concept which sounds very legal and thereby maintains the analytical purity of the syllogism.

When one considers the important interpretative functions of the legal text as outlined above it is distressing that such a pronounced similarity should arise. Unless writers in the administrative law field are prepared to undertake a thorough examination of their underlying beliefs it is unlikely that academic writing will ever transcend the stage of the Citator or Digest; nor is it likely that new ideas for creative judicial decision-making will arise from the authors. Having set out this general overview, we proceed to a more detailed examination of the 1978 offerings in administrative law.

Kavanagh, A GUIDE TO JUDICIAL REVIEW

The fourth effort to appear in "Carswell's Practice Series" is John A. Kavanagh's *A Guide to Judicial Review.*[13] Designed for the student and the legal practitioner, this book concentrates on the procedural aspects of judicial review, with emphasis on federal and provincial jurisdiction largely as portrayed in Ontario. It derives most of its authoritative substance from decided cases of "fairly recent vintage", although some minimal reference is made to the well-known scholarly works on the subject. The author claims only that the book is a guide or manual which merely classifies the most important principles in a summary fashion.[14]

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[13]The other books are C.E. Choate, *Discovery in Canada* (Toronto: Carswell, 1970); Davis, *McKeon's Small Claims Court Handbook* (3rd ed., 1975); and Wunder, *The Conduct of a Personal Injury Action* (1970. It appears that the subtitle "Carswell's Practice Series" was initiated only with the appearance of Choate's text. Earlier texts by Davis and Wunder were subsequently subsumed under this category.

[14]Kavanagh, Preface.

The form of the book is impressive. The table of contents is well designed and, when combined with the index, the reader is able to locate specific areas of concern with relative ease. A complete table of cases and a table of statutes are included as well. Especially useful to practitioners are the appendices, which provide compilations of information necessary for a quick and authoritative reference. Appendix A provides a list of the Ontario statutes which establish administrative agencies and sets out schematically the specific administrative and judicial appeals involved with each. Appendix B gives examples of some of the most common precedents useful in judicial review applications before the Federal Court of Canada. Appendix C provides ready access to most of the statutory enactments relevant to judicial review in Ontario and on the federal level, and to the rules of practice and procedure relevant to both. While none of the appendices provides a wholly complete source in that all are selective and provide no new information, they do offer a touchstone for further research.[15]

The actual text is not voluminous, comprising only 187 of the volume's 280 pages. Roughly one-third is concerned with substantive grounds of review; one-third, with various general aspects of judicial review, such as its discretionary nature, privative clauses, alternatives to judicial review, the problem of standing, and the timeliness of review; and the final portion, with the statutory enactments relevant to judicial review, such as the *Federal Court Act*[16] and the *Judicial Review Procedure Act.*[17] Regrettably, although the *Statutory Powers Procedure Act*[18] is dealt with in applicable portions of the text, there is no readily accessible treatment of the statute as a whole. One must search through the various subheadings for references.

It might be said that Canadian administrative lawyers have a distinct form of analysis which does not conform to either of the approaches taken by British or American writers in that we tend to concentrate on practical realities rather than a theoretical framework. We seem to be content with a descriptive or functional analysis rather than with discovering an elusive jurisprudential truth. The organization of the Kavanagh text reflects this typically Canadian approach with its numerous references to practical procedural difficulties inherent in the relatively new statutory incursions into this area. As a result little emphasis is placed on the distinctive nature of the various remedies

[15]Practitioners would be interested in W. R. Jackett, *The Federal Court of Canada: A Manual of Practise* (Ottawa: Queen's Printer, 1971). (See also his article on the same subject at (1973), 11 Osgoode Hall L.J. 253). As to forms, see R. T. Hughes, *Federal Court of Canada Service* (Toronto: Butterworths, 1970) vol. 2 (updated regularly). In Ontario see D. W. Mundell, *Manual of Practise on Administrative Law and Procedure in Ontario* (Toronto: Govt. of Ontario, 1972) and Williston and Rolls, *Williston and Rolls' Court Forms,* vol. 3, 1975.

[16]R.S.C. 1970, c. 10 (2nd Supp.).

[17]S.O. 1971, c. 48.

[18]S.O. 1971, c. 47.

available for review except to note their procedural complexities. It is a relief not to view judicial review solely through available remedies and to compare and contrast each. Although statutory reforms have not done away with all common law complexities, they may allow us to view the administrative process in terms of substantive grounds for review rather than the procedural minutiae assocated with each available remedy. However, if neither a remedial nor a subject-matter approach is preferred, it is necessary to select a format which emphasizes substantive grounds for review leading to loss of jurisdiction.

