

Non-Judicial Decision-Making

Steve Wexler

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Article

Citation Information

Wexler, Steve. "Non-Judicial Decision-Making." *Osgoode Hall Law Journal* 13.3 (1975) : 839-849.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol13/iss3/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

NON-JUDICIAL DECISION-MAKING

By STEVE WEXLER*

Most of the decisions which affect a person's legal rights and duties are not made in courts. They are made in other institutions and only the tiniest fraction of them are either in theory reviewable or in fact reviewed by courts. Nevertheless, lawyers and legal scholars pay a great deal more attention to courts than to the wide range of other institutions in which legal decisions occur, and a great deal more attention to the 'reviewability' of non-judicial decisions than to any of their other qualities. This preoccupation with the courts and with the judicial review of non-judicial decisions is understandable given legal tradition and training, but it means, first, that we ignore the overwhelming majority of the decisions which affect a person's legal rights and duties and, second, that we do not understand the institutions from which those decisions come. We simply do not see decisions which are not reviewable in the courts or the institutions in which such decisions occur as 'legal'.

Of course, this argument is circular. Because there is no way to bring certain decisions into court we do not think of them as legal, and because we do not think of certain decisions as legal there is no way to bring them into court. This article is expressed in the distinction which is made in administrative law between "judicial" or "quasi-judicial" acts on the one hand, and "administrative", "ministerial", "executive", "discretionary" or "absolute" acts on the other.¹

This distinction, which is basically very simple, causes a surprising amount of trouble. Some of the difficulty comes from an ambivalent use of the word "ministerial". It is sometimes used in the same way as "administrative" to refer to a decision which is not "judicial" or "quasi-judicial" (*i.e.*, an unreviewable decision),² but it is also used (particularly in the law of *mandamus*) in exactly the opposite way, to refer to a decision allowing for no discretion (*i.e.*, a reviewable decision).³

Using key words this way doesn't help, but the confusion about "ministerial" is not the major source of our problems. We have difficulty with the distinction between reviewable and unreviewable decisions primarily because we fall under the sway of the words that mark it. We make the mistake of believing that words such as "judicial" and "administrative" name, as they seem to do, certain qualities which decisions possess: qualities which one can see, and which enable one to distinguish those decisions which courts do and ought to review from those which they do not and ought not review. But the

* Assistant Professor of Law, University of British Columbia.

¹ S. A. deSmith, *Judicial Review of Administrative Action*, (2d ed. London: Stevens & Sons, 1968) ch. 2.

² *Id.* at 56, "It is sometimes used loosely to describe any act that is neither judicial or legislative."

³ *Id.* at 55, "It may describe any duty, the discharge of which involves no element of discretion or independent judgment."

qualities apparently named by words such as "judicial" or "administrative" don't exist, and therefore the search for them is bound to cause problems.⁴

The major one is that instead of trying to decide whether or not a decision should be reviewed, we try to decide whether it can be identified as "judicial" or "administrative". There are good arguments in favor of reviewing some decisions and not others; there are also good reasons for holding that a particular decision is reviewable and that another is not. But labeling a decision "administrative" or "judicial" is neither an argument nor a reason for treating it in any particular way. Those labels are legal talismans not legal tools; elements in legal ritual not legal analysis. Thus, no one can, nor should anyone expect to, sort out whether a decision is reviewable because it is "judicial" or "judicial" because it is reviewable. The word "because" has no place here: one might as well ask whether God's in his heaven because all's right with the world or all's right with the world because God's in his heaven.

The words "judicial", "administrative", "ministerial", *etc.*, like most legal words, link a certain, fairly precisely defined range of consequences with a certain, fairly imprecisely defined range of antecedents. They are not a way of finding out the sense of things but a way of marking out the sense we've made of things. They express the particular way in which we've decided to channel an unlimited number of distinct events and circumstances into a preconceived and limited number of paths.

