

# THE LIMITS OF JUDICIAL DISCRETION

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Every time a lawyer in his practice comes across an instance in which custom or legislation leaves anything to the discretion of the court, he is confronted with two series of *dicta* that are repeated with but little variation almost as a matter of course. First, there is that group which decries discretion as the rule of tyranny and would limit it in every possible way. A distinction is drawn between discretion in the ordinary sense and judicial discretion, which is said to be "legal" or regulated by rule. Marshall and Mansfield are in this imposing array of authority.<sup>1</sup> On the other hand there are pronouncements not to be neglected to the effect that discretion involves the very opposite of rule.<sup>2</sup> Impossible as it may be to reconcile these conflicting statements and the results that they lead to, a great deal of obscurity can be avoided if we simply attempt to distinguish among the various ideas that lawyers seek to convey, frequently without consciousness of any ambiguity, by the word "discretion." At least seven types of definitions can be distinguished:

First, as used in a number of maxims, the expression simply refers to a "faculty" in the sense in which the old faculty psychology spoke of our mental activities.<sup>3</sup> In this sense to say that a matter is one involving judicial discretion means no more than that judges should act thoughtfully.

Second, the term is used frequently merely to refer to the finality of a decision of the court whether as to the law or as to the facts or as to some other type of question if any such type exists.<sup>4</sup>

Third, some courts, especially in New Hampshire, have so described discretion as to limit its application to fact-finding from which every legal element is excluded.<sup>5</sup>

Fourth, the term is further used of the legislative or quasi-legislative power which may or may not, under various views of constitutions, reside in a court.<sup>6</sup>

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<sup>1</sup> Besides the *dicta* of Marshall and Mansfield quoted in the text *infra* at notes 20 and 21 respectively, there are a number of cases in which particularly strong language is used denouncing or limiting legal discretion. Most of these are referred to in Burke, *Judicial Discretion* (1920) 90 CENT. L. JOUR. 355.

<sup>2</sup> The stock citations in favor of enlarging discretion are those quoted or referred to *infra* at notes 7 and 25.

<sup>3</sup> See discussion and references at note 13, *infra*.

<sup>4</sup> See discussion and references at notes 14-18, *infra*.

<sup>5</sup> See discussion and references at note 19, *infra*.

<sup>6</sup> In a letter commenting on an article by the author, *Judicial Review of Administrative Findings* (1921) 30 YALE LAW JOURNAL, 781, Hon. Francis B. James, of

Fifth, the term is used to suggest absence of rules in particular fields.<sup>7</sup>

Sixth, related to the absence of rules there is the conception that in cases where the application of standards rather than the formulation of rules is the task in hand, courts may be vested with a certain range of choice, "a flexible limit of judgment."<sup>8</sup>

Seventh, at the other extreme are those definitions which consider "discretion" as a designation of one body or another of rules within the law. There is considerable latitude among those who speak of discretion in this way. Some think of it as a set of rules which a particular court may make or change, but which that court must apply until it is changed.<sup>9</sup> Others think of it as a freedom on the part of courts in general rather than of any particular court,<sup>10</sup> and still others have in mind a hard and fast type of rule which happens to be labeled for historical or other reasons "discretion."<sup>11</sup>

Perhaps another head should be added to cover the use of the word in special senses and particular cases, for example, in contracts, wills and other documents, as well as in statutes.<sup>12</sup>

It may be suggested at once that the best disposition to be made of a word that can be used in so many senses, some of them at least utterly inconsistent with others, is to drop it from the vocabulary of the law. Unfortunately, however, it has fastened itself on our jurisprudence so that the best course open to us is to insist upon careful definition, or at

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Washington, takes exception to the use of the words "policy" and "discretion" with reference to questions determined by any body other than a legislature. He proposes the substitution of the expression "flexible limit of judgment," used by Mr. Justice White in *Atlantic Coast Line Ry. v. N. C. Corporation Commission* (1907) 206 U. S. 1, 26, 27 Sup. Ct. 585, 594, quoted and referred to by Mr. Commissioner Lane in *I. & S. Docket 26* (1912) 22 I. C. C. 604, 624. On the other hand, he notes that the word "discretion" is used by the United States Supreme Court with reference to the power of non-legislative bodies, for example, in *Pennsylvania Ry. v. International Coal Co.* (1913) 230 U. S. 184, 196, 33 Sup. Ct. 893, 895. Of course there is a sense in which "discretion" and even more clearly "policy" are purely legislative matters. Cf. *Scott v. Marley* (1911) 124 Tenn. 388, 394, 137 S. W. 492, 493, and see *infra* notes 52 and 53.

<sup>7</sup> Mr. Justice Sutherland in *People v. Super. Ct. of N. Y.* (1830, N. Y.) 5 Wend. 114, 125, frequently quoted, says: "It is that discretion which is not and cannot be governed by any fixed principles or rules." Cf. *Ex parte Jerman* (1910) 57 Or. 387, 399, 112 Pac. 416, 420-421; *Palliser v. Home Tel. Co.* (1911) 170 Ala. 341, 345, 54 So. 499, 500.

<sup>8</sup> See text *infra*, at note 29.

<sup>9</sup> See discussion and references at note 26, *infra*.