It used to be thought that since Canadian books on administrative law and judicial review were so rare their very appearance was cause for praise. With the respectability of the subject in Canada established by McRuer, the distinctly Canadian portrayal by Reid, the intellectual excitement of Dussault and the contributions of numerous Canadian academics in legal journals, we can no longer afford such promiscuous approbation. The complexity and significance of the administrative bureaucracy in modern governmental institutions deserves more than the analytical framework of the *Canadian Encyclopedic Digest.* Even a book on administrative law which is restricted to technical aspects of judicial review must canvass the subject within a positive jurisprudential framework. We have come to the level of sophistication in administrative law that allows us to discern the major lucanae in the judicial theory of review, but articulate solutions have yet to be offered.[19] Case summaries can contribute little in the way of ultimate resolution. The highly visible human interaction of administrative machinery and perceived equities in the process makes the solution only more difficult to structure by rules.

To be sure Kavanagh claims only to be a guide and a summary, so that one can excuse the concentration on procedural detail rather than the substantive theory of jurisdiction. Yet it is painfully clear that a lawyer must establish a case for judicial review before most procedural technicalities become relevant. For the lawyer who is looking for jurisdictional errors in order to review administrative action, this book will provide little guidance. Reid, deSmith and Wade are still absolutely essential. The theory of jurisdiction is set out with little analysis. No position is taken, no reconciliation is attempted, and no answers to fundamental questions are provided. For example, in Chapter Four, entitled "Substantive Jurisdictional Errors", subheaded "Various Routes to Jurisdictional Error",[20] the famous passage of Lord Reid from *Anisminic*

[19]It is certainly not the case because of lack of effort. See: P. Hogg, *Judicial Review: How Much Do We Need?* (1974), 20 McGill L.J. 147; W. H. Angus, *The Individual and the Bureaucracy: Judicial Review — Do We Need It?* (1974) 20 McGill L.J. 177; P. C. Weiler, *The Administrative Tribunal: A View from the Inside* (1976), 26 U.T.L.J. 193; J. Willis, *Canadian Administrative Law in Retrospect* (1974), 24 U.T.L.J. 225; S. Wexler, *Non-Judicial Decision-Making* (1975), 13 Osgoode Hall L.J. 839; and A. Abel, *The Dramatis Personae of Administrative Law* (1972), 10 Osgoode Hall L.J. 61.

[20]Kavanagh, at 37.

Ltd. v. *Foreign Compensation Commission*[21] analyzing the meaning of jurisdiction is quoted, but it is followed by no attempt at analysis. Surely at least an acknowledgement of the upheaval this case has caused in Canadian and Commonwealth administrative jurisprudence is worthy of mention.[22] In fact Kavanagh's whole treatment of substantive jurisdictional errors is contained in a total of seven pages of text. In contrast five pages are devoted to the Ontario procedure for setting the time and place for the filing of documents.[23]

One clue to Kavanagh's conceptual framework for judicial review may be revealed in the following statement from his preface: "In *more important* areas, such as the rules of natural justice, the summary format gives way to more lengthy explanation and analysis". The *audi alteram partem* principle is prefaced by the remark that "this is by far the most common ground of complaint in administrative law". Admittedly, judicial review of administrative action is concerned with procedural technicalities, and natural justice identifies the important principle of individual freedom to have legal rights dealt with in a manner which is procedurally fair. Yet frequency of litigation is not necessarily the best standard of importance. It may be a reflection of the lawyer's incapacity to recognize and deal with the more fundamental issues of administrative regulation and the proper role for judicial intervention. The concentration of procedural fairness as the prime focus of judicial review is a reflection that the best method for dealing with administrative action is to impose lawyer's values on the process. The author sees judicialization of administrative agencies as a positive value, but one determined by the circumstances of each individual case. The alternative process-oriented view is not even put forth.

With regard to the author's choice of sources of law, the authorities are limited largely to cases decided since 1970. One could fairly doubt the accuracy of the picture painted by such limited resources, but one must also be aware that the practising lawyer has a need for contemporary expositions of judicial logic. Yet this is no justification for disregarding the whole historical framework of administrative law in Canada simply because major procedural changes have been wrought through legislation in recent years. For example, such historically significant cases relating to the problem of classification of functions in Ontario as *Re Brown and Brock and The Rentals Administrator*[24] and *Re Cloverdale Shopping Centre, et al.*

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[21][1969] 2 A.C. 147 (H.L.).

[22]Eg. *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796 et al.* [1970] S.C.R. 425; *Bell* v. *Ontario Human Rights Commission*, [1971] S.C.R. 756. See P. Hogg, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada: Bell* v. *Ontario Human Rights Commission* (1971), 9 Osgoode Hall L.J. 203 and compare D. J. Mullan, *The Jurisdictional Fact Doctrine in the Supreme Court of Canada — A mitigating Plea* (1972), 10 Osgoode Hall L.J. 440. As to Commonwealth sources see: J. K. MacRae, *Jurisdictional Error: A Post-Anisminic* Analysis (1977), 3 Auckland U. L. R. 111 and McInnes *Jurisdictional Review After Anisminic* (1977), 9 Vic. U. Well. L. R. 37.

