

Why I Don't Teach Administrative Law (And Perhaps Why I Should?)

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Commentary



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Abstract

This Commentary reflects upon the challenges of teaching Administrative Law today. Drawing upon the author's own career trajectory and his commitment to a critical account of law and adjudication, the article seeks to question the foundations of both administrative law and critical theory. It offers no comprehensive or cogent plan as to what to do, but insists upon the relevance and importance of combining both legal theory and legal doctrine in a convincing pedagogical approach.

Keywords

Administrative law--Study and teaching (Higher)

Commentaries

Why I Don't Teach Administrative Law (And Perhaps Why I Should?)

ALLAN C. HUTCHINSON*

This Commentary reflects upon the challenges of teaching Administrative Law today. Drawing upon the author's own career trajectory and his commitment to a critical account of law and adjudication, the article seeks to question the foundations of both administrative law and critical theory. It offers no comprehensive or cogent plan as to what to do, but insists upon the relevance and importance of combining both legal theory and legal doctrine in a convincing pedagogical approach.

Ce commentaire porte sur les défis qui accompagnent aujourd'hui l'enseignement du droit administratif. S'inspirant de la propre expérience professionnelle de l'auteur et de son engagement envers un compte rendu fidèle du droit et de l'arbitrage, cet article remet en question le fondement tant du droit administratif que de la théorie du criticisme. Il ne propose aucun argument exhaustif ni convaincant sur ce qu'il y aurait à faire, mais insiste sur l'à-propos et l'importance de combiner dans une approche pédagogique convaincante la théorie et la doctrine juridiques.

A COUPLE OF YEARS AGO, I was approached by my Dean, Lorne Sossin, to teach a high enrolment course in Administrative Law. The School was in a bit of a bind and the clock was ticking. I had never taught Administrative Law before, but had written in the area and kept a weather eye open for recent comings and goings in legal doctrine. This meant that I knew enough to sense that this was no easy undertaking and could not be done without some serious preparation.

* Distinguished Research Professor, Osgoode Hall Law School, York University, Toronto, Canada. This essay is based upon a talk that I gave at London School of Economics in October 2014 at the invitation of Tom Poole. I am grateful to Tom Poole, Jennifer Leitch, Lorne Sossin, other friends and colleagues, and, of course, my Administrative Law Class of 2014 for critical assistance and intellectual support.

Nevertheless, against my better judgment and with Lorne's encouraging charm, I agreed to give it a shot. I had racked up some professional debts to Lorne and the school and decided that this was one way to settle my account. Administrative Law it was to be.

As I began to get myself up to speed, I remembered Antonin Scalia's famous quip that "administrative law is not for sissies."¹ I took this more as a thrown gauntlet than a shot across the bow. I was no academic sissy and relished the idea of taking on a fresh challenge. Also, over the years, I had made much of the fact that my colleagues needed to be less precious in their expressed unwillingness to teach in anything other than their areas of narrow specialization. In the past, I had taught Constitutional Law without having much background in it and had emerged relatively unscathed (and much the wiser). So it was a kind of put-up-or-shut-up moment for me. However, as I soon realized, it was another instance when my bravado got the best of me. I had acted in haste and now had ample time to repent at leisure. Was Administrative Law a bridge too far? Was the gig up?

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As with much of my teaching, I started with the operating premise of the great Oliver Wendell Holmes Jr.—why is that some of the greats had wonderful monikers to match?—that lawyers, and especially judges, "spend too much time shoveling smoke."² It was my job as a critical theorist and professor to clear away some of that murkiness and reveal, for good and/or bad, what lay beneath. My general go-to position was that it was important to read between the lines as much as read the lines themselves; the sub-text and larger context of judgments was as illuminating as the text itself. This did not mean that legal doctrine was not to be taken seriously, only that it was not to be taken too seriously. What was not said and why it was not said gave meaning and force to what was said and why it was said. So, whether teaching Tort Law (as I had done for many years) or Administrative Law (as I had not done before), I adopted the same critical frame of analysis. To both my relief and chagrin, this proved to be a worthwhile and rewarding approach.