<sup>10</sup> See discussion and references at note 28, *infra*.

<sup>11</sup> See references and quotations at notes 20-22, *infra*.

<sup>12</sup> *Commonwealth v. Anthes* (1855, Mass.) 5 Gray, 185, 200; *Norton v. Kearney* (1860) 10 Wis. 443, 450; *Linn County v. Morris* (1902) 40 Or. 414, 420, 67 Pac. 295, 297; *Conway v. Minn. Mut. L. Ins. Co.* (1911) 62 Wash. 49, 51, 112 Pac. 1106, 1107; *Nashville Grain Exch. v. United States* (1911, Commerce Ct.) 191 Fed. 37, 39; *Cargnani v. Cargnani* (1911) 16 Calif. App. 96, 102, 116 Pac. 306, 309.

least adequate modifying words whenever it is used, and to exercise great care in keeping the senses apart so as to avoid the fallacy of the undistributed middle term and kindred traps connected with the use of ambiguous terminology.

Of the several senses enumerated a few, at least, may be eliminated entirely from any study of the limits of judicial discretion, and with them go a host of decisions, *dicta*, maxims, and learned discussions that tend rather to confuse the problem than to elucidate it. Thus we can dispose at once of the first sense, that in which a faculty or quality of the judicial mind is referred to. "*Discretio*," we are told, "*est discernere per legem*" or "*scire per legem, quid sit justum*."<sup>13</sup> Whatever we may say of the care and attention a judge should bring to his task, whatever wisdom may be a desideratum, no more light is thrown on the vital question of the restrictions under which a judge is required to act where discretion is vested in him than if these maxims were left entirely on one side. On the contrary, their use has wrought a great deal of mischief. Courts have argued that since discretion is merely this quality of mind or this faculty, it follows that there is no such thing contemplated by law as a judicial freedom from rule. These maxims are popular with the lawyer arguing against the exercise of judicial freedom.

Likewise we may eliminate from our discussion that definition which sees in discretion merely the opposite of reviewability.<sup>14</sup> True it is that where discretion is vested in a particular tribunal, it follows that no other tribunal can substitute its discretion for that of the first.<sup>15</sup> Discretion may, as a rule, be unreviewable.<sup>16</sup> Of course it is not inconceivable that a discretion be given to a particular body to decide in the

<sup>13</sup> On these maxims compare the learned note in Broom, *Legal Maxims*, \*84; 4 Coke, *Institutes*, \*41; Coke, *Littleton*, \*227b, frequently quoted in opinions restricting the scope of discretion, for example, *Miller v. Wallace* (1886) 76 Ga. 479, 484; *Commonwealth v. Anthes* (1855, Mass.) 5 Gray, 185, 204; *Rex v. Peters* (1758, K. B.) 1 Burr. 568, 570; *LeRoy v. N. Y.* (1820, N. Y.) 4 Johns. Ch. 352, 356; *Keighley's Case* (1609, C. P.) 10 Coke, 139a, 140a; *The Leonard* (1869, N. D. N. Y.) Fed. Cas. No. 8,256.

<sup>14</sup> *Jenkins v. Brown* (1839, N. Y.) 21 Wend. 454; *Ry. v. Heck* (1879) 102 U. S. 120; *Harrington v. Ry.* (1893) 157 Mass. 579, 32 N. E. 955; *Perry v. Shedd* (1893) 159 Mass. 200, 34 N. E. 174.

<sup>15</sup> *King v. Justices of Devon* (1819, K. B.) 1 Chit. 34; *King v. Justices of Middlesex* (1821, K. B.) 4 Barn. & Ald. 298, 300; *Ex parte Harris* (1875) 52 Ala. 87; *State v. Van Ness* (1875) 15 Fla. 317; *United States v. Judge Lawrence* (1795, U. S.) 3 Dall. 42, 53; *Rowley v. VanBenthuyzen* (1836, N. Y.) 16 Wend. 369, 378; *Powell v. Dayton, etc. Ry.* (1886) 14 Or. 22, 23, 12 Pac. 83, 84; *Detroit Tug, etc. Co. v. Wayne Circuit Judge* (1889) 75 Mich. 360, 382, 42 N. W. 968, 976; *Halliburton v. Martin* (1902) 28 Tex. Civ. App. 127, 133, 66 S. W. 675, 678; *Rex v. Young* (1758, K. B.) 1 Burr. 556, 560.

<sup>16</sup> "To say that a matter is within discretion of a judge is but another mode of saying it is beyond control." *Ex parte Mackey* (1880) 15 S. C. 322, 328; cf. also *Palliser v. Home Tel. Co.* (1911) 170 Ala. 341, 345, 54 So. 499, 500. Of course abuse of discretion is always a ground for review, as indicated below.

first instance, subject to a power to review and exercise an independent discretion when the matter is argued *de novo* before another and a higher tribunal.<sup>17</sup> Yet for obvious reasons, particularly the desirability of economy in judicial effort, this is not generally done. On the other hand, it is quite possible to cut off the power of review without vesting any discretion in a tribunal. We constantly forget that there is nothing in the constitution to give a man more than one day in court. Yet a vast portion of the law in books with reference to discretion is really concerned with the question of reviewability rather than with the scope or nature of judicial discretion. This observation applies particularly to the learning as to the ordering of new trials where nothing is sought to be predicated except the finality of the opinion of a particular court.<sup>18</sup>

We may also discard those definitions which seek to limit discretion to a type of fact-finding.<sup>19</sup> The finding of facts by a court may be made by law final or merely presumptive or completely reviewable, or the function of a court may be so limited as to exclude all questions of fact from its ken. When these difficulties are settled, we are still no further in our task of drawing the boundaries around judicial freedom.