[23]At 179-183.

[24][1945] O.R. 554 (C.A.).

and Township of Etobicoke et al.[25] were not deemed worthy of mention, although the author himself makes little attempt to deal with this central problem of judicial review. Notable exceptions in other areas include *Re Toronto Newspaper Guild et al. and Globe Printing*[26] as to the remedy of *certiorari*, *Cowan* v. *CBC*[27] relative to injunctions, *Re Hopedale Developments Ltd. & Town of Oakville*[28] and *Smith and Rhuland Ltd.* v. *The Queen*[29] as to abuse of discretionary power. But even if the frame of reference has been narrowed to recently decided cases, the omission of cases like *Re Nicholson and Haldimand - Norfolk Regional Board of Commissioners of Police*[30] on the emerging doctrine of fairness, *Mitchell* v. *The Queen*[31] on the remedy of *habeas corpus*, *Grillas* v. *Minister of Manpower and Immigration*[32] on the right to a rehearing, *Grillas* v. *Minister of Manpower Powlowski*[33] on bias, and *Delanoy* v. *Public Service Commission Appeal Board*[34] dealing with excess of jurisdiction, is cause for concern. Exclusion of such relevant material could create a false impression as to the proper conclusions to be drawn, and statements of opinion in the absence of all the relevant authorities must be viewed with some skepticism.

The lack of discussion on the place of judicial review of administrative action in our constitutional structure leaves the lawyer with an inadequate understanding of the context in which a case must be argued. It is trite to say that every administrative law case involves the formulation of a delicate balance between individual rights and administrative convenience: that in some instances the court will bow to the mysteries of administrative expertise and in others will insist upon strict scrutiny of administrative action in line with a chosen dialectic of rationalization.[35] This is the major drawback with the book: the lack of an analytical framework to suggest when court intervention will occur or even when it is desirable. Instead, the amalgam approach has been preferred. Little

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[25][1966] 2 O.R. 439 (C.A.).

[26][1951] O.R. 435 (H.C.J.), affirmed [1952] O.R. 345 (C.A.) and [1953] 2 S.C.R. 18.

[27][1966] 2 O.R. 309 (C.A.).

[28][1965] 1 O.R. 259 (C.A.).

[29][1953] 2 S.C.R. 95.

[30](1976), 9 O.R. (2d) 481 (Div. Ct.), reversed by (1976), 12 O.R. (2d) 337 (C.A.), reversed by [1978] 23 N.R. 410 (S.C.C.) Both the Divisional Court and Ontario Court of Appeal decisions were available long before the date of publication.

[31](1975), 61 D.L.R. (3d) 77 (S.C.C.).

[32][1972] S.C.R. 577.

[33][1972] 6 W.W.R. 643 (Man. Q.B.), affirmed (1973), 37 D.L.R. (3d) 100 (Man. C.A.).

[34][1977] 1 F.C. 562 (C.A.).

[35]It is possible to argue persuasively that the court's role should be a continued judicialization and a protectionist attitude in line with traditional rule of law conceptions. See: B. Schwartz, *Of Administrators and Philosopher-Kings: The 'Republic', The 'Laws', and Delegations of Power* (1977), 72 Northwestern U.L.R. 443.

attempt has been made to select and identify those sources which are authoritative. Emphasis has been placed on areas which have received recent judicial attention. Subject areas unblessed with numerous recent judicial opinions are dealt with in a summary manner. As a result a complete structure has not been portrayed, and major questions of judicial review have been left unresolved. The author must be congratulated on his ability to organize new material; but the impression left with the sophisticated reader is further confusion or a false sense of certainty. Delineation and circumscription of revelant sources with an historical, analytical, jurisdictional and constitutional foundation would do much to make the author's arguments believable. More foundation would, in the long run, make the whole text more convincing. Even if neutrality is the preferred approach, it cannot be based in a theoretical vacuum.

Threads of consistency can be observed in Kavanagh's statement of the discretionary nature of judicial review.[36] Even the summary format allows a well-balanced outline to identify the principle considerations used by courts to refuse relief. Examples such as delay, waiver, voidness, exhaustion and ripeness are set out in a scheme which is both accessible and comprehensive. Similarly, it is difficult to criticize the author's treatment of legislative reconciliations of proper administrative procedure and review within Ontario and the federal level.[37] On the whole, however, they add little to accumulated knowledge on the subjects, especially when concerned with substantive questions like the jurisdictional split between the trial and appellate divisions of the Federal Court under sections 18 and 28 of the *Federal Court Act.*[38] Rules of practise are illustrated with some degree of particularity, and should be beneficial to the practitioner seeking procedural assistance. Yet, it cannot be said that this factor alone provides sufficient *raison d'etre* for a text of this type.