I do not wish to suggest by what I've said that legal words are senseless, or that the way the law channels events is arbitrary; there is, often enough, a great deal of sense behind the distinctions that the law makes. But, as the following quote makes clear, the sense behind the distinctions is easily lost in pursuit of the qualities which the words expressing the distinctions seem to name:

The withdrawal of or restrictive interference with privileges, the normal punishment for a disciplinary offence which is not flagrant or serious, does not affect any civil right of the inmate as a person: and if the exercise of the disciplinary powers inherent in the administrative functions of the institutional head results only in the withdrawal of privileges, this is not the exercise of a power which so affects the civil rights of the prisoner as a person as to endow the withdrawal or interference with the character of a judicial act. Of a similar nature we consider the crediting or abstaining from crediting remission which is defined as "earned remission" to be a purely discretionary administrative act on the part of the officers of the Service.

On the other hand, forfeiture of statutory remission as a penalty would entail the prolongation of the period of confinement beyond the time for which the inmate has been sentenced, less the statutory remission with which he is entitled to be credited; to that extent it would affect his liberty and a decision to forfeit such remission would accordingly be reviewable on *certiorari*.

The ordering of corporal punishment which is punishment inflicted *upon* the person, e.g., strapping as opposed to punishment *of* the person, e.g., alteration of the locale or nature of confinement, does affect the civil rights of an inmate to personal security. Therefore, the decision to award corporal punishment is the exercise of a power by its nature judicial.⁵

⁴ For a full explanation of this view on legal words see A. Ross, *Tû-Tû*, (1957), 70 Harvard L. R. 812.

⁵ *R. v. Institutional Head of Beaver Creek Correctional Camp ex parte McCaud* (1969), 2 D.L.R. (3d) 545, at 551.

Oh really? And is the decision to put a prisoner in solitary confinement an "administrative" or a "judicial" act? Is solitary confinement a punishment inflicted *upon* a person or punishment *of* him? Does it affect a "right" or just a "privilege"?

For reasons which I will give in a moment, I do not intend to say much more about the difference between reviewable and non-reviewable decisions. It is worth noting, however, that the area of reviewable decisions has grown a great deal in recent years, and it continues to grow. Poverty law, prison law, the law about native peoples, immigration law, ecology law, consumer law, all are examples of areas in which lawyers have obtained, or are seeking to obtain, judicial review of decisions which were not reviewable before. In these areas lawyers have made or are trying to make us see decisions as legal, which used to not be seen as legal.

But somehow the whole distinction between reviewable and non-reviewable decisions is misleading. Administrative law, the area from which the distinction comes, is about what goes on in courts not what goes on in administrative agencies. And, because the distinction between reviewable and non-reviewable decisions makes us look at non-judicial institutions in terms of the courts rather than on their own terms, it blinds us to what really happens in them.

Our mistake, a mistake forced on us by legal tradition and training, is to see decision-making exclusively as a rational activity which takes place in the conscious mind of the decision-maker. For lawyers, decision-making is a mental process in which standards of some sort — rules, principles, policies, *etc.* — derived from a variety of sources — statutes, regulations, cases, custom, *etc.* — are applied to particular cases.

Of course, some decision-making is like that, in fact, some part of *all* decision-making is like that; it does take place in the conscious mind of the decision-maker. But a great deal of decision-making, especially non-judicial decision-making, does not. It takes place not only outside the conscious mind of the decision-maker but outside the decision-maker altogether. For that reason it is misleading to speak of non-judicial decisions being "*made*". They *occur*, and we come closer to the mark if we see the non-judicial decision-maker floating about in the decision-making rather than the decision-making taking place in his head.⁶

There is, of course, a growing body of non-legal literature about organizations, administrative structure, decision-making, bureaucratic psychology, *etc.*⁷ There is a great deal in that literature which lawyers would do

⁶ In *Discretion: The Unacknowledged Side of Law* (1975), 25 U. of T. L.J. I tried to paint a portrait of law which revealed its personal, subjective, non-rule governed face. I now think that, though I was going in the right direction in that piece, I did not go nearly far enough. To talk about decision-making in terms of discretion is still to see it as primarily a conscious, rational activity which takes place in someone's mind.