The remaining definitions are more directly connected with the question whether the court is to be governed in a particular case by rules or to be partly or wholly free from rules. All of them have in common this element: that they attempt to describe in terms of rules the latitude, if any there be within the law, in deciding controversies. Let us consider first those *dicta* in which it is flatly denied that any such latitude exists. The language of Mr. Justice Marshall in the case of *Osborn et al. v. The Bank of the United States*<sup>20</sup> is most frequently met with in this connection:

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose

<sup>17</sup> *Norris v. Clinkscales* (1896) 47 S. C. 488, 497-498, 25 S. E. 797, 800-801.

<sup>18</sup> Some courts hold discretion to involve a matter of law and hence to be reviewable. *Lovinier v. Pearce* (1874) 70 N. C. 167, 171; *People v. Common Council of Syracuse* (1879) 78 N. Y. 56; *Conway v. Minn. Mut. L. Ins. Co.*, *loc. cit. supra* note 12; 40 L. R. A. (N. S.) 148, note; *People v. Pfanschmidt* (1914) 262 Ill. 411, 440, 104 N. E. 804, 816.

<sup>19</sup> "Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland* (1872) 52 N. H. 401, 408; *Colburn v. Groton* (1889) 66 N. H. 151, 153, 28 Atl. 95, 96; *Jaques v. Chandler* (1905) 73 N. H. 376, 382, 62 Atl. 713, 715; *Nawen v. Boston, etc. Ry.* (1914) 77 N. H. 299, 301, 91 Atl. 181, 182; *cf. also Loftus v. Metropolitan St. Ry.* (1909) 220 Mo. 470, 119 S. W. 942; *Foy's Election* (1910) 228 Pa. 14, 19, 76 Atl. 713, 715; *Griffin v. State* (1913) 12 Ga. App. 615, 620-621, 77 S. E. 1080, 1083.

<sup>20</sup> (1824, U. S.) 9 Wheat. 738, 866.

of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

With this goes Lord Mansfield's famous *dictum*:<sup>21</sup>

"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."

Applied in practice, such language has led to a development similar to that which Lord Eldon completed in the history of Equity. Thus a United States Circuit Judge in 1910 quotes with approval the language of the Master of the Rolls in *Haywood v. Cope*:<sup>22</sup>

" . . . it is most important that the profession, and those who have to advise in reference to this subject, should understand the rule which is adopted in this and the other Courts, which is that the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by considering what, as between the parties, would be fair to be done; what one person may consider fair, another may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised."

This principle was applied to a case of specific performance in such a way that the judge felt it beyond his power to refuse that remedy on the ground of hardship and inadequacy of consideration.

The impulse that leads to this extreme sort of statement can readily be understood even though it leads eventually to the absurdity that a judge has no discretion in the exercise of his discretion. It is the desire to reduce everything in our law to system. It is the attempt to get away from the famous reproach in *Selden's Table Talk* that equity is a roguish thing.<sup>23</sup> There is, further, an aesthetic desire for a complete, rounded system that will take care of every situation almost mechanically. But even if we succeed in getting away from the academic considerations in favor of a law that acts automatically, there is on the human side of the question a desire for a government of laws and not of men, especially in a democratic state, a desire that urges us to minimize, if not to eliminate, the power of the personal judge in the regulation of our affairs.<sup>24</sup>

<sup>21</sup> *Rex v. Wilkes* (1770, K. B.) 4 Burr. 2527, 2539.

<sup>22</sup> (1858, Ch.) 25 Beav. 140, 151, quoted in *Heyward v. Bradley* (1910, C. C. A. 4th) 179 Fed. 325, 330; cf. also *Lee v. Bude, etc. Ry.* (1871) L. R. 6 C. P. 576, 580; *Detroit Tug, etc. Co. v. Wayne Circuit Judge* (1889) 75 Mich. 360, 42 N. W. 968.

<sup>23</sup> [Circ. 1634-1654] "Equity."

<sup>24</sup> Maule, J., in *Freeman v. Tranah* (1852) 12 C. B. 406, 414 speaks of restraints on English courts from earliest times: "Such restrictions have prevailed in all civilized countries; and it is probably more advantageous that it should be so, though at the expense of some occasional injustice." In *Ex parte Chase* (1869) 43 Ala. 303, 310, it is said, quoting Lord Camden from Bouvier, *L. D.*: "The discretion of a judge is the law of tyrants; it is always unknown; it is different from different men; it is casual and depends upon constitution and passion. In

Whatever justification, psychological or logical, there may be for this minimizing of judicial power, the absurdity to which the desire may reduce us has not escaped judicial notice. In this connection the language of Senator Tracy in an early New York case has often been quoted:<sup>25</sup>

"But what is to be understood by a discretion that is governed by fixed legal principles is, I must be allowed to say, something that I have not found satisfactorily explained, and what it is is not easy for me to comprehend. Poetry may be indulged the license of saying,

'We have a power in ourselves to do it, but it is  
'A power which we have no power to do.'