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1. Antonin Scalia, "Judicial Deference To Administrative Interpretations Of Law" (1989) 1989:3 Duke LJ 511.
 2. Edward W Knappman, *Watergate and the White House*, vols 1-2 (New York: Facts on File, 1973).

Choosing a casebook for the course was easy. Lorne Sossin and Colleen Flood's book, *Administrative Law in Context*,³ seemed to be the obvious choice both for reasons of pedagogical quality and institutional loyalty. It was as much a textbook as it was a casebook. As the title suggested, it sought to put the law side of the administrative process into a more practical and less abstract setting. I supplemented the book with a series of readings from the leading cases that were studied in the text. While the book was not the traditional fare of law school classes, it provided a stimulating, if mainstream, presentation of the law and courts. I supposed this would provide a convenient foil to my own more critical comments and skeptical ideas. It was both my life belt and my target.

A good place to begin my preparation was an article that I had written many years, even decades, before: "The Rise and Ruse of Administrative Law and Scholarship."⁴ Fittingly, it had been published in the *Modern Law Review*, which was the scholarly journal of the London School of Economics (where I most recently gave a talk that was the origin of this essay).⁵ On re-engaging with the piece as much from a reader's perspective as from that of an author, I was struck by its strident and uncompromising tone. It was the product of an 'angry young man' who thought that he had much to prove to the world about the law and, as importantly, about himself. It took a take-no-prisoners stance on the development of modern administrative law and the contributions of its judicial and academic apologists. I felt a little sheepish about this approach as I am no longer as angry nor as young, but I took some solace from the fact that at least I was, if I may, 'man' enough to speak my mind, and that my mind was pretty much on the right track.

The main thrust of the article was that judges are part of a deeply ideological enterprise in which the need to make political choices, even if masked is inevitable. Moreover, despite efforts by mainstream theorists, especially Ronald Dworkin, to demonstrate that these choices are the law's and not those of judges personally, I insisted that no background theory could pull off that jurisprudential feat:

Legal doctrine does not conform to any simple logic and is unified only by its enduring indeterminacy ... With imagination and industry, legal materials can be organised so as to support radically inconsistent positions. In so far as it is possible to defend a variety of plausible theories, no one proposal can lay claim to exclusivity or universality. Meaningful interpretation is only possible where there already exists a

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3. Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013).
 4. Allan C Hutchinson, "The Rise And Ruse Of Administrative Law And Scholarship" (1985) 48:3 *Mod L Rev* 293.
 5. *Ibid.*

commitment to a shared set of values. However, as in the political domain, the legal territory is a focus of conflict. There is a pervasive matrix of contradictory forces which prevents the establishment of a sufficiently full tradition of shared understandings. The indeterminacy of legal doctrine finds its energy and power in the antithetical modalities of individual and community. This deep logic of contradiction sustains and ensures an inescapable scheme of doctrinal indeterminacy. Doctrine can be consistently converted into its own opposite self-image.⁶

I am less dogmatic and schematic in my approach today. I am also less persuaded that there is always a “deep logic” at work; this is too formulaic and analytic. From a more pragmatic perspective, the development of legal doctrine is best characterized as being more about muddling through than the manifestation of some structural dynamics. The need to connect judicial activity with legal theory remains paramount, but I have a less imperialist and grand understanding of what theory is or can do; it is more an artistic endeavour than a scientific one. However, I still very much retain a critical stance and hold the view that the best account of law is summarized by the notion that it is “indeterminacy with a cut.”⁷

When I first started teaching, I was haunted by the same insecurity that I had as a student. While preparing for an Evidence class, I strove to explain and present the relevant legal doctrine in terms of a coherent and convincing framework. In this way, law could be understood as the entirely rational enterprise that it was proclaimed to be. Any failure to achieve that state of academic repose was a personal weakness on my part, not a feature of the legal doctrine. As I walked into class, I thought that I had it all worked out in my mind. But, as I began to lecture (and that was what I did to begin with in my early English years), the clarity and grasp of the doctrine that I had experienced only a few minutes earlier began to slip away. Instead of being a finely balanced and rationally sophisticated structure, it turned out to be so much pie in the sky. The doctrine collapsed in on itself and became more accurately depicted as a series of generalized rules with numerous and discretionary ad hoc exceptions on ad hoc exceptions. I still defy anyone to articulate the law of hearsay in other terms. It might be said that the smoke was so thick and so disorienting that even the flimsiest handhold was welcome.