Wade, ADMINISTRATIVE LAW

In many respects the fourth edition of Wade, *Administrative Law* has deviated from the course set by its predecessor editions. The text can no longer be considered a brief general introduction to the subject from which even the well-informed citizen may profit. It has grown from 350 to 837 pages; it has become abundantly footnoted; it now purports to be comprehensive in scope and detailed in analysis.[39] Yet it remains

[36]Kavanagh, Chapters 7-11.

[37]*Ibid.*, Chapters 12 and 13.

[38]For example, see D. J. Mullan, *The Federal Court Act: Administrative Law Jurisdiction* (Ottawa: Law Reform Commission of Canada, 1977).

[39]It may be that this reorientation of the fourth edition was motivated by the untimely death of S. A. deSmith. In scope this new edition resembles the third edition of *Judicial Review of Administrative Action* more than its own third edition. Professor Wade acknowledges the pioneering efforts of deSmith in his introduction (at vi).

fundamentally the same book that was first released in the Clarendon Law Series in 1961. Many reviewers' commentaries on that first edition are still apposite: "it is therefore as much a hotch-potch of topics as any other book on the subject"; "[P]rofessor Wade regards as descriptively accurate what in my view is traditional mythology";[40] "there often seems to be in the book an undertone of harking back and an acceptance of the traditional legal attitudes in this whole field"; "one could have wished that administrative law had been put much more broadly in its setting in the modern state and all its mechanisms";[41] "Professor Wade has stuck to well trodden paths"; "his preoccupation is with legal and other constitutional controls over the exercise of power, and in particular with the infusion of 'the legal ideals of fair procedure and just decision' into the administrative process".[42]

Administrative Law consists of twenty-four chapters divided into seven parts. A fifty page Introductory sets the stage for Part Two, which offers a survey of the principal public authorities and government functions in the United Kingdom. Part Three is devoted to an explanation of the legal nature of administrative powers and to an outline of the general theory of jurisdiction. This analysis provides a framework within which the topics treated in Parts Four (discretionary powers) and Five (natural justice) may be evaluated. The sixth major division of the text treats judicial remedies and includes a discussion of prerogative orders and equitable relief, as well as Crown proceedings and public authority liability. Part Seven, which seems almost like an appendix to the main exposition, canvasses the legal aspects of what most North Americans consider to be the heart of the administrative process: delegated legislation, statutory tribunals (agencies, boards, commissions), and statutory inquiries (investigations, recommendations). In principle, this brief rundown of the table of contents should provide the experienced practitioner or teacher of Canadian administrative law with all the information needed to evaluate the usefulness of Professor Wade's text. But because this fourth edition seems to be enjoying substantial success in the United Kingdom, it is perhaps worthwhile to review once again some of the points raised in commentaries on earlier editions and to situate Professor Wade's analysis in a Canadian context.[43]

Although this work is entitled "administrative law" it is really an outline of the judicial control of administrative action.[44] There are three important consequences which flow from the author's identification of

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[40][1962] Camb. L.J. 111 at 111, 113. (Book review by J. A. G. Griffith).

[41](1962), 78 L.Q.R. 577 at 578, 579. (Book review by J. D. B. Mitchell).

[42](1962), 25 Mod. L. R. 618 at 618. (Book review by S. A. deSmith).

[43]It has also come to the reviewers' attention that this fourth edition is being assigned as a basic text in some Canadian law schools.

[44]*Cf.* Dussault, *Traité de droit administratif canadien et québecois* (1974).

administrative law with judicial opinions about the legality of an individual act of a public official. First, the subject matter considered appropriate for examination tends to be severely restricted in scope; second, from a process perspective, one is inevitably left with the impression that the work of the courts is admirable and that increased judicialization is desireable; third, many philosophically questionable assumptions parading as jurisprudential gospel are incorporated uncritically into several of the topics analysed.

One of the most nefarious consequences which flows from the confusion of administrative law and judicial review is the belief that the reality of administration takes place in the courts. Although Wade devotes 150 pages to examining various public authorities, little of the discussion focusses on the internal functioning of such bodies. In his introduction the author states: "administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities". . . . "All the detailed law about their composition and structure . . . lies beyond the proper scope of the subject."[45] In keeping with this perspective, little discussion is devoted to topics such as the workaday world of our public bureaucracy, government ownership of land or water, control of resources, the power to contract, the administration of justice (after all, courts are merely specialized administrative tribunals) or the civil service (including hiring, promotion and dismissal).[46] Surely the focus of a text entitled administrative law *prima facie* should be the administration, and an exclusionary definition must not be postulated, but in some manner justified. Yet at no point does Wade undertake a justification for his restricted definition of the proper scope of administrative law.

It is perhaps natural that a work authored by a lawyer should be mistrustful of government and should exalt the courts. Nevertheless, even the sympathetic reader can hardly be prepared for assertions such as "the primary purpose of administrative law . . . is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse". "The powerful engines of authority must be prevented from running amok. . . . Faced with the fact that Parliament freely confers discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the need of fair and efficient administration and the need to protect the citizen against arbitrary government."[47] If there is any reason for concluding that government is prone to corruption and that only lawyers and courts are capable of protecting private citizens, Wade does not state it.