⁷ P. Nonet, *Administrative Justice* (New York: Russell Sage Foundation, 1969); P. M. Blau, *The Dynamics of Bureaucracy* (2d. ed. Chicago: U. of Chi. Press, 1964); N. Crozier, *The Bureaucratic Phenomenon* (Chicago: U. of Chi. Press, 1964); A. Downes, *Inside Bureaucracy* (Waltham, Mass.; Little, Brown & Co., 1967); M. J. Hill, *The Sociology of Public Administration* (New York: Crane, Russak & Co., 1972); H. J. Elcock, *Administrative Justice* (New York: Marlow, Longmans, 1969).

well to study. But lawyers ought to begin to explore the nuts and bolts of non-judicial institutions for themselves. There are solid, practical reasons for doing so, since even the most casual exploration of the ways in which non-judicial institutions work reveals a wealth of strategies for affecting their decisions. And lawyers are, after all, in the business of affecting decisions.

Moreover, if the inquiry I am suggesting is important for all lawyers, it is especially important for those lawyers who wish to attack social inequities. The injustice in our society is not fashioned case by case, and it is not enshrined in statutes. Rather, it is embedded in the routines and assumptions which lie hidden between the rules and the cases. Our inequitable social system is built and rebuilt continuously, by people who almost never see themselves as making evil choices, and very often don't see themselves as making any choices at all. The visible, individual decisions on which lawyers concentrate, whether they are judicial or non-judicial, reviewable or non-reviewable are not the machinery that creates and maintains our inequitable social structures. Individual decisions are manifestations of inequity, not the tools for fashioning it; they are the icing, not the cake.

Those of us who want to change things must look more closely at the background out of which non-judicial decisions seem to spring. Up until now, that background has gone largely unnoticed. It has fallen between two stools. Lawyers have been loathe to look at it for fear that it was political. And politicians have left it alone for fear that it was not. It lies far enough behind the individual cases to be just out of reach of the law, and far enough in front of the large social issues to be just out of reach of parliamentary politics. The result is that the people whom it affects have absolutely no way to affect it.

This article is an attempt to begin to examine non-judicial institutions, administrative agencies and other institutions as well, from a new perspective — a perspective designed to illuminate what goes on in the black box between the debate over social issues and the decision of individual cases. To begin, I will point out one very simple way in which decision-making bodies differ. Pursuing that difference will not lead us to the normal distinction between courts and non-judicial bodies, but, as I hope will become clear later, it will nevertheless help us understand some of what is characteristic of both judicial and non-judicial decision-making.

It is obvious that some decision-making bodies handle a great number of cases while others handle comparatively few. What is not so obvious, but is I think clear on reflection, is that, as a rule, the more cases a decision-making body faces, the more likely it is that every one of its cases poses exactly the same question.⁸ If we ignore such things as their names, the categories in which they are usually put, and the particular content of their decisions, decision-making bodies can be spaced out along a spectrum which runs from those bodies, such as welfare offices, which handle a great

⁸ Professor Berner of my faculty has suggested that another way to say the same thing is that the more cases a body handles, the more limited its range of what we traditionally call "remedies", that is, responses it can or will make to any case.

many cases all of which involve the same few questions (*e.g.*, is the applicant eligible), to those, such as appellate courts, which handle a small number of cases each of which raises different questions.

Now, it is characteristic of non-judicial institutions that they come at one end of this spectrum. They and the people who work in them make a tremendous number of repetitive decisions, and this single fact has, I think, a great deal of impact on the way non-judicial decisions are made. In fact, it produces most of the traits we take to be characteristic of non-judicial decision-making.