But the same idea, when attempted to be gravely enforced as the basis of a judicial decision, seems too paradoxical to admit of our assent to it. As a matter of faith, we can assent to the theological dogma of 'an overruled free agency,' but in a matter of legal reasoning, we are justified in asking for pretty strong evidence to convince us that a judicial discretion can exist independently of the right or power of exercising it."

It is, of course, obvious that those who would so define discretion as to define it out of existence have gone too far in their faith in the all-sufficiency of legal rules prescribed by non-judicial authority. Let us examine, then, those definitions which admit of some judicial initiative and which yet insist that discretion is merely the application of rules. In an early New York case, for example, it is said:<sup>26</sup>

"Although it might rest entirely in their discretion whether they would retain the rule or not [a judge-made rule], still, as long as it was retained, it would be binding on them. It conferred legal rights upon their suitors, which they had no power to withhold from them."

This language is suggestive of modern discussions of procedure before administrative bodies which are sometimes held to have abused their discretion in failing to act in accordance with their own rules, though it be conceded that they have full power to change or abrogate these rules. As a matter of fact, to declare a rule and not to follow it, looks very much like an abuse of discretion, though one can hardly say that as a matter of law it must be so considered.<sup>27</sup> It has furthermore been suggested that the initiative in the adoption of such rules is not in the individual judge but rather in the collective judiciary so that their

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the best it is often, at times, capricious; in the worst it is every vice, folly and madness, to which human nature is liable.'" This point of view was found a little embarrassing in the same state somewhat later. Cf. *Brown v. State* (1895) 109 Ala. 70, 20 So. 103, 108.

<sup>25</sup> *Oneida C. P. v. People* (1837, N. Y. Senate) 18 Wend. 79, 99.

<sup>26</sup> *People v. N. Y. City Super. Ct.* (1830, N. Y.) 5 Wend. 114, 126.

<sup>27</sup> Senator Tracy's opinion cited *supra*, at note 25, goes on to suggest that a judge whose practice is inconsistent with itself calls down upon himself the disapproval of the community rather than any penalty of the law.

habitual procedure from which no individual judge is free to deviate constitutes a type of rule and yet no strictly legal limitation.<sup>28</sup>

There are really two difficulties involved in every attempt to reduce discretion to a series of rules. The first is connected with the fact that law consists not only of rules but also of principles and, as Dean Pound has made clear, of standards.<sup>29</sup> There are, of course, some branches of law that readily lend themselves to formulation in the shape of definite rules. The outstanding examples are those in which certainty is the chief prerequisite, for example, commercial law and property law. On the other hand, there are branches in which any attempt to formulate rules must result in the use of terms which themselves simply command the judge to make a rule for a particular case in accordance with a broad general principle or to attempt to apply a standard which must consciously or unconsciously be formulated in the light of all the circumstances before it can be applied. Thus, when the law speaks of "due care under the circumstances," no amount of rule-making can eliminate the personal equation in the application of this standard. The circumstances of life are too variegated and unforeseeable. But there is a second difficulty to be faced by those who would reduce discretion to a series of rules. There are places in which the law, even the statute law, deliberately refuses to dictate a rule and clearly creates a range for freedom from restraint in the decision of the judge. As was said in *Moers v. City of Reading*:<sup>30</sup>

"Half the statutes on our books are in the alternative, depending upon the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them."

Hence, regardless of the definition of the word "discretion" that we may adopt, there is within our law a sphere be it ever so limited, and be it called discretion or anything else, of freedom from rule on the part of the court.

How large is this sphere? The answer to this question varies from time to time and from place to place. Certainly in a period of growth by equity it is larger than in a period of rigid law. When Selden spoke of the variability of chancellors' consciences,<sup>31</sup> he was not describing the kind of equity that Lord Eldon administered one hundred and fifty years later. Furthermore, it differs at any given time or place in different parts of the law. The vast discretion given to most of our courts of first instance in the matter of granting a new trial stands out in striking contrast to the watchfulness of the law in those same courts

<sup>28</sup> 1 Bishop, *Married Women* (1873) sec. 676, defines it as denoting "a sort of individual liberty, a sort of liberty in the collective judges, and an adherence to legal principles, blended in such a way as shall constitute an established course of justice bending to the circumstances of cases instead of requiring the cases to bend to it."

<sup>29</sup> *Introduction to the Philosophy of Law* (1922) ch. 3.

<sup>30</sup> (1853) 21 Pa. 188, 202.

<sup>31</sup> *Selden's Table Talk*, loc. cit. *supra* note 23.

over every act and gesture of the court likely to influence the jury before the objectionable verdict is rendered. All that can be done, then, towards sketching the boundaries of judicial discretion is to lay down a few principal types of inquiry which must be answered only for a limited situation at a given time and place.