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[45]Wade, at 6.

[46]Only chapter 3, "The Central Government", deals with any of these topics in a manner that can be applied to Canada.

[47]Wade, at 5, 24.

Generally, criticisms of excessive court intervention such as that advocated by the author are directed to the dangers of judicializing the administrative process. Wade seems oblivious to these criticisms, and in his advocacy of an expansion in natural justice, demonstrates a remarkable insensitivity to the variety of administrative procedures. This failure to consider decision-making paradigms other than adversarial adjudication can serve only to compound the doctrinal intolerance of the legal community. Moreover, throughout the chapters on "jurisdiction" and "discretionary power" there is absolutely no recognition that problems of statutory interpretation (which masquerade as legal *issues) are always policy questions.*[48] Is "self-contained unit" a question of fact, or of law? What are the characteristics of being "self-contained"? What criterion of relevancy makes a consideration "relevant" or "irrelevant"? What theory of motivation makes a purpose "improper"? It is unacceptable that a text which preaches the necessity for, and efficacy of, jurisdictional control by courts fails to examine how traditional theories of interpretation frustrate administrative policy without contributing to a more meaningful administrative law.

The view that questions of statutory interpretation involve no policy considerations is but one of several philosophically untenable assumptions which lawyers have grafted onto the law of public administration. Two others also deserve illumination. The belief that there is a field of decision-making which is entirely rule-bound and within which no discretion operates lies at the foundation of the "pure theory of jurisdiction" and doctrines such as "abuse of discretion". This bifurcation permits courts to claim that judicial review of the legality of administrative acts involves no determination upon the merits. However, it has been repeatedly demonstrated that such a dichotomy does not and cannot exist.[49] A second tenet of the gospel is the claim that any classification of functions must logically be prior to determinations affecting, *inter alia,* the application of the rules of natural justice or the availability of *certiorari.* Absent such a belief, no theory of limited review could survive; yet philosophy has clearly revealed the relativity of concepts.[50] It is unfortunate that two of the most questionable assumptions underlying our judicial system have been imported into administrative law; rather than focussing attention on the "beams" in their own theoretical system, lawyers seem intent on exorcising the "motes" they think they find in administrative decision-making. Unfortunately, in constructing his theory of administrative law, Wade seems to be wholly in accord with these traditional assumptions and unaware of their fallacy.

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[48]See, for example, *Bell* v. *Ontario Human Rights Commission* [1971] S.C.R. 756.

[49]Wittgenstein, *Philosophical Investigations,* para. 198.

[50]Hospers, *An Introduction to Philosophical Analysis* (1967), at 101-112.

Many of these points have been made in one form or another by various reviewers of this text's first three editions.[51] However, independently of these criticisms (which, to be fair, may be made of almost every text in this area) there are other reasons why *Administrative Law* may not be particularly useful as a Canadian text.

Despite some reference to Canadian cases, the text remains essentially a commentary on the law of the United Kingdom.[52] With respect to substantive questions, the problems resulting from this orientation present a double aspect. Much of the analysis and discussion is predicated on the fact that the United Kingdom is a centralized, unitary state. Hence, consideration of the difficulties faced by dual or federal jurisdictions is minimal, with the consequence that almost all of Part Two on "government authorities" is irrelevant. In addition, one of the characteristic features of North American administrative law is the existence of a number of semi-independent regulatory (and non-regulatory) agencies and commissions. Wade devotes one chapter to what in the United Kingdom are known as statutory tribunals, but his discussion is really of little utility to the Canadian lawyer. The observation that "the typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation"[53] is evidence that the semi-independent agency simply does not exist in the United Kingdom. In other words, important problems such as whether rulemaking or adjudication should be the preferred method of developing agency policy, or whether all or any decision-making procedures should be adjudicative in nature, or whether commissions should be insulated from judicial control by privative clauses, are left largely unexplored. The author's expressed mistrust of tribunals and his faith that a Montesquieuian "separation of powers" thesis should be applied to agencies renders most of his discussion meaningless in the Canadian context.

But it is not just on substantive questions that the book reveals its limitations as a Canadian text. Part VI on remedies and liability is only marginally useful, for no teacher here could fail to devote a substantial segment of his course to an examination of the jurisdiction and procedures of the Federal Court. Yet, for obvious reasons, no discussion of "federal board, commission, or other tribunal" or of "other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" appears. Moreover, both Ontario and British Columbia have enacted consolidating statutes which create new remedial distinctions such as "statutory power" and "statutory power of decision". Wade mentions these statutes but does not discuss their implications in any detail. Finally, the common law procedural tech-

[51]The points raised in the immediately preceding paragraph have not, to our knowledge, been made previously.

[52]There are citations to over 1500 cases of which approximately 100 are Canadian.