Since I do not expect to arrive at the usual distinction between courts and non-judicial bodies, I do not have to claim what is obviously not true, that only non-judicial bodies face a great many cases which are all roughly the same. Obviously, some courts do face a case load similar to that confronting non-judicial bodies. But courts with that sort of case load — traffic courts, divorce courts, petty criminal courts and the like — retain the name “courts” mostly for historical reasons; notoriously, they function more like non-judicial bodies than like what we usually think of as judicial bodies. There is no need to worry about what such bodies are called, but it is important to admit rather than to deny their non-judicial quality. In fact, what I am after here is essentially an explanation of what we mean when we say that courts of this sort, like non-judicial bodies, do not make decisions in the way we usually think courts do. If we could get at the ways in which such courts resemble the bodies at the non-judicial end of the spectrum, and differ from the judicial ones at the other end, we might find out what it is that is characteristic of both.

The administrative law distinction between acting judicially or quasi-judicially and acting administratively undoubtedly grows (as the word “quasi-judicial” makes so clear) out of the image of a special court-like way to make decisions. At one end of the spectrum which I have sketched, is our image of the way a court acts. We know that that way of acting is very special, and we are aware that most decision-making bodies, and even many courts, do not act in that special court-like way. There is some tendency in administrative law to associate this court-like way of acting with something about the substance of the decisions which courts make: that is, to rest the distinction between judicial and non-judicial, on the supposed difference between privileges and rights. But what is special about the way we imagine courts to act has as little to do with the substance of the decisions which courts make, as it has to do with the name “court”. And the attempt to distinguish non-judicial bodies on the basis that one decides about privileges, while the other decides about rights is, therefore, not only nonsensical but extremely misleading.

The major difference between the way a judicial body acts, that is, between our vision of the way a court acts, and the way other bodies act, is that judicial bodies do not mass-produce decisions. Each case is treated separately as a distinct and clearly marked thing. Of course, judges are supposed to take account of judgments which have been rendered in similar cases, but the whole notion of *stare decisis* — of treating similar cases in similar ways — assumes, indeed it requires, that each case is a separate,

distinct thing which, though it may be *like* other separate, distinct things, is always and irreducibly itself.

This is precisely what is not true of non-judicial decision-making. There is no talk of *stare decisis* in non-judicial decision-making because there is no need for such a notion: there are so many cases before any particular non-judicial decision-maker and all of them raise questions which are so similar, that no case is seen or treated as a separate, distinct thing which counts of and by itself. Judicial decisions are made one-by-one; each decision is the decision for one case and it fits no other. Non-judicial decisions, whether they occur in "quasi-administrative" courts or in bodies which are non-judicial in name as well as style, are not made one-by-one. At the end of the non-judicial process a decision is attached to every case, but the decisions are mass-produced to fit all the cases and no decision is made about any one particular case.

It seems paradoxical, but the more individual cases a body handles, the less sense it makes to talk as though the people in it *made* decisions about individual cases. The more cases an institution handles, the more it will tend to mass-produce its decisions, and mass-producing decisions is entirely different from making decisions one-by-one. When decisions are mass-produced they are not, in any real sense, the result of a deliberative process which goes on in someone's mind. There may or may not be a deliberative step in their production, but whatever deliberation there is will be at most one factor in a much larger process. Mass-produced 'decisions'⁹ are affected by distant occurrences in the decision-making institution: by the way it budgets, by the way it selects, trains and evaluates employees, by the way it controls and shapes the stream of cases it handles, by the way it monitors and evaluates its activities, by the way it relates to other institutions, by its physical plant, *etc.*, by a host of factors which one does not have to worry about in institutions which make decisions one-by-one.

Needless to say I am describing extremes which melt together in real life. But the tendency toward mass-production and away from case-by-case adjudication is the central, critical reality about non-judicial decision making. I would like to explore some of the characteristics of this sort of decision-making. The most important one is that no single case affects the institution or the people in it who make the decisions. There are two separate but inter-related points here. The first is an emotional one, the second a structural one.

