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## DISCRETION<sup>†</sup>

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### I.

In this field questions arise which are certainly difficult; but as I listened last time to members of the group, I felt that the main difficulty perhaps lay in determining precisely what questions we are trying to answer. I have the conviction that if we could only say clearly what the questions are, the answers to them might not appear so elusive. So I have begun with a simple list of questions about discretion which in one form or another were, as it seemed to me, expressed by the group last time. I may indeed have omitted something and inserted something useless: if so, no doubt I shall be informed of this later.

The central questions then seem to me to be the following:

1. What is discretion, or what is the exercise of discretion?
2. Under what conditions and why do we in fact accept or tolerate discretion in a legal system?
3. Must we accept discretion or tolerate discretion, and if so, why?
4. What values does the use of discretion menace, and what values does it maintain or promote?
5. What can be done to maximize the beneficial operation of the use of discretion and to minimize any harm that it does?

From this list I am certainly conscious of omitting some specific questions [from] last time. For example, I have not included the psychological question raised by Professor Freund: what are the psychological conditions of a sound use of discretion? I have omitted this be-

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<sup>†</sup> The following note preceded this Essay, which Professor Hart circulated in draft form among members of the Legal Philosophy Discussion Group at Harvard Law School:

I have been asked to circulate my paper on discretion: so here it is though so fugitive a piece does not deserve so durable a form.

It is practically *verbatim* what I said last time: the only major addition is paragraph II designed to remove some misunderstandings about definition.

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cause I believe that if we clearly understand what it is to exercise a discretion and what in different fields counts as the satisfactory exercise of a discretion, we shall not really have to face an independent psychological question of the form: what are the psychological conditions of its sound exercise or how are we psychologically able to exercise a discretion? Indeed, I think this question, which looks on the surface to be one of empirical psychology, perhaps really expresses in a rather misleading form just our initial unclarity about what discretion is and what in various fields we count as a sound exercise of discretion. But only further exploration of our subject will show whether I am right in this, and I may very well not be right.

## II.

I have headed my list with a question of definition and separated this from the other, more substantial-looking questions. It might of course be the case that the term discretion is hopelessly vague and used by courts and juristic writers in an entirely haphazard fashion: if this were the case, the only observation which we could make about the meaning of the term discretion would be just this. But it seems to me very unlikely that this is in fact the case: if it were the case, we must agree to discuss discretion without any expectation that we should in fact be talking about a common subject. What is likely to be the case, as in all the major notions involved in the law, is that we can find a set of characteristics which are found together in the standard case of discretion: that is, in cases where everyone would agree that we have the phenomenon of discretion (e.g., rate-fixing by the ICC, the grant or refusal of specific performance by a court, the exercise of reprieve or pardon by the executive). After the characteristics of the central or clear cases of the exercise of discretion have been distinguished, we can then see that there will be many other cases where only some of the cardinal features present in the clear case are present and where we would hesitate or disagree as to the classification of them as cases of discretion; there will also be present in cases which we would not normally classify as the exercise of discretion some features of those present in the central cases. This position, namely that we are able to distinguish the leading features of a clear case and then borderline cases where some but not all of the features are present, is characteristic, it seems to me, of definition in this field. I prefer this way of putting the semantic situation to just saying that we have a continuum which stretches over a wide area and that we distinguish something which fades gradually into other notions because this metaphor of a continuum does not bring out the fact that we do, as well as recognize the vagueness at the boundary of such notions as discretion, also recognize clear or simple cases, and if we could not do this we should not be able to use the term in communication with each other.