[53]Wade, at 744.

nicalities for obtaining each equitable or prerogative remedy differ as between the United Kingdom and most Canadian jurisdictions. In combination with our unique approach to problems of exhaustion, ripeness and standing and our specialized rules of public authority liability and Crown proceedings, these differences render most of Wade's analysis inapplicable. Consequently, there is little in the two hundred pages of Part VI that is directly relevant to our Canadian context.

In view of these comments one might conclude that *Administrative Law* is not a worthwhile addition to the library of a Canadian administrative lawyer. This conclusion would not, however, be correct, for the text is well-written, comprehensive, accurate and up-to-date. Wade's analyses of such areas as jurisdiction, natural justice and the nature of administrative powers are excellent. As a commentary on the law of judicial review in the United Kingdom it offers a first-rate, if somewhat one-sided, perspective. Yet it should be borne in mind that the text does not discuss the major part of administrative law. For the Canadian teacher or practitioner it may prove a valuable reference book, as long as he recognizes and compensates for its essential United Kingdom orientation. But in the hands of a student this text could be dangerous and one should be aware of its limitations. Our administrative law has suffered a laborious disentanglement from Dicey, and it would be unfortunate if another generation of Canadian lawyers grew up nursed on the priorities and perspectives of the English.

Reid and David, ADMINISTRATIVE LAW AND PRACTICE

The long awaited revision of Reid's *Administrative Law and Practice* (now co-authored by Hillel David, who was responsible for the 1976 Supplement to the first edition) is a disappointment to those seeking the definitive Canadian treatise or even some answer to especially perplexing problems with the subject. The great promise of the first edition has not been fulfilled by the second. Since the organization and approach are the same, the criticism and the praise directed at the earlier edition remain generally relevent.[54]

The first edition was hailed as the initial English-language Canadian text on the subject; it broke new ground and attempted to analyze judicial decisions with the degree of consistency suitable to the practitioner's needs. The author's failure to develop cohesively a rational framework for administrative law was attributed to the nature of the subject matter and not to a lack of insight on his part. Reviewers were agreed that although the book did ". . . not solve the basic problems, the fault does not lie with the author, but with the subject itself".[55] "If one

[54]For example, see Anhang, (1971), 49 C.B.R. 490; Henry (1972), 5 Ottawa L. R. 598; P. Hogg, (1971), 9 Osgoode Hall L. J. 663 and R. Dussault, (1971), 21 U.T.L.J. 583.

[55]Anhang, *ibid.*, at 492.

thing emerges from the various chapters as they unfold, it is the complete lack of consistency of the jurisprudence on almost all major points. This is a fact which students and practitioners alike must understand; to try to pin down the attitude of the courts is like nailing jelly to the wall."[56] One reviewer of the first edition was prepared to offer the criticism that "[i]t is a pity that the author did not impose more coherence on the material by identifying and elaborating those doctrines which seem to him to be satisfactory and by criticising those which seem to him to be unsatisfactory".[57] Yet, these critical comments were minor in view of the general approbation bestowed on a major first effort; and it was not without reason that the legal community expected a major breakthrough with the publication of the second edition.

In his original text the author had warned of overjudicialization and of a lack of clarity by the courts involved with judicial review, and of the evils which could accompany continued intervention without a sound theoretical framework.[58] Since Robert Reid had become, in the interval between editions, Mr. Justice Reid of the Ontario Supreme Court, with extensive experience in the Divisional Court dealing with applications for judicial review, a true insight into the mechanics of court review of the administrative process was awaited. One had hoped, as well, that some of the enormous difficulties caused by legislative initiatives in Ontario and at the federal level would be resolved. Unfortunately, these insights are not present. As a consequence, criticisms spared the inaugural work can no longer be withheld.

Since there is no forward or preface to the second edition it is difficult to understand what the authors were trying to achieve with their revision. Certainly, the original text has been updated by the inclusion of several recent cases. But, the original organization framework, although somewhat confusing and redundant,[58a] has been continued and most of the chapters are retained in the same order. The Case Citator, one of the main features of the first edition, has been deleted in favour of two short chapters dealing with "words and phrases" and "statutory provisions" considered in an administrative law context. A copious and up-to-date table of cases (case references were also a strong point of the first edition) is included. On the other hand, there is little reference to academic writing and there is no table of statutes. As a general impression, the result is a shorter book, but one with few substantive changes.

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[56]Henry, *supra*, at 598.

[57]Hogg, *supra*, at 663.

[58]Reid, (first edition), chap. 23, "A Summing Up".

[58a]One will note, for example, that several paragraphs at 52-3 are identical, even to the footnotes, to paragraphs at 179-80.