The first of these general inquiries is whether judicial discretion ever goes so far as to affect the substantive rights of parties. It has frequently been implied that the office of judicial discretion is to control mere matters of procedure<sup>32</sup> and it has even been categorically denied that discretion ever affects substantial rights.<sup>33</sup> The opposite has not, so far as I have been able to ascertain, ever been affirmed with equal positiveness. But what is the difference, after all, between adjective and substantive law? Can they be so completely torn asunder that we can be sure that the particular bit of adjective law which we leave to the discretion of the court has no substantive law precipitated in its meshes? Let us take the commonest case—that in which a verdict has been rendered touching on property rights and set aside by the court. To the litigants this is just as effective as annulling a judgment, a destruction of substantive rights.<sup>34</sup> And yet the difference between annulling a judgment and setting aside a verdict is a difference which has a meaning only in procedural law. Or take the case where a judge within his discretion may decide whether or not specific performance or an injunction shall be granted.<sup>35</sup> Does not his action or failure to act vitally affect substantive rights in property? Is it not a

<sup>32</sup> *Winklemeir v. Daiber* (1892) 92 Mich. 621, 52 N. W. 1036; *Northern Pac. Ry. v. Charless* (1892, C. C. A. 9th) 51 Fed. 562; *Estis v. Jackson* (1892) 111 N. C. 145, 16 S. E. 7; *Utsey v. Charleston, etc. Ry.* (1893) 38 S. C. 399, 17 S. E. 141; *Coffin v. Grand Rapids Hydraulic Co.* (1893) 136 N. Y. 655, 32 N. E. 1076; *Linn County v. Morris* (1902) 40 Or. 415, 420, 67 Pac. 295, 297; *Palliser v. Home Tel. Co.*, *loc. cit. supra* note 7.

<sup>33</sup> *Hennessy v. Carmony* (1892) 50 N. J. Eq. 616, 25 Atl. 374; *C. W. & Z. Ry. v. Com'rs.* (1852) 1 Ohio St. 77, 88.

<sup>34</sup> The difficulty of distinguishing in practice between substantive law and adjective law and the fact that the layman frequently finds it necessary to deal with adjective law as the embodiment of substantive rights is the theme of a paper by the author in the current number of the West Virginia Law Quarterly entitled, *Contractual Control over Adjective Law* (1922) 29 W. VA. L. QUART. 1.

<sup>35</sup> "It is not always easy to distinguish theoretically between matters of practice in chancery, which are subject to such discretion, and those which dispose of the rights of the party and may be decided upon broad principles of lasting and general application. But this court would violate its constitutional duty if it refused to hear appeals of the latter class, only because they were presented by orders or decisions upon the course of proceedings. . . ."

"Judicial discretion is a phrase of great latitude; but it never means the arbitrary will of the judge. . . . Such a discretion may be exercised in relation to the convenience of courts and suitors and the expedition of business, or upon the evidence as to some interlocutory matter, on which one tribunal could not well prescribe to or even advise another. It may also be exercised in deciding on the application of one or other of two conflicting rules, according to special circum-

fact that substantive rights are involved or at least jeopardized in every case where the court has discretion, and is it not a mere fiction that the chance to have another trial is just as good as a verdict or that the money judgment is an adequate remedy where specific performance is desired and just missed through the element of judicial discretion? The fact of the matter seems to be that where a discretion is vested in the court, the litigants have no right-duty relation with reference to the point of the decision. They have merely liability-power relations to the court.<sup>36</sup> The court has the power to create a duty in the one and a right in the other. Of course there are other ways of stating the same proposition. If one prefers, he may say that the parties have a conditional right-duty relation, contingent upon the exercise of the court's discretion in a particular way, and we may add what we will of the probabilities. All that can be said of the part of the boundary around judicial discretion that can be sketched through a consideration of the difference between adjective and substantive laws is that there are fields in which it is eminently desirable to have certain substantive rights clearly and easily predicated and that as to these particular substantive rights as little leeway as possible should be given to the courts. So far, however, as legal discretion is exercised it may result in *res judicata*, not only in equity but in law as well.<sup>37</sup>

Of course it is quite another matter to say that a court must not violate positive rules of law in the application of its discretion in any particular case. Even here, however, *dicta* sometimes seem to raise a doubt. Thus it has been said:<sup>38</sup>

“. . . this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or over-turn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court.”

Between “allaying the rigor” of the law and “contradicting or over-turning the grounds or principles thereof” there is at least a little room for judicial initiative. As a matter of fact, of course, we know that through this chink the greater part of equity was dragged into our legal system. The persistence of the fiction that equity has come not to destroy the law but to fulfill it, and that in spite of the work of the chan-

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stances, or else in cases of doubt where the decision is not governed by the absolute certainty of law, but rests upon the probabilities of evidence.” *Tripp v. Cook* (1841, N. Y. Senate) 26 Wend. 143, 152. Cf. also *Hennesy v. Carmony* (1892) 50 N. J. Eq. 616, 625, 25 Atl. 374, 379; *Kirkpatrick v. Pease* (1907) 202 Mo. 471, 494, 101 S. W. 651, 657; but see *Aiple-Hennelmann Real Estate Co. v. Spelbrink* (1908) 211 Mo. 671, 722, 111 S. W. 480, 494.

<sup>36</sup> *Alden v. Hinton* (1867) 6 D. C. 217.