But there are more important reasons for focusing attention on the characteristics present in those cases where we would all be agreed that they should be classified as cases of discretion: the first reason is that many difficulties or worries about discretion as expressed by members of the group certainly arise in the clear cases, and the fact that there are borderline cases which are doubtful or may be classified as discretion or not is irrelevant to many of these problems. Secondly, we have in this case, as in similar cases where a definition may be profitable, the situation which really has stimulated philosophical inquiries ever since philosophy began: this is that while we are able to agree about a central area of phenomena as constituting clear cases of discretion, there coexists with this agreement on the use of the term or, if you like, with its mastery for the purposes of everyday life a fundamental unclarity about the principles which govern our agreed usage. The position is parallel to a person who knows his way about town by rote but could not draw a map of it or the crude case where we can say that I can recognize an elephant but I could not define the term "elephant" for you. It seems to me to be vital to make *explicit* the characteristic features present in the agreed cases of discretion, and this can be done only by some kind of reflective analysis of our actual usage of that term.

Very often of course the question "What is *X*?" and the question "For what purposes do we in fact use *X*?" must be considered together. This is obviously the case where the expression in question, *X*, like the word "knife," turns out on investigation to refer to some instrument designed for some purpose. In such cases what the thing is used for actually enters in to the meaning of the expression, but whether this is the case or not cannot be settled in advance of inquiring what the standard use of the term in question is. Is it or is it not an instrumental term in the sense that the expression "a knife" is? Lastly, sometimes when we investigate the meaning of some important expression we find that there is really no disagreement about what the expression means — everybody clearly understands it — and that what the dispute is about is the way in which what the term stands for is used. An example of this situation is, I think, discussion of what the State is; there is little disagreement that the State is in fact an organization of persons living on a territory under a certain type of legal system: the real dispute is more as to what form the State should take consistent with these primary features and what we want the State to [do] for us. In these cases I agree that the fundamental questions get misrepresented when posed as mere questions of definition. But again, whether this is the situation or not can only be seen after we have undertaken to find out the minimum of agreed content in the normal usage of terms.

## III.

I list a set of examples of cases which would all clearly fall within the agreed ambit of the term “discretion.” I have done this to remind ourselves of the tremendous diversity of the situations in which this phenomenon appears, for nothing in this field is so misleading as over-concentration on one sort of example.

A. *Express or Avowed Use of Discretion*1. *By administrative bodies*

- (a) Rate-fixing, e.g., railroad rates by ICC.
- (b) Licensing for carrying on a specific trade.
- (c) Control of potentially harmful activities, e.g., orders by Fish and Game Commissioners.
- (d) Appointment to offices in the public service.
- (e) Allocations of resources conceived to be at the disposal of government, e.g., allocations of public land by Land Department.
- (f) Management of public service or business undertaken by government, e.g., contracts for the construction of public works.

2. *By Courts*

- (a) Application of standards by Courts
  - (1) by Judge, e.g., “reasonable or proper cause” in malicious prosecution.
  - (2) by Jury under control of Judge, [e.g.,] “reasonable care” in negligent cases.
- (b) Discretionary remedies, e.g., injunction and specific performance.
- (c) Sentencing in criminal cases.

B. *Tacit or Concealed Discretion*

1. Interpretation of statutes.
2. Use of precedent.

C. *Discretionary Interference or Dispensation from Acknowledged Rules*

1. A reprieve or pardon.
2. Injunction against exercise of common law remedies.

Two principles have guided me in the construction and division of this list of examples.

- A. I have taken examples which might suggest that the *type* of factor to which weight would be properly attached in the exercise of discretion will vary in different types of situations, e.g., there will be a difference in this respect between cases where a discretion is exercised in order to make a distribution of a benefit or bounty (e.g., allocation of land or other resources at the disposal of the State) from cases where there is a discretionary interfer-

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ence with what may be recognized [as a] prima facie right ([e.g.,] orders interfering with use of land or water threatening pollution or destruction of wild life).

- B. My main division is designed to emphasize the contrast between the cases where the sphere to be controlled is recognized ab initio as one demanding control by the exercise of discretion (Avowed Discretion) rather than by specific rules, even if it is hoped that rules will ultimately evolve in the course of the discretionary authority's experience, and on the other hand cases where there is an initial attempt to regulate by specific rules but these are found in the course of actual application not to yield a unique answer in specific cases because combinations of circumstances arise in which the application of the rule is drawn in question and these combinations are outside the range of concrete applications considered at the time of the formulation of the rule. This is the common choice of (1) disputable questions of interpretation of statutes or written rules and (2) disputable questions of what a precedent "amounts to" and whether or not a given case falls within the ambit of a precedent. The resolution of these doubts calls for the exercise of discretion: but again the factors requiring attention in such exercises of discretion in the application of rules may prove to be different from those requiring attention in the cases of Avowed Discretion conferred on bodies by statutes by the use of the typical words "reasonable," "convenient," "just," "proper."