On the whole the text is a conglomeration of short, pithy, one-line statements of law as viewed through the cases, with little instructive or explanatory comment. The authors attempt no reconciliation of conflicting trends which have developed in the cases. Moreover, every case — be it from the Supreme Court of Canada or a provincial superior court — is treated as being of equal authority; no evaluation of judgments as good or bad, worth following or to be ignored, well-considered or poorly reasoned, is presented. Finally, the authors do not seem to have considered it to be their function to elaborate a "theory of jurisdiction" within which various errors of law and fact may be catalogued and analysed. There is perhaps a justification for this "digest approach" to scholarship once the underlying framework of an area has been explained and assimilated. But a basic text book such as this ought to serve a higher role than that of a mere compilation.

The tremendous emphasis which this second edition places on *certiorari* and natural justice without reference to the effect of statutory procedural changes on these topics is extremely anomalous. In British Columbia and Ontario there has been a substantial reform of judicial review remedies,[59] and other provinces have also attempted to overcome the technicalities associated with the prerogative writs.[60] Insofar as natural justice is concerned, both Alberta and Ontario have attempted to codify the *audi alteram partem* principle.[61] Yet almost no reference to these developments is contained in any of Chapter 1, "The Right to be Heard"; Chapter 2, "The Nature of the Hearing"; Chapter 6, "Natural Justice"; Chapter 13, "Certiorari and Prohibition"; Chapter 16, "Mandamus"; Chapter 18, "Declaratory Relief" or Chapter 19, "Injunctions". The final chapter in 1971, perhaps excusably entitled "Recent and Impending Legislation", should not have been continued in 1978 as "The Ontario Divisional Court, The Federal Court, The Statutory Powers Procedure Act, and The Judicial Review Procedure Act" when these are no longer peripheral to judicial review, but in fact constitute integral parts of Canadian administrative law.

The topics of rehearings, bias and standing are handled well in separate chapters, but no hypothesis is offered or proven.[62] Neither is a rationale attempted for the chapter on classification of function. Almost nothing has been added to the chapters on "What is the record?", "Quo Warranto" and "Damages", although substantial new

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[59] *Judicial Review Procedure Act* S.B.C. 1976, c. 25.

[60] For example, see changes in the Nova Scotia Rules of Civil Procedure outlined in Mullan *Reform of Administrative Law Remedies — Method or Madness?* (1975), 6 Fed. L. R. 340.

[61] *The Administrative Procedure Act,* R.S.A. 1970, c.2.

[62] For example, on bias see the recent trio of articles by D. P. Jones, *Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions* (1977), 23 McGill L. J. 605; *The National Energy Board Case and The Concept of Attitudinal Bias* (1977), 23 McGill L. J. 462; and (1977), 55 Can. B. R. 718.

developments have occured in each area.[63] Finally, even though citations of case authority are generally comprehensive, the recent abundance of decisions on the jurisdictional problems with the remedy of *habeas corpus* at the federal level have been ignored.[64]

The practicioner in search of cases to support his argument can still gain great benefit from the text, but he will find the treatment of recent legislation related to judicial review most inadequate. As noted, these statutes are not referred to in places throughout the text where they are relevant. Moreover, the Ontario Divisional Court and the Federal Court are analysed in one short chapter of eight pages, despite the major upheaval caused by these institutions. Important phrases such as "decision or order" in section 28 of the *Federal Court Act*[65] and "statutory power of decision" in the two Ontario statutes[66] are not examined closely nor explained with any degree of completeness. This arrangement and these omissions are very inappropriate and detract from the effectiveness of the work as a whole. This is to be regretted even more since Mr. Justice Reid is one of the few judges to appreciate in his decisions the true scope and intent of the Ontario judicial review legislation.[67] One looked forward with great anticipation to his observations from the perspective of a judge on how successful or unsuccessful the attempt to create a statutory law of judicial review has been.

Once again we are forced to conclude that this text probably does not merit serious consideration as a reference work — especially if one is already in possession of the first edition. Despite the enormous possibilities for rearrangement, original analysis of statutory developments, and critical commentary on the direction Canadian administrative law has taken since 1971, this second edition has accomplished no more than the addition of a case supplement to the first.

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[63]For example, in Chapter 14, "What is the Record?" no mention is made of the *Statutory Powers Procedure Act*, s. 20 which defines "record" for the purposes of Ontario tribunals.

[64]For example see: *Ex parte Gorog* (1975), 23 C.C.C. (2d) 225 (Man. C. A.); *Mitchell* v. *The Queen* (1975), 61 D.L.R. (3d) 77 (S.C.C.); *Ex parte Collins* (1976), 30 C.C.C. (2d) 460 (Ont. H. C.); and *Re Pereira and Minister of Manpower and Immigration* (1976), 14 O.R. (2d) 355 (C.A.).

[65]*Federal Court Act*, R.S.C. 1970, (2nd. Supp.), c. 10, s. 28 (1).

[66]*Judicial Review Procedure Act*, S.O. 1971, c. 48, s. 1(f) and *Statutory Powers Procedure Act*, S.O. 1971, c. 47, s.(1)d.