There is a tremendous emotional discrepancy between the people who make non-judicial decisions and the people affected by them. Each person about whom a decision is made cares a great deal about the decision which is made about him; his single case is important to him. But to the non-judicial institutions and the people in them who make decisions about other people no single case is important. This discrepancy in their emotional stances is

⁹ In a sense it is misleading even to speak about decisions here. I will continue to use that word, but only because there is no other. That, of course, is both a symptom and a cause of the problem which I am trying to explore.

clearly perceived both by the people who make decisions and the people about whom decisions are made, and almost inevitably it sours whatever relationship they have.

The point I am making here, I must stress, is an analytical one and not a political one. It is not meant as a criticism of particular non-judicial institutions or the people who work in them. Many non-judicial institutions do a good job, and, even in the ones that do not do a good job, there are people who do. But all non-judicial institutions and all the people who work in them are up against an inescapable fact: no one who makes exactly the same decisions over and over again about people he doesn't know will care about the particular decisions he makes. Anyone who has ever had to sit on a committee which made a great many repetitive decisions about other people will remember how giddy the meetings became, what sorts of silly distinctions were made, and how eventually someone facetiously suggested flipping a coin. What is unfortunately true is that, for the person who makes the decisions, flipping a coin would not be so silly. He does not care about the outcome of any particular case. And so far as he is concerned, once the clear cases are decided in the obvious way, the large number of close cases which remain to be decided might just as well be decided by flipping a coin.

This brings me to the structural point. Neither the institutions nor the people who make non-judicial decisions do flip coins. They may sometimes feel like doing so, and their attitude may make it look as though they were doing so, but they don't; and they don't really want to. In the first place, responsible people are not supposed to make important decisions that way, and non-judicial decision-makers, like the rest of us, think of themselves as responsible people. More important, if the decisions they make could really be made by flipping a coin, the institutions and the people who make decisions would lose the sense that their work was important.

But, if they don't flip coins and don't feel it is right to do so, neither do they plow through the details of hundreds of files. They don't because they know that doing so would get them nowhere. They know that there is no way to tell whether the single, 22 year old applicant who is in good health and has a 74 G.S.R.E.,¹⁰ 2.6 years of continuous, recent, directly related experience

¹⁰ G.S.R.E. is, of course, the Goldstein-Strutt Radiometric Evaluation. At one time this objective, efficient standard basis for ranking all applicants for anything on the basis of their dominant colour and height-above-sea-level was expected to render all other criteria for judgment unnecessary. The high hopes which were at first held out for the G.S.R.E. have, however, in the light of new data, proven to be unrealistic. The latest work, fully documented and summarized in Hartze and Puffle, *G.S.R.E. Big Boon or Big Boondoggle?* (1974), 6 J. of Semantic Profusion 721 demonstrates conclusively that G.R.S.E. is at best only .6 (\pm 1.4) more effective as a guide to selection than the venerable E.M.M.M.M. (Eeny, meeny, meiny, mo method). Since G.S.R.E. is so much more costly than E.M.M.M.M. its use is rapidly being phased-out and I mention it here merely as an example of the wide range of standard, efficient, objective, acronymically designated tests which measure so many strange and wonderful things today. I make the same point I am after in this footnote in a more traditional way a little further on in the text and also in *Discretion: The Unacknowledged Side of Law* (1975), 25 U. of T. L.J. 120 at 142-43.

and a sick mother is preferable to the divorced, 36 year old applicant who wears glasses, has a 72 G.S.R.E., a total of 6.1 years of intermittent, indirectly related experience which is 7 years old, and a retarded child. They also know that there is no way to tell how either of those applicants compares to the married, 54 year old applicant from Yellowknife, who has a history of heart trouble, no experience and a 78 G.S.R.E.

If we adopt the traditional picture of decision-making, the non-judicial decision-maker seems to be in a bind. He faces a great many cases, each of which poses the same question: Do we grant the loan? Do we admit the applicant? Do we grant permission? A few of the cases before him call for an obvious decision one way or the other; but the vast majority do not. He must decide them, but he cannot do so by flipping a coin or by digging into every file. Flipping a coin is irrational, irresponsible and demeaning. Digging into every file not only takes too much time, it gets him nowhere; the deeper he digs the less able he is to decide.