#### IV.

What then is discretion? In attempting to define or elucidate this term, we must for the moment avert our gaze from the Law because we shall find that the phenomenon of discretion which worries us in the Law has its roots and important place in our ordinary life and by the consideration of the relatively simple examples there we may be able to formulate clearly what are the characteristics present in the standard cases.

I think that the first point which we learn from consideration of the use of the term outside the Law is that it would be mistaken to identify the notion of discretion with the notion of choice (*tout court*). These are different though related notions. It is worthwhile, I think, remembering that discretion is after all the name of an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence; it is the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning. Hence we speak of years of discretion meaning not merely the age at which a human being is able to choose (because we can choose long before this) but merely the age when the judgment or

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discernment to be exercised in choice is ripe. A discreet person is not someone who just remains silent but who chooses to be silent when silence is called for.

The above suggests that there is one kind of choice which we should not rank as the exercise of discretion, namely those cases where in choosing we merely indulge our personal immediate whim or desire. Will you have a martini or a sherry? You choose a martini, and I ask why: you reply, "Because I like it better — that's all." Here, it seems to me, it would be absurd to talk of a discretion being exercised; the chooser accepts no principle as justifying his choice: he is not attempting to do something which he would represent as wise or sound or something giving effect to a principle deserving of rational approval and does not invite criticism of it by any such standards. Of course, we might condemn his choice in many different ways: we might say, "You should have exercised some discretion and not just chosen what you felt like drinking." This would be to condemn or praise his choice by reference to prudential standards. The drinker's choice might approximate to something like the exercise of discretion if, in answer to the question "Why a martini," he replied, "I have found from experience that I get on better when I drink that rather than sherry, I don't talk so much," etc.: here the choice is made by reference to some general principle justifying it which affords some reason for calling it sound or wise, even if the scope of this principle is limited to the individual conduct of his own life and does not purport to be of any greater generality. So one case where choice and discretion seem to diverge is where the choice purports to be no more than the expression of personal whim, immediate desire, or liking. This is one reason why I should say that if you vote for one or other candidates at an election, though this may in certain circumstances represent the exercise of discretion, it is not made so by the bare fact that the voter has a choice. A voter who votes for the candidate just because he likes him is choosing, certainly, but is not exercising a discretion.

What excuses but does not justify the premature identification of the notion of discretion and the notion of choice is, I think, the following:

When we are considering the use of discretion in the Law we are considering its use by officials who are holding a responsible public office. It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim. The position may perhaps be clarified by distinguishing between the following pair of expressions: (1) the expression "*a* discretion," which means the authority to choose given on the understanding that the person so authorized will exercise discretion in his choice; and (2) the expression "discre-

tion," which means a certain kind of wisdom or deliberation guiding choice, the characteristics of which I shall try to bring out in what follows.