At root, the problem was the foundational belief among judges and scholars that the law did make sense and that, if it did not, it was the fault of judges

6. *Ibid* at 297; see also Allan C Hutchinson, “Mice Under a Chair: Democracy, Courts, and the Administrative State” (1989) 40:3 UTLJ 374 at 375. The bottom line was that “the work of the courts is qualitatively incoherent and...inescapably political.”

7. Allan C Hutchinson, *Towards an Informal Account of Legal Interpretation* (New York: Cambridge University Press, 2016). See also Allan C Hutchinson, *The Province of Jurisprudence Democratized* (Oxford: Oxford University Press, 2008).

who must be chastised and corrected by academic commentators. For example, C.P. Harvey's conclusion that the law of evidence was "less of a structure than a pile of builders' debris"⁸ and Rupert Cross's observation that judges and lawyers relied on "distinctions absurd enough to bring a blush to the most hardened academic face"⁹ were very much to the point. However, both these esteemed scholars assumed that the jurisprudential project of making evidence law make deep and enduring sense was possible and realizable. It simply had not achieved that exalted status at that moment or in that doctrine.

As I grew in confidence and read more widely, I began to reject the traditional black-letter and even black-theory standpoint. The *raison d'être* of the academic project was to make sense of legal doctrine, but what that involved was very much open to contestation. Rather than be content to indicate the non-rational failings of particular legal doctrines, I set out to elucidate the non-rational failings of legal doctrine as an entire enterprise. In other words, I set out to make sense of why legal doctrines and judicial decisions did not make sense. It was essential that rigour and discipline be brought to that task. There might well be instances in which the fault lay with the critic in failing to grasp the niceties of any slice of legal doctrine. There might be stretches of doctrine and pockets of individual rules that had a plausible coherence at any particular time and on any particular occasion. But that coherence was short-lived, superficial, and contingent; it was always up for grabs and often did get grabbed by those who framed it to suit their own purposes. The overall project of doctrinal scholars was a fool's errand.¹⁰ Once the smoke cleared, there was only debris strewn around.

Of course, I promoted and purveyed that critical line with an excessive amount of zeal. On that count, I am guilty as charged. But this ought not to have diminished nor detracted from the fact that the basic claim was accurate and compelling—legal doctrine taken as a whole is a patchwork quilt of compromises and concessions that makes no enduring sense over time and across discrete subject areas. If there is any sense to be discovered or imposed, it is to be found in the ever-changing and conflicting policies that judges and lawyers seek

8. CP Harvey, *The Advocate's Devil* (London: Stevens & Sons Ltd, 1958) at 79.

9. Rupert Cross, "The Evidence Report: Sense or Nonsense?" (1973) *Crim L Rev* 329 at 333.

10. It should go without saying that this was not in any way a unique or untutored insight on my part. I drew extensively on the original and path-breaking work of the so-called Critical Legal Scholars. Largely American in base and style, they offered me a set of resources from which to fashion my own take on the Anglo-Canadian world of judicial opinions and academic scholarship. In particular, the work of Duncan Kennedy has been indispensable and influential over the years. See Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, Massachusetts: Harvard University Press, 1997).

to achieve as a matter of ideological balancing. In other words, legal doctrine is hostage to the changing personnel of law and to the changing and often contradictory impulses of those professional actors. It is not that this amounts to some closed-door conspiracy of judicial bureaucrats. Most judges act in good faith in their efforts to make sense of legal doctrines and its apparent limits, and they proffer their judgments as the product of reasoned and reasonable doctrinal analysis. But the materials available and the resources at hand belie the claim, express or implied, that the law is something apart from the ideological leanings of the judges; judicial decision-making is an enterprise of law and ideology.