The solution, and it is uniformly adopted, is to move away from deliberating about *each* case and to construct or settle on one criterion which can be mechanically applied to *all* the cases. That criterion must require no digging; it must be something which can be easily picked out of every file. It cannot require agonizing assessments or personal judgments, but rather it must be (or appear to be) "objectively" determinable. It must decide each case unequivocally, and therefore it must either be the sort of thing which can be said to be definitely so or definitely not so about every case (for instance, "over 16" or "a mother") or else it must be the sort of thing which can rank every case on a numerical scale fine enough to distinguish between the last "yes" and the first "no". Thus, it will not do to rank cases as "ones" "twos" and "threes" unless you can say "yes" to every "one", and "no" to every "two" and "three". If the "ones" are either too large or too small a group of "yesses", then the scale must be refined to . . . 1.7, 1.8, 1.9, 2.0, 2.1. . . . The same, of course, is true for the so-or-not-so type of test: it cannot just divide the cases up; it must divide them up in an acceptable way.

Now, this notion of the criterion dividing the cases up in an acceptable way is very important, and it explains the particular sort of indifference to individual cases which is characteristic of non-judicial decision-making. We can see the point most clearly if we contrast judicial with non-judicial decision-making. I have said that non-judicial decision-making is characterized by an indifference to individual cases. But, there is a sense in which the same thing could be said of judicial decision-making; it should not, and generally does not matter to a court who wins the case before it. In fact this lack of interest, this impartiality or indifference, is the highest virtue ascribed to our courts. But there is a critical difference between the indifference to cases of judicial and non-judicial institutions.

The whole point of courts is that they make decisions about other people's business but have no business of their own. They have no function except making decisions. This is precisely what is not true about non-judicial institutions. They do, and are in fact supposed to have interests of their own. Non-judicial decision-makers are indifferent to their individual cases but they

have something else to worry about; unlike the courts they have a program to pursue, and deciding individual cases is not for them an end in itself but a means to other ends. What counts for non-judicial institutions and for the people who work in them is not their individual decisions, but the *pattern* of those decisions.

The pattern counts in a number of ways. First, the institution has a program to pursue. It wants to accomplish certain real goals in the world, such as providing housing for people who need it, or making sure that tainted meat doesn't get on the market. No single decision, or rather no identifiable one, really counts in the pursuit of that goal. The agency can be providing housing for people who need it though in one particular case it denies housing to someone who needs it. The institution's success at its program is a matter of the pattern of its decisions, not any one. Moreover, every institution has, in addition to its stated purpose, certain other purposes. Institutions seek to perpetuate themselves, to get higher budgets, to match the performance of institutions which do similar jobs, *etc.* And purposes such as these, like an institution's stated purposes, are affected by the pattern of its decisions, not the decisions themselves.

The pattern of decisions is also what counts for each real person who actually makes the individual decisions. Each case worker, field officer, operator, unit manager, *etc.* realizes that it is the pattern of the decisions he produces which affects both his career within the institution and, perhaps more important, his day's work. He knows that his cases are tabulated and, though the institution reassures him that the tabulation is "for information purposes only", he suspects, correctly I think, that there is no such thing as "information purposes". Nobody collects records just to put them in a drawer marked "information".¹¹ The institution has almost no relevant information about its employees besides their 'score', and each person in the institution knows that if his score is close to everybody else's he will not get fired and he will not get hassled or supervised. His program (and this is independent of whatever programs the institution has) is to have a smooth working day, not to get into trouble with his immediate superiors, and to make more money next year than he did this year. To accomplish this program, he must pay attention to the pattern of his decisions but not to any one in particular.