Perhaps they may come to light if we consider some choices that are not exercises of discretion but for quite different reasons from the cases which we have so far considered. These are choices where we do not indeed merely give effect to personal whim or desires of the moment but where we attempt to conform to principles and to defend our choices by them; yet because the principles are clear, determinate, highly specific, and uniquely determine the particular thing we have to do, we do not classify them as cases of discretion and it would be confusing to do so. Thus to take a simple example, suppose I am writing with a pencil, it breaks, and I want to sharpen it to a new point. I go to the drawer and I am faced with a knife, three spoons, and two forks. I choose a knife: if asked why, I would not here reply, "Because I like it," but perhaps, "Because I want to sharpen a pencil and this is the obvious way to do it." Here it seems to me absurd to speak of a choice of a knife as an exercise of discretion: it was the only sensible thing to do, and when our aims are as determinate as this and the situation is as clear as this and the proper thing to do is patent to the elementary knowledge of what will produce what, we choose indeed correctly but not in the exercise of discretion. There is indeed no room for discretion in such a case. Another case where there is no room for discretion and yet we are not really in our decisions or choices indulging private whim are cases such as the following. "The Star Spangled Banner" is played: I stand up. "Why did you stand up?" I reply not indeed by saying, "Because I wanted to," but I cite the established rule which quite unambiguously specifies what I am to do in this particular case. Here I have done the correct thing: I have made the right choice, but it would be misleading to describe [it] as the exercise of a discretion. Notice that if we shift the example and imagine that I was weighing compliance with the rule against wider considerations and decided on the whole to obey the rule, this would approximate to a case where we would intelligibly speak of discretion. So much depends on a precise description of the choice with which the individual is faced.

## V.

It seems to me then that discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious. The positive character of discretion may perhaps be brought out by contrasting with the examples so far taken the following case, where the leading characteristics of discretion seem to me to be present

in simple form. A young hostess is giving her first dinner party and the question arises, shall she use for this occasion the best knives: they are old silver, very beautiful, and they will set off the snowy tablecloth and the glasses. On the other hand, they are undoubtedly heavy and somewhat difficult to handle: they are not a bit sharp, and also their splendour might be thought a little bit showy by some. What are in such a case the hostess' controlling aims? We can enumerate some without difficulty: a pretty dinner table, admiration, but also the comfort of the guests and perhaps that of an old distinguished judge with somewhat shaky hands who is going to the party. So the hostess ponders, she thinks out the possible disasters and some possible good consequences from the courses before her: she balances one consideration against another and perhaps wonders whom she can consult. She asks someone who has had a lot of experience in this field, an old lady, who says sagaciously that "on the whole I think the wisest thing to do would be to use the second-best set." She can give reasons for this such as the danger of discomforting old Mr. X. and his unfortunate behaviour when some small thing sets off his temper: she reminds the hostess of the possible jealousy of the younger guests, and so on.

Now in this simple case it seems to me are the following features characteristic of discretion everywhere.

- A. There is not, as there was in the pencil-sharpening situation, a clear right or wrong. Of the hostess' situation we should say honest and sensible persons may take different views, and though there are arguments weighing in favour of one or other course, these are not conclusive though they have weight.
- B. There is not a clear definable aim, though we may use such general terms as "a successful dinner party" as an overall description of the various things at which the hostess is aiming. This however may be very deceptive: it may conceal from us that this stands for a general matrix susceptible of different types of filling, though of course it excludes quite definitely a number of determinate things such as the discomfort of the guests, ugly appearance of the table, and so on.
- C. The precise circumstances over which the decision will operate once it has been made are not known with any very great certainty, though the probable course of choices may to some extent be forecast. Contrast the general high probabilities of what would happen if we used a knife to sharpen the pencil.
- D. Within the vaguely defined aim of a successful dinner party, there are distinguishable constituent values or elements (beauty of the table, comfort of the guests, etc.), but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them.



- E. In this field, the hostess' decisions or those of her advisor will not happily be called "right" or "wrong" with their sharp black or white connotations and refusal to admit degree: instead we would more felicitously use terms such as "wise," "sound," and perhaps deploy comparatives such as "wiser," "sounder," "better."
- F. If the hostess' decision is challenged there are two different ways in which a defense may characteristically be made of it.
1. She would point out how her decision had been reached: that it had been preceded by as careful a consideration of the constituent elements in a successful dinner party as she could give; that she had attempted to work out what would happen on either course; that she had thought of similar cases in her own experience and that she had obtained the advice of an experienced person. To defend the choice along these lines is to appeal primarily to the manner in which the choice has been reached and the honest attempt to give effect to such controlling principles or values as applied to the case and to strike impartially some compromise between them where they conflicted. This is to say that for choices of this kind we have a fairly definite idea of what are the optimum conditions for reaching a sound decision though we do not have a clear idea of what the right or wrong choice is.
  2. To be distinguished from the defense of the choice by reference to the manner of its exercise, the hostess might well appeal to the actual success of the dinner party.
  3. It is worth, I think, distinguishing these two lines of defense: we may refer to the first as *justification* and distinguish it from the second as *vindication* by results. It seems to me plain that an exercise of a discretion may be justified even in cases where it is not vindicated by results. We may however learn from a series of vindications certain new factors making for success to which we must also attend henceforth if our choices are to be justifiable. There is a progressive evolutionary discovery of important and hence justifying factors.