None of this is to say that all decisions are bad. To say so would be to mistake the critical thrust of my approach. My claim is that what makes one decision better than another is simply whether one likes the ideological cut or thrust of the decision. Some judgments are better crafted than others, but what makes the good or even great decisions is that the political agendas or interests that they advance are more acceptable than less acceptable. Decisions are never right or wrong in any enduring or internally legal way. It is simply that a decision and its supporting argumentation are more or less palatable in terms of the political interests that they protect or promote. Moreover, any political deconstruction of a decision is rarely straightforward or two-dimensional. A simple liberal/conservative analysis is facile and unconvincing; the interplay of different interests is complex, dynamic, and obscure. This is particularly so in an area like administrative law. The politics of administrative law are not always obvious or easily decipherable. The technical and institutional issues play out across a range of interests that do not line up easily or at all with those in private law. At bottom, administrative law is built on courts' desire to preserve their own legitimacy and own brand of justice in reviewing the work of the administrative state. Put more crudely, judges want to ensure that administrators know that they are the bosses.

Of course, the emphasis in administrative law on judicial action and legal doctrine is itself problematic. The administrative process comprises much more than that. Indeed, it is arguable that available legislative checks and balances do much more effective work than the legal principles and guidelines that result from judicial review. Nevertheless, for good and bad, judicial law-making and the resulting doctrinal rules cast a long shadow over the workings and dynamics of administrative law and process. While this gives some legitimacy to the intense focus on the work of the courts (along with the general and continuing preoccupation in law schools with the courts), it cannot justify it entirely. Indeed, legal education (including its critical antagonists) might do more to perpetuate this state of affairs than it likes to think. Accordingly, part of my task as a critical

theorist was to expose the infirm foundations and effects of judicial review not in order to improve the judicial process, but to encourage greater interest in other more effective and democratic means to enhance the operation, accountability, and fairness of the administrative state.

So, in approaching my responsibilities in teaching Administrative Law, I carried with me a career's worth of intellectual and jurisprudential baggage. This makes me no different than any other teacher; everyone carries some baggage. The difference is that my baggage is less mainstream and more critical in substance and style. Yet, as I began my classes, I was also weighed down by a lingering sense that my pedagogical duty was to offer the students as coherent and rational an account of the legal doctrine in administrative law as I could muster; criticisms were to be discrete and piecemeal. This brought back echoes of the charge that teachers and scholars like me were "disappointed absolutists."¹¹ For all my critical rejection of the formalist mind-set, I was still somewhat in thrall to it. Indeed, such a schizophrenic mind-set is not surprising if you have lived in an institution for all your professional life where the dominant approach, despite much protestation to the contrary, is largely formalistic and rationalistic. So, with the usual ambivalence and gusto, I began to teach my first Administrative Law class.

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I started the classes by laying my cards on the table. I was very much a known quantity at school, so little would come as surprising or new to those students who had enrolled for the course. I told them that, although I had written in the area, I had not taught Administrative Law before. I spun it such that what they might lose in my expertise in administrative law would be offset by what they might gain in terms of my overall teaching and jurisprudential experience. I also made plain that, as a committed democrat, I was no fan of courts and that a significant part of the course would be devoted to providing a critical perspective on both the work of the courts by way of judicial review and the shortcomings of the administrative process in terms of democratic governance. The students seemed to take this in their stride. However, as this was an upper-year course, I assumed (correctly, as it turns out) that the amount of reading and preparation would not be great. With that, the adventure began.