[67]For example, see his judgments in *Re Chadwill Coal Co. Ltd. and McCrae* (1976), 14 O.R. (2d) 393 (Div. Ct.) and *Hydro Electric Commission of Mississauga* v. *City of Mississauga* (1975), 13 O.R. (2d) 511 (Div. Ct.).

CONCLUSION

This survey of recent textbooks in Administrative Law has been critical. In addition to offering reviewers' standard complaints touching issues such as comprehensiveness, accuracy, tone and perspective, we have suggested that in many ways these works are simply ill-conceived. Rarely do they even hint at the schizophrenia which is inherent in all good legal treatises: the tension between the "system, system-builders and theorists" and the "practice, practicioners and sceptics".[68] Although it is arguable that such truly creative legal scholarship arises only at points of conflict or rapid development in the law, surely one must concede that Administrative Law is situated today at such a point. There is no better proof of the immature state of our thinking about this subject than the absence of doctrinal controversy in our text books.

On at least two occasions important branches of North American law have been developed and buffeted by conflicting theoretical undercurrents. The development by Pound of the "social interest" view of torts, now an established orthodoxy subject only to occasional sniping from heretics, endured a slow and painful birth in the first third of the century.[69] Similarly, the famous Williston/Corbin debate over the "classical theory of contract" dominated mid-twentieth century legal thinking.[70] Not surprisingly, these cross-currents were reflected in the writing about jurisprudence. For Pound,[71] Pollock,[72] and Salmond[73] "torts" was merely the substantive peg upon which their own distinctive theory of law was elaborated. For Fuller[74] and Llewellyn,[75] "mercantile and contract law" served a similar function. One cannot help but wonder whether "administrative law" will (or should) come to occupy a similar position as the twentieth century draws to a close. Already Davis[76] and others[77] have recognized the jurisprudential implications of their work. In Canada one sees glimmers of insight in the law reviews[78]

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[68]Compare Gilmore, *The Ages of American Law* (New Haven: Yale U. Press, 1977).

[69]G. E. White, *The Impact of Legal Science on Tort Law, 1880-1910* (1978), 78 Col. L. R. 213.

[70]Gilmore, *The Death of Contract* (Columbus: Ohio State U. P., 1974).

[71]Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale U. P., 1922).

[72]Pollock, *A First Book of Jurisprudence* (London: Macmillan, 1929).

[73]Salmond, *Jurisprudence* (7th ed.) (London: Sweet and Maxwell, 1924).

[74]Fuller, *The Problems of Jurisprudence* (temp ed) (New York: The Foundation Press, 1949).

[75]Llewellyn, *The Common Law Tradition* (Boston: Little, Brown, 1960).

[76]Davis, *Discretionary Justice* (Baton Rouge: L.S.U. Press, 1969).

[77]Vining, *Legal Identity: the coming of age of public law* (New Haven: Yale U. P., 1978).

[78]S. Wexler, *Discretion: the unacknowledged side of law* (1975), 25 U.T.L.J. 120.

but the fervor of fullblown debate has hitherto been absent. Aside from John Willis, whose critiques were largely pragmatic as opposed to philosophical,[79] Canadians have not plumbed the assumptions underlying their commentaries on law and government.

A book review is hardly the place to join issue on these matters,[80] but we offer, nevertheless, the following suggestions as to what questions this long-awaited debate might address. Their scope indicates why none of the three texts examined in this review are likely to stimulate their consideration. (1) Should law schools continue to teach common law subjects (cases, but no statutes) in preference to administrative law? (2) Should lawyers not be concerned with understanding the variety of administrative processes rather than judicial review? (3) Should not civil procedure be taught as a specialized administrative law course concerned with the institutional problems of adversarial adjudication? (4) Should theoretical models of rules and procedures for agencies be developed with the same degree of care as those relating to courts? (5) Does the proliferation of agencies signal the collapse of our society, or does it tell us that we are again engaged in a struggle to escape the fate of civilizations which succumbed to the internal assault of the legalists?

Only if we begin to address issues such as these will our understanding of the process by which democratic preferences are translated into government policy display the sophistication it deserves. At such a point will our textbooks become worthwhile both for the student struggling to prepare for exams, for the teacher seeking the nourishment of intelligent commentary on policy matters, and for the practitioner looking for the case or point upon which he can build a convincing argument. When this development occurs Canadian administrative lawyers will deserve to inherit the jurisprudential mantel of their private-law predecessors; for then are they likely to make a lasting contribution not only to the specifics of our law, but also to our thinking about the law itself.

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[79]J. Willis, *The McRuer Report: Lawyers' Values and Civil Servants' Values* (1968), 18 U.T.L.J. 351; *Foreign Borrowings* (1970), 20 U.T.L.J. 274; *Canadian Administrative Law in Retrospect* (1974), 24 U.T.L.J. 225.

[80]See however *Davis: Administrative Law Treatise — A Symposium Review* (1959), 43 Minn. L. R. 601-650.

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