Of course, no real court is entirely oblivious to the pattern of its decisions and some courts have fairly precise programs to pursue. Moreover, judges, like everyone else, worry about their careers; they care about the impression they make on other judges, on lawyers, on their clerks, the people in the gallery, their wives, their children, history, *etc.* Even the most exalted ones care, as Professor Greenwood has shown, about the prestige, the power and the future of the court on which they sit.¹²

¹¹ What are "information purposes"? Or to put it the other way, what are the other purposes which that phrase is supposed to reassure one are not at issue? Especially when the word "just" is thrown in, the phrase seems designed to reassure one that *no* purpose at all is being served, hence there is no need to worry.

¹² F. Greenwood, Lord Watson, *Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's* (1974), 9 U.B.C.L.R. 244 at 277.

But lawyers are trained to look at cases, and trained to see decision-making in terms of ideals appropriate for bodies which do not have programs to pursue, either personal or institutional. We think of decision-making in terms of an ideal body which deliberates about every case; a decision-maker whose criterion-of-decision is embodied in each separate, distinct case, and whose pattern of decisions will exist, if at all, only in the future. The way we learn about law stresses the fact that the criterion-of-decision is so complex that it exists in its application, and the pattern so attenuated that it only exists in retrospect. Because of our training we misunderstand non-judicial institutions. We cannot fathom, for instance, the seemingly capricious way in which they either cave-in or stiffen-up on certain cases. We take each case as important, and assume the decision-maker does too. But he does not, and his decision in any particular case, therefore, can be affected by factors which are related to his program, personal, or institutional, but have nothing to do with the particular case at issue.

Inevitably, for non-judicial decision-makers the cases swim together. The court-like way of making decisions, in which each case is separate and distinct, is only possible when there are a relatively few cases on any particular question. When there is a flood of cases (not the ten or twenty cases the courts envision when they talk about "the flood-gates of litigation" but hundreds of cases involving exactly the same question), the notion of case law, the notion of court-like decisions, the notion of each case standing on its own feet, all such notions necessarily go by the boards. And when a lawyer is dealing with a non-judicial institution, whether she wants to change the institution itself or just one of its decisions, she must learn to look past what she is trained to see, to look past the decisions in cases, to the criterion-of-decision which lies behind the cases, the pattern which that criterion expresses, and the personal and institutional factors which affect both.

Though non-judicial bodies often pretend it is so, neither the pattern of their decisions nor the criterion of decision which generates the pattern is written in the stars; both grow out of the routines, aspirations and assumptions of particular institutions and the people who work in them. Sometimes the people in the institution are conscious of the tangle of factors which affect their decisions, sometimes they are not. Sometimes the critical factors occur at the highest level of an institution, sometimes at the lowest. Sometimes what lies behind the decisions will be acknowledged, sometimes it will be hidden.

What it comes down to is this: if there is a special sort of welfare allowance which one can get only after a talk with a counselor, and if, in the office where the counselors are, one must wait three hours to see someone, and if there are only two toilets, and if the office is crowded, then a lot of mothers with children will wind up "denied for failure to see counselor". Of course, if, despite all this, the agency expects a pattern in which mothers with children get the allowance, then in deciding the cases which are not "denied for failure to see counselor", the counselors will apply the criterion "all mothers get the allowance". The counselors will learn this criterion not from the agency's manual, or from the regulations or the statute, but from hearing scuttlebutt in the office, from seeing who gets promoted, from being asked why they are low on grants to mothers with children, *etc.*

Nowhere in this complex process is there a rational process such as the one lawyers are trained to think about. Any particular non-judicial decision is, as the decision about the welfare allowance would be, the result, mostly unseen and unintended, of whole congeries of actions and inactions which seem to have little or nothing to do with deliberation or the decision of cases. Lawyers have not been encouraged to look at what lies behind decisions. Indeed our training and tradition focuses our attention on that end of the decision-making spectrum where it is both irrelevant and improper to ask how the decision-making institution budgets, how it selects, trains, evaluates and promotes employees, how it controls and shapes the stream of cases it receives, how it informs people of its programs, how it monitors its own programs, how it relates to other institutions, how it perceives its programs. And yet, these are precisely the sorts of things that we must look at if we are going to deal with non-judicial institutions.