I will not trouble or bore you with a day-to-day account of the classes and the discussions that took place within them. Suffice it to say that there were ups and downs. However, for present purposes, what is more important was my

11. HLA Hart talks about the realists or rule-skeptics with whom I might be loosely grouped. See HLA Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 135.

own engagement with the materials and decisions of the courts, especially the Supreme Court of Canada. Like the students, I was reading cases that I had never read before. I came to them with little pre-conception of what they said or did. But I did come to them, of course, with my own critical approach to law, judicial decision-making, and teaching. I read the cases as a critical teacher/scholar. I was not to be disappointed in my expectations or my engagements with them. Try as I might, it was impossible for me not to view the leading judgments as so easily and obviously grist for my critical mill. The leading cases amounted to what was almost a caricatured tableau of judicial decision-making that said one thing (*i.e.*, law) and did another (*i.e.*, politics); they were an example par excellence of law-as-ideology.

From its effective beginnings with *Roncarelli* in 1959,¹² the heart of Canadian administrative law has been the tension between the courts and the executive. The central challenge has been to chart and justify a path between the different institutional claims of each branch of government to ensure that the principles and promise of democracy are best protected and advanced. Although clothed in all manner of legal and technical details, this is essentially a clash of politics—who gets to have the decisive say over how the dealings between citizens and the administrative state are organized and negotiated? This question touches so many aspects and dimensions of democratic governance and defies easy analysis. At least as understood by the courts (and that, of course, is of great significance), it has touched upon and given rise to three main doctrines of legal doctrine: the procedures to be followed by tribunals and executive officers, the remedies available to citizens to correct maladministration, and the need for review of the substance of decisions made and actions taken.

While there has been considerable toing-and-froing over the first two doctrines, it is the third—substantive review—that has generated the most activity and anguish. This is where the institutional rubber hits the governmental road. Most of this debate has been over how government is made accountable to the citizenry it is supposed to serve and, as importantly, who is best available to achieve that objective. The development of legal doctrine has gravitated between the differing extents to which the courts can or should interfere in the workings and wiles of administrative agents and agencies. This is captured by the idea of deference: When and how should the courts defer to the decisions and actions of the executive? The courts have insisted that their task is to interpret statutes against the demands of the Constitution. But no sensible observer could pretend that the task was as simple or straightforward as that. The push-and-pull of

12. *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

institutional politics and priorities energizes and backstops that ostensible legal drama over the standard of review. Indeed, as with so much legal doctrine, it all boiled down to what the judges thought was the best thing to do.

Beginning with *CUPE*¹³ in 1979, the courts have sought to develop and defend some crucial but vague distinctions between jurisdictional powers and the exercise of substantive discretion. While the former was to be policed aggressively and adjudged by norms of correctness, the latter was to be granted more leeway and measured only against the standard of patent unreasonableness. This resulted in executive efforts to squeeze courts out of the action by relying on privative or exclusion clauses that sought to oust courts from their supervisory authority. But the courts were having none of this. They raised constitutional concerns and refused to vacate their role as the privileged underwriters of democratic legitimacy.¹⁴ Even when the legislature was entirely clear that it wanted the courts to have no supervisory role, the courts took that as merely an indication that less deference might be warranted. By 1997, the courts had introduced a more complicated and murky approach that established a tripartite set of standards for reviewing administrative action. Abandoning the jurisdiction/substance test, they placed their faith in a nuanced balancing between correctness, reasonableness *simpliciter*, and patent unreasonableness.¹⁵

For the next decade or so, the courts sought to demonstrate how this balancing could be operationalized with any consistency or clarity. If the chorus of criticism was anything to go by, this they failed abjectly. The judges disagreed with themselves over how to categorize contested matters and what the subsequent categorizations meant in practical terms. The doctrine simply collapsed of its own weight. Administrative law had become a living manifestation of Tennyson's telling characterization of "the lawless science of our law/ ... That wilderness of single instances."¹⁶ Although the judicial ambition was to forge a path through the dangerous thickets of institutional authority and accountability, the result was to make matters worse, not better. The doctrinal smoke that the courts were generating was not fooling anyone and, if it had any real effect, it was to disorient further the judges themselves. Indeed, I might be forgiven for taking some comfort from the courts' capacity to make the critics' argument for them and to do so with enviable cogency—the rules of the administrative game shifted

13. *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417 [*CUPE*].