<sup>37</sup> *Thompson v. Connell* (1897) 31 Or. 231, 48 Pac. 467; but see *Stevens v. Trafton* (1908) 36 Mont. 520, 527-528, 93 Pac. 810, 813. Cf. the discussion in the *Notes of the Late Professor Willard Barbour* (1922) 22 Col. L. Rev. 699.

<sup>38</sup> Sir Joseph Jekyll, Master of the Rolls, in *Cowper v. Cowper* (1734, Ch.) 2 P. Wms. 720, 753-754.

cellors not one jot or tittle of the law shall pass away has occasioned the surprise if not the indignation of more than one modern writer.<sup>39</sup> Of course there are definite limits in particular cases as to what a court may do in its discretion. Thus it is clear that the discretion to grant a new trial does not authorize a court to do so after the end of the term of court,<sup>40</sup> or that the wide discretion connected with *mandamus* will not authorize a court to create an equitable set-off where upon established principles none exists.<sup>41</sup> In general it may be said that where any rule of law is definitely established discretion does not mean a power in courts to ignore that rule.

Another boundary mark around the field of discretion has been somewhat paradoxically described by saying that a court ordinarily has no discretion as to whether or not it will exercise the discretion vested in it. Thus it is error for a court to hold that it has no discretion in a particular case where by law it has, and to dismiss or otherwise dispose of a matter accordingly.<sup>42</sup> "On a *mandamus*," said Chief Justice Marshall quoting Mr. Justice McLean,<sup>43</sup> "a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but *they will, in a proper case, require the inferior court to*

<sup>39</sup> Hohfeld, *The Relations Between Equity and Law* (1913) 11 MICH. L. REV. 537; *The Conflict of Equity and Law* (1917) 26 YALE LAW JOURNAL, 767; Billson, *Equity in its Relations to Common Law* (1917).

<sup>40</sup> *Vickers v. Philip Carey Co.* (1915) 49 Okla. 231, 248, 151 Pac. 1023, 1028.

<sup>41</sup> *State, ex rel. Sea Isle City Impr. Co., v. Tax Ass'rs* (1898) 61 N. J. L. 476, 477, 39 Atl. 1063, 1064.

<sup>42</sup> *Hanthorn v. Oliver* (1897) 32 Or. 57, 62, 51 Pac. 440, 441; *Marsh v. Griffin* (1898) 123 N. C. 660, 668, 31 S. E. 840, 843; *Fretland v. Cantrall* (1915) 78 Or. 439, 441-442, 153 Pac. 479, 480; *Rogers v. State* (1897) 101 Ga. 561, 28 S. E. 978; *Central of Ga. Ry. v. Harden* (1901) 113 Ga. 453, 38 S. E. 949; *Thompson v. Warren* (1903) 118 Ga. 644, 45 S. E. 912; *McIntyre v. McIntyre* (1904) 120 Ga. 67, 47 S. E. 501. *Rome Scale Mfg. Co. v. Harvey* (1914) 15 Ga. App. 381, 383, 83 S. E. 434, 435, is distinguished from these on the ground that the record did not show on its face that discretion had not been exercised. It is generally held that there is a strong presumption that there has been no abuse of discretion where a court has acted, and very strong language is used to describe the degree of clearness of the proof necessary to overcome the presumption. *Miller v. Lash* (1897) 4 Pa. Super. Ct. 292; *Stroup v. Raymond* (1897) 183 Pa. 279, 282, 38 Atl. 626, 627; 63 Am. St. Rep. 761, note; *Richardson v. Augustine* (1897) 5 Okla. 667, 674, 49 Pac. 930, 933; *Citizens' St. Ry. v. Heath* (1901) 29 Ind. App. 395, 406, 62 N. E. 107, 111; *Starr v. State* (1911) 5 Okla. Cr. App. 440, 457, 115 Pac. 356, 363. In *Weaver v. Richardson* (1913) 21 Wyo. 343, 132 Pac. 1148, it is said that by abuse of discretion is meant an error of law committed by the court. To the same effect is *Goldfarb v. Keener* (1920, C. C. A. 2d) 263 Fed. 357, 359: "Abuse of discretion, means at the least refusal to obey or follow plain judicial precedent in matter of law, including customary law; therefore it is error of law, and that is the sole reason why it is reviewable by writ of error."

<sup>43</sup> Italics are the author's. *Insurance Co. v. Wilson's Heirs* (1834, U. S.) 8 Pet. 291, 304, quoted in *Insurance Co. v. Adams* (1835, U. S.) 9 Pet. 573, 602. For a collection of other cases to the same effect see the opinion in *Detroit Tug, etc. Co. v. Wayne Circuit Judge* (1889) 75 Mich. 360, 378, 42 N. W. 968, 974.