## VI.

Nearly every one of the factors which characterize the dinner party situation may be found in the legal literature concerning discretion in the Law. Writers and courts considering the rate-fixing determinations of the ICC, for example, frequently use such expressions as, "[T]here is

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no possibility of solving this question as though it were a mathematical problem to which there could only be one correct answer.”<sup>1</sup> Other common phrases are, “The indefinite and often speculative character of the factors involved makes rate-fixing an exercise of discretion.” There is of course continual reference to the need for experts and an *experienced* board. Sometimes the best that can be hoped for is said to be “a decision which reasonable men could have made on the evidence.” References are made to “an undefined sense of what is proper under given circumstances.” It is sometimes said that the facts in such cases do not “compel a result” but there is need for “judgment.”

These characteristic observations and also the features of the simple case discussed bring out that the distinguishing feature of the discretion case is that there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which we must take into account and conscientiously weigh may themselves be identifiable.

## VII.

To go further we must now move to questions 2 and 3 and ask why in a legal system we do accept such a mode of decision as we have discussed and whether we must accept it. To the question *why*, I think the short answer is: *because we are men not gods*, and as part of the human predicament we may find ourselves faced with situations where we have to choose what to do under two handicaps. The first I will call Relative Ignorance of Fact, and the second I will call Relative Indeterminacy of Aim. These two factors may face us in a given sphere alone or jointly: in any sphere in which we may want to regulate in advance by general principles or rules to be invoked in successive particular occasions as they arise, we find our capacity limited by them. Sometimes the limitation imposed by the factors is so patent at the outset that we do not attempt to lay down specific rules but ab initio confer a discretionary jurisdiction on some official or authority: these are cases of Avowed Discretion. In other spheres where these limitations are not so patent, we do attempt to lay down rules, and though we may proceed happily with them over a wide area, cases arise where in offense the rules break down and supply no unique answer in a given case: this is the case of Tacit or Disguised Discretion.

Let us consider now the first of these limiting factors: Relative Ignorance of Fact. If the world in which we have to act and choose (1) consisted of a finite number of features or characteristics, (2) the modes in which these features could combine were limited to a finite number

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<sup>1</sup> ICC v. Union Pac. R.R. Co., 222 U.S. 541, 550 (1912).

of these modes, [and] (3) we knew both these features and modes of combination exhaustively, then we could always know in advance all the possible circumstances in which a question of the application of a rule would arise and we could therefore in framing our rule specify exhaustively in advance all the cases to which it was to apply and those to which it was not. Then, to use Mr. Braucher's expression, our labels would "clearly fit" the facts and not fit as we now feel loosely in many cases; but this would be the world of that mechanical Jurisprudence which we have long been taught is not our world. Our world is indeed different: when we are bold enough to frame a rule of conduct (e.g., No vehicles are to be taken into the park), certain concrete applications of this rule are indeed present to our minds: these are the paradigm clear cases of the rule showing the motor car, the horse and cart, the motor bicycle, and the bus to be excluded without doubt by it. But the totality of possible circumstances in which the application of the rule may be drawn in question so that we shall have to ask, "Is this a vehicle?" for the purposes of this rule are not confined to such clear cases. We shall find that the cases where the application of the rule is suggested will not divide into the clear cases where the rule applies and on the other hand to clear cases where nothing of the sort envisaged by the rule is present in the park, only birds, flowers, and children. On the contrary, there will be borderline cases which either we did not anticipate or could not anticipate: these will be the cases of skates, bicycles, perambulators, and toy motor cars, and faced with them we raise the characteristically mixed question, "Is this to be called a vehicle?" Though some of those elusive cases could not have been anticipated or imagined in advance when they arise, we are forced to say that the rule either does or does not apply: such unprovided cases will certainly have some features in common with the clear standard cases and yet differ from them in respects which are relevant, where relevance is itself determined by many complex factors running through the legal system and depending on our aims in having a rule of this sort.