14. *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220, 11 ACWS (2d) 165.

15. *Canada (Director of Investigation & Research) v Southam Inc*, [1997] 1 SCR 748, 114 DLR (4th) 1.

16. Lord Alfred Tennyson, *Aylmer's Field* (London: Macmillan and Co, 1891) at 14.

and changed, their meaning and application were elusive even to those who set them, and exceptions popped up as and when the occasion demanded.

The turning point came with *Dunsmuir*, although it would prove to be another and inevitable false dawn. The point at issue was whether standards of reasonableness applied to the firing of public employees and, as importantly, whether a tribunal's decision on that issue was reviewable by the courts. The three judgments of the Supreme Court do as much to continue the confusion as to dispel it. All the judges agreed that the adjudicator's decision should be set aside, but they did so for very different reasons and in line with different considerations. For those looking to the Supreme Court for guidance and reassurance, they were surely disappointed. Although touted as the last word on standards of review, *Dunsmuir* is likely to be the last word only until the next last word.

In speaking for the majority, Justices Bastarache and Lebel decided that it was time reassess "the structure and characteristics of the system of judicial review as a whole" and develop a principled framework that is "more coherent and workable."¹⁷ To that end, they decided that there should be a reversion to two standards (*i.e.*, reasonableness and correctness): "Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility."¹⁸ In deciding which standard applied, they were less forthcoming. While reasonableness ought to be the norm, a multi-factored analysis could be used to determine if correctness was appropriate; these factors included whether there was a true jurisdictional issue, a privative clause, a constitutional question, a centrally important legal issue, and the level of the decision-maker's expertise. Applying this analysis, the majority held that reasonableness was the proper standard and that the decision-maker had not acted reasonably in the circumstances. However, Justices Bastarache and Lebel were not very expansive nor instructive in how such unreasonableness could be measured.

Justice Binnie took a slightly different line. He was more pragmatic and less enamoured of the majority's analytical claims: "Judicial review is an idea that has lately become unduly burdened with law office metaphysics."¹⁹ He took the position that, while a move back to two standards was probably wise, "a single 'reasonableness' standard is a big tent that will have to accommodate a lot of variables."²⁰ He went on to indicate that any analysis must necessarily be contextual and cannot lend itself to easy or exhaustive resolution among the

17. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at 248.

18. *Ibid* at 192.

19. *Ibid* at 195.

20. *Ibid* at 196.

relevant considerations. Again, he concluded that reasonableness was the proper standard and, in relatively short order, that the decision-maker had not acted reasonably in the circumstances.

Justice Deschamps spoke for her two other colleagues. She went along with the reduction of the standards from two to three. She came to the conclusion that this was an occasion on which correctness was the appropriate standard as the adjudicator had strayed from his area of administrative expertise and into the realm of legal interpretation. This took him beyond the need for deference by way of the reasonableness standard. So, in line with the rest of the Court, but for very different reasons, she held that the adjudicator's decision should be set aside because it was incorrect.

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When I first read the *Dunsmuir* decision, I experienced that usual mix of excitement and self-doubt. It was as if I had walked into the middle of a continuing conversation with only a very general sense of exactly had been said and done before. I made a game effort to make sense of the judgments in their own terms and how they might be applied. Yet, try as I might, there were many more questions than answers. The superficial appearance of coherence and workability gave way to a much more substantial sense of fundamental disagreement and empty abstraction. Having cleared away the smoke and dug down, I was left with little more than a pile of builders' debris. It became obvious (if anything can be obvious about the decision and its judgments) that *Dunsmuir* was supposed to be the occasion on which the Supreme Court laid out for administrative law a principled framework that is more coherent and workable. Yet, judged by that standard of the Court's own choosing, the decision fails; it is not coherent, workable, nor principled.