*decide.*" The discretion given to a court in the issuing of licenses has been held not to extend to a general opinion of the judge upon the propriety of granting licenses in general. "Whether any or all licenses should be granted is a legislative, not a judicial question. Courts sit to administer the law fairly as it is given to them, and not to make or repeal it."<sup>44</sup>

By far the most important part of the boundary, however, of the whole field of judicial discretion is hidden rather than revealed in the expression "abuse of discretion." What constitutes an improper use of discretion really presents to the judge a question involving a standard rather than a matter to be decided by rule. "Judicial discretion," says one judge,<sup>45</sup> "is not without limits or conditions, although these limits or conditions are not defined or established by fixed rules or principles of law." There are, however, a few principles which may serve as a guide in determining whether or not discretion has been abused in particular cases. In the first place, it is an abuse of discretion to act without any ground or basis for one's action. A court has no discretion to set aside the report of a referee without cause.<sup>46</sup> Under ordinary conditions a court cannot award alimony to a wife against whom a divorce is decreed.<sup>47</sup> Where there is no fact justifying a temporary injunction, no reasonable showing, there is no matter of discretion involved.<sup>48</sup> It has been said that in a plain case discretion "has no office to perform and its exercise is limited to doubtful cases, where an impartial mind hesitates."<sup>49</sup> Perhaps the principle may be stated a little more strongly: that not only some ground for the alleged exercise of discretion must be visible but that a *reasonable* foundation is essential.<sup>50</sup> Thus it has been held an abuse of discretion to grant a new trial where no ground for the action is alleged except that a new trial "could do no injury."<sup>51</sup>

Perhaps it is only another way of stating the same thing to declare that discretion does not represent the will of the court. There is frequently, however, in the minds of those who state this proposition most emphatically an echo of the constitutional principle of division of powers among the executive, legislative, and judicial departments of government.<sup>52</sup> They say clearly enough that a court must never legislate. Yet in practice it is very difficult to distinguish between supplying

<sup>44</sup> *Schlaudecker v. Marshall* (1872) 72 Pa. 200, 206.

<sup>45</sup> *Alexander v. Smith* (1899) 20 Tex. Civ. App. 304, 305, 49 S. W. 416.

<sup>46</sup> *Tingley v. Dolby* (1882) 13 Neb. 371, 374, 14 N. W. 146, 148.

<sup>47</sup> *Harris v. Harris* (1878, Va.) 31 Grat. 13, 16.

<sup>48</sup> *Schilling v. Reagan* (1897) 19 Mont. 508, 512, 48 Pac. 1109, 1110.

<sup>49</sup> *Bailey v. Taaffe* (1866) 29 Calif. 423, 424.

<sup>50</sup> *Ridge v. Johnson* (1908) 129 Mo. App. 541, 107 S. W. 1103; *Moody v. Reichow* (1905) 38 Wash. 303, 308, 80 Pac. 461, 462.

<sup>51</sup> *Sharp v. Greene* (1900) 22 Wash. 677, 688, 62 Pac. 147, 150.

<sup>52</sup> Cf. language of Mr. Chief Justice Marshall in *Osborn v. The Bank* quoted *supra*, at note 20.

blanks in the expressed will of the legislature as to when a law is applicable and law-making. Thus one court, in recognizing the existence of discretion in bodies outside of the legislature to determine whether the proper occasion exists for executing statutes expressed in the alternative, adds that "it cannot be said that the exercise of such a discretion is the making of the law."<sup>53</sup> And another meets the same difficulty by assuring us that the law as it leaves the hand of the legislature is "perfect, final and decisive in all its parts and [that] discretion given only relates to its execution."<sup>54</sup> Aside from its obvious applicability to extreme cases, this rule that discretion must never represent the arbitrary will of the court is not very helpful in sketching the outer limits of judicial discretion. For if a court is manifestly unfair in doling out penalties within limits clearly entrusted to it by law, its penalties are still lawful, and relief against such arbitrariness is to be sought elsewhere than in an appeal to the law. At best the proposition that the court should not be arbitrary is a counsel of perfection rather than a guide in determining the legal limits of discretion.<sup>55</sup>

Perhaps the most effective guide from a practical point of view has been the rather vague counsel that discretion is an element to be minimized in the administration of justice. "*Optima lex*," says a maxim, "*quae minimum relinquit arbitrio iudicis: optimus iudex qui minimum sibi*."<sup>56</sup> Of course such a proposition is more useful to the judge who in the first instance is called upon to exercise his discretion than to the reviewing court. The mere fact that a judge has not kept down the exercise of his discretion to a minimum is in itself hardly an abuse of discretion. But in the course of history the habit of mind which makes a judge seek the guidance of precedent and leave as little as possible to himself tends very strongly to convert what had been a mere matter of discretion into propositions of law duly numbered in the digest and piously repeated in the textbooks and decisions. Of particular points, therefore, it is difficult to say whether they are still in the plastic state of discretion or in the rigid state of law. No wonder courts find it necessary to tell us that abuse of discretion is used in a technical sense and that it does not necessarily involve any moral turpitude or bad motive on the part of the court that stands charged with it.<sup>57</sup>

<sup>53</sup> *Moers v. City of Reading* (1853) 21 Pa. 188, 202, quoted in *Inc. Village of Fairview v. Giffie* (1905) 73 Ohio St. 183, 189, 76 N. E. 865, 866.

<sup>54</sup> *C. W. & Z. Ry. v. Com'rs. loc. cit. supra* note 33, quoted in *Inc. Village of Fairview v. Giffie* (1905) 73 Ohio St. 183, 189, 76 N. E. 865, 867.