First, any coherence that the decision has is merely abstract and only wafer-thin at that. If coherence is meant to signify that a measure of balance and intelligibility has been achieved, there is nothing more or less coherent in having two rather than three categories of review. Even when viewed in its best light, the attainment of coherence says little about the substantive quality of the doctrine itself; the doctrine can be good or bad, even if it is coherently so. However, if "coherent" is being used as a synonym for simpler or more rational, there is also nothing compelling about the new *Dunsmuir* test as a simpler or more rational test. As Justice Binnie notes, "a single 'reasonableness' standard is a big tent that will have to accommodate a lot of variables."²¹ This strongly

21. *Ibid.*

suggests that any claim for simplicity or rationality in the new two-part test is more apparent than real: The action has simply been moved from the front to the back of the legal doctrine. As such, coherence is the proverbial sack that can be filled with almost any content.

Secondly, the workability of the *Dunsmuir* framework is undermined by the Court's own judges. Three of the nine judges—Justices Deschamps, Charron, and Rothstein—pull the rug out from under the decision by failing to agree on whether the standard of review on these facts should be reasonableness or correctness. This is a major problem. If the majority of the Court cannot persuade its own colleagues that the test is workable (*i.e.*, it will direct most judges in similar circumstances to come to the same categorization), what chances are there that other judges will be able to agree? Apart from the general open-endedness of what counts as reasonable, any distinction for fixing the standard of review that cannot be utilized consistently by Supreme Court judges seems to be less a serious and efficacious test and more an accommodating screen for more free-wheeling assessments.

As for being principled, this begs the very big question that the Court is tasked with answering across administrative law: Who should get to set the terms for distributing responsibility about making the administrative process more accountable and fair? Throughout the legal doctrine, there is a taken-for-granted assumption that the legislature and executive cannot be trusted, but that the courts can be. While there are clearly limitations on the courts' ability to over-reach themselves, the courts maintain that they are the trusted guarantors of fairness and justice. Yet the historical rise of the administrative state and tribunals had much to do with the unwillingness of the courts to perform their role with appropriate expertise and political balance. For example, the initial reason for establishing an administrative structure for human rights and labour relations was the poor job that was being done by the courts. Moreover, the accountability of the courts is itself less than robust or extensive. The judges are quite literally a law unto themselves; they make the law that they then claim to be governed by. This seems far from being the principled basis that the Supreme Court claims for its justification of administrative law's development.

This general stance was confirmed by some of the cases that followed *Dunsmuir*. In blunt terms, the new *Dunsmuir* world was more smoke and style than shape and substance. For all the talk about principles and coherence, it remained a mug's game to predict what the courts would do in reviewing the actions or decisions of administrative agencies. Even if there is agreement on whether the standard is reasonableness or correctness, there is no real sense of

how a decision will be made as to whether an administrative action is reasonable or correct. Clearing away the doctrinal smoke, there are simply judges muddling through in determining if they disagree enough with the disputed administrative action or decision to set it aside. Describing this as palm-tree justice might be a little exotic for the Canadian sensibility, but it captures something of the style and substance of judicial review. Two cases will suffice to make the point.

In *Khosa*,²² the Court had to decide whether a tribunal's decision to allow the deportation of an individual convicted of street racing causing death and to deny "special relief" was reviewable. The Federal Court of Appeal applied a reasonableness standard and set aside the tribunal's decision as being unreasonable. It found that the tribunal had some kind of fixation with the fact that street racing was involved and no explanation had been given as to why a favourable rehabilitation report had been ignored. The Supreme Court took a contrary stance. A majority declared that the *Dunsmuir* principles were not ousted by the relevant governing legislation. The judges agreed, therefore, that the reasonableness standard was applicable and that the tribunal had acted reasonably or, at least, not unreasonably. The tribunal had reached its own conclusions based on its own appreciation of the evidence and the decision did not fall outside the range of reasonable outcomes. Justices Rothstein and Deschamps insisted that the *Dunsmuir* principles did not displace the statutory provisions. Nevertheless, they found that the tribunal's findings "were not perverse or capricious or made without regard to evidence."²³ However, Justice Fish dissented and held that "deference ends where unreasonableness begins."²⁴ He went with the majority on the standard of review being *Dunsmuir* reasonableness but found that the tribunal had failed to evaluate the facts and issues in a reasonable way.