<sup>55</sup> That discretion must not be "arbitrary" is of course a commonplace of our books. *Rooke's Case* (1598 C. P.) 5 Coke, 99b; *Miller v. Wallace* (1886) 76 Ga. 479, 484; *Jarrett v. Trunk Co.* (1906) 142 N. C. 466, 469, 55 S. E. 338, 339; *Simmons v. Fisher* (1912) 210 Mass. 563, 97 N. E. 102; *Ruckle v. American Car & Foundry Co.* (1912, C. C. M. D. Pa.) 194 Fed. 459; *People v. Pfanschmidt, loc. cit. supra* note 18.

<sup>56</sup> Bacon, *Aphorisms*; Broom, *loc. cit. supra* note 13.

<sup>57</sup> *Sharon v. Sharon* (1888) 75 Calif. 1, 48, 16 Pac. 345, 366; *Murray v. Buell* (1889) 74 Wis. 14, 18, 41 N. W. 1010, 1011; *Root v. Bingham* (1910) 26 S. D.

From what has been said of the tendency to make rules out of practices in the administration of justice, it might appear that discretion was an element destined gradually to disappear. Certainly if we consider the three periods in the history of equity, discretion was freest in the period of "grace," more restrained in the period of "conscience," and almost eliminated in the period of "equity."<sup>58</sup> Certainly the tendencies of the late eighteenth and the nineteenth centuries were all in the direction of stifling judicial discretion. There was the philosophy of equality together with its passionate belief in a government by laws and not by men. This more or less universal belief combined, as Dean Pound has so clearly shown, with the Puritanical element in American tradition which refused to call any man master.<sup>59</sup> Political conditions in America tended to foment distrust in elected and even appointed officers of the court. The theoretical jurisprudence of the day was strongly in favor of definiteness and finality in legal rules.

In more recent years, however, certain factors tended to emphasize the need of judicial discretion. Thus in the matter of rule-making for the guidance of procedure attempts by the legislature had utterly broken down. In the law of evidence, the lack of freedom of the courts had built up an intolerable body of rules from which refuge was naturally sought in the suggestion that many matters should be left to the courts. The loosening up of formalism in any part of the law, such as pleading, tends to bring about a breaking up all along the line, and judicial emancipation, together with the importance of judicial discretion, become factors again in legal development. It would be interesting to learn just how much of the dissatisfaction of the last generation with the judiciary was traceable to its lack of discretion. Some light is thrown on this question by the tendency to substitute commissions for courts and to give these commissions a very wide discretion.<sup>60</sup> This tendency represents, of course, but one way of reintroducing the element of discretion into the administration of justice. It is exactly parallel to what happened when courts of equity were created instead of giving courts of law the discretionary powers which they needed to mitigate the letter of the law.

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118, 119, 128 N. W. 132, 133; *State v. Robinson* (1919) 111 S. C. 467, 98 S. E. 329. The opposite view has also been asserted. Thus in *Stewart v. Stewart* (1902) 28 Ind. App. 378, 382, 62 N. E. 1023, 1025, Comstock, C. J., quotes with approval from Anderson's *Law Dictionary*: "The abuse of discretion to justify an interference with the exercise of discretionary power, implies not only error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency."

<sup>58</sup> As these words are used, for example, in Jenks, *Short History of English Law* (1912) 208, 210.

<sup>59</sup> *The Spirit of the Common Law* (1921) lecture 2.

<sup>60</sup> For a learned discussion of *Ministerial and Discretionary Official Acts* of non-judicial officers, see the article by Professor Edwin W. Patterson in (1922) 20 MICH. L. REV. 848. As to the power of review vested in the judiciary see the author's *op. cit. supra* note 6.

These conflicting tendencies coming together in our own day make the relation between rule and discretion in the administration of justice one of the most vital, if not the most vital, problem of jurisprudence today.<sup>61</sup> Unfortunately most of the discussions, perhaps unconsciously and unintentionally, seem to be groping for a "right" adjustment of the old elements in our law.<sup>62</sup> We are still sufficiently under the influence of the natural law school to take it for granted without reasoning that there must be a right adjustment. When one considers the vast fluctuations from time to time and from place to place in the extent allowed to judicial discretion, one becomes skeptical, to say the least, as to whether there is any right mixture, or at least as to whether we can ever hope to discover it. After all, we must remember that the function of discretion which should be the prime consideration in any argument either for its extension or for its limitation is, not merely to keep any part of our law free from rules, but "to subserve and not to defeat substantial justice."<sup>63</sup>

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<sup>61</sup> Cf. the illuminating paragraph beginning on page 111 in Pound, *Introduction to the Philosophy of Law* (1922). One aspect of this problem is the theme of a volume of essays, in the Modern Legal Philosophy Series, on *The Science of Legal Method* (1917).

<sup>62</sup> Even the admirable discussion by Dean Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696, (1914) 14 *ibid.* 1, 103, uses language indicative of the assumption that there is a "proper" balance of rule and discretion. Cf. also his *Introduction to the Philosophy of Law* (1922) 128, 129: "May we not find the *proper* field of each. . .?" Italics are the author's.

<sup>63</sup> *Butler v. Strickland-Tillman Hardware Co.* (1914) 15 Ga. App. 193, 194, 82 S. E. 815, 816.