Disagreement among the judges in itself is not fatal. But, in *Khosa*, the difference of opinion is telling, especially in light of the fact that *Dunsmuir* was supposed to represent administrative law in a new light and as a principled framework that is more coherent and workable. Again, judges on the same court could neither agree on the appropriate test to be applied (coherence) nor on how that test should be applied (workability). The claim to be taking a principled stance is entirely belied by the confusion and indeterminacy that thread through the decision and judgments. Despite assertions about the importance of the Rule of Law, *Khosa* comes close to confirming the notion of the 'Rule of Five'

22. *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCR 339 [*Khosa*].

23. *Ibid* at para 137.

24. *Ibid* at 160.

[should be 'Rule of Five' to be consistent]: It is not principle that counts or determines the legal doctrine, but the number of judicial votes that combine behind any principle of or putative application.

The serendipity or even perversity of the judicial process was made even more apparent in *Mowat*.²⁵ This was a discrimination case and the question was whether a human rights tribunal could award legal costs to a successful applicant under a statutory provision that allowed payment "for any expenses incurred by the victim as a result of the discriminatory practice."²⁶ While the tribunal and Federal Court found that it could, the Federal Court of Appeal and the Supreme Court did not. Applying a *Dunsmuir* analysis, Justices Lebel and Cromwell determined that the reasonableness standard applied, not correctness. Emphasizing that this conclusion was based upon deference to the decision-maker's expertise and experience, the Court still went on to insist that "no reasonable interpretation supports [the] conclusion" that the tribunal may award legal costs to a successful applicant under the rubric of expenses.²⁷ After extensive analysis, the Court set aside the tribunal's decision to award costs and held that:

The text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue.²⁸

The effect of this kind of analysis is to collapse reasonableness into correctness. While there is scope for two courts to disagree over whether "expenses" includes legal costs, it is preposterous and, ironically, unreasonable to conclude that a decision that it does is unreasonable. The fact that this is done in the name of deference further exacerbates matters. Even the Court admits that the tribunal was faced with a difficult point of statutory interpretation and conflicting judicial authority. To determine that the tribunal's decision was unreasonable is to circumscribe the zone of reasonableness so tightly that it amounts to making the same decision as the reviewing judges would make. Moreover, the apparent hands-off approach of the majority in *Khosa* was disregarded. This is a perfect

25. *Canada (Canadian Human Rights Commission) v. Mowat*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*].

26. *Ibid* at para 1.

27. *Ibid* at para 34.

28. *Ibid* at para 64.

example of the courts being long on talk about deference and reasonableness, but short on any action or application that holds true to those stated ideals. As such, the *Mowat* decision is a revealing cameo about how administrative law does and does not work: It is about generating 'principled' smoke to cover the political and normative debris that lies beneath.²⁹

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I hope that there is now some better understanding of why I do not teach Administrative Law (and perhaps why I should). I do not teach Administrative Law because I cannot be an administrative lawyer in the sense of presenting administrative law as even vaguely amounting to "a principled framework that is ... coherent and workable"—not now, not any time. However, perhaps I should teach Administrative Law as a legal theorist because it will be substantial grist for my critical mill in that I will be able to show that administrative law, like most areas of law, cannot be presented as even vaguely "a principled framework that is...coherent and workable." As I have sought to show, administrative law is "all echoes and shadows, like looking into a box of fog."³⁰ Of course, the same might be said of other courses that I teach as well. The structures and features of administrative law are no different in this regard than any other subject area in terms of their doctrinal opacity and political underpinnings. But that is a topic for another day.

29. The smoke thickens, not clears as time goes by. As I finished this article, the Supreme Court handed down another decision that does more to confuse than to clarify. In a 4-3 decision, the Court could not agree on what standard of review should be applied, and how, to a tribunal's exercise of statutory interpretation. See *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, 263 ACWS (3d) 396.

30. Kate Atkinson, *Started Early, Took My Dog* (London: Transworld Publishers, 2010) at 141.