So far I have considered the factor termed Relative Ignorance of Fact. Consider now the second factor, Indeterminacy of Aim. This factor is intertwined with the first factor, but there are cases certainly where the two may appear independently and separately. Suppose my aim in having the rule excluding vehicles from the park was to make parks fit for people to rest and play in and walk freely about in without the stringent attention to safety necessary in the streets. Then it is true that this aim is so far determinate that we know that we have decided to pursue it in what are the clear standard cases recognizable as application of the rule: that is to say, we know that we want peace in the park quoad the motorists, the bicyclists, the bus driver. On the other hand, though we put this general aim of peace in the park in conjunction with those cases which we could not ab initio anticipate,

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e.g., the scooter, the toy motor car electrically propelled (perhaps rather fast, moderately dangerous to the old, but great fun for the young), our aim is indeterminate in these directions: we have not settled whether some and if so what degree of peace in the park is to be sacrificed to those whose interest or pleasure it is to use these objects.

When the actual case arises we then have to weigh and choose between or make some compromise between competing interests and thus render more determinate our initial aim. In cases of this sort, the two factors limiting our power to regulate *ab initio* come together.

Consider now cases where discretion is Express or Avowed, as when the courts apply a variable standard, e.g., the standard of due care in cases of civil negligence. Very roughly speaking, the law is of course that a man has a right to compensation if his injuries, especially physical ones, are the result of the failure of another to take reasonable care to avoid inflicting such injuries. But what is reasonable or due care in a concrete situation? We can of course cite typical examples of due care: doing such things as stopping, looking, and listening where traffic is to be expected. But we are all well aware that the situations where care is demanded are hugely various and that many other factors come in besides stop, look, and listen: indeed, these may not be enough and might be quite useless if looking would not help you to avert the danger or see anything. What we are striving for in the application of standards of reasonable care is (1) to insure that precautions will be taken which will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests. Nothing very much is sacrificed by stopping, looking, and listening unless of course you are driving [a] man bleeding to death to the hospital. But owing to the immense variety of possible cases where care is called for, we cannot *ab initio* foresee what combinations of circumstances will arise nor foresee precisely what interests will have to be sacrificed and how far if precaution against harm is to be taken. Hence it is that we are unable to consider before particular cases arise precisely what sacrifice or compromise of interests or values we wish to make in order to reduce the risk of harm. Again, our aim of securing people against harm is indeterminate til we put it in conjunction [with] or test it against possibilities which only experience will bring before us: when it does, then we have to face a decision which will, when made, render our aim *pro tanto* determinate.

### VIII.

Administrative rate-fixing is of course a more dramatic illustration of the factors that make discretion inevitable in this human situation. We want a rate which is reasonable and fair, but this aim, like the aim of a successful dinner party, is [a] sort of grand matrix capable of in-

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definite number of different fillings or completions. As usual there will be clear, identifiable examples of what is not a reasonable rate: a rate which would hold the public up to ransom for a vital service because it is so high would defeat any purpose that we could have in regulating rates; on the other side, perhaps more disputably, a rate too low to provide any possible incentive for running the railway organization or too low to provide returns higher than the occupation of sweeping the streets would normally have to be rejected. But it is patent to anyone acquainted with this area of discretion that these are only some of the main constituents: successive cases reveal different factors requiring attention. There may be rates which owing to the predicament of a local industry would jeopardize the prosperity of millions but apart from this consideration might well be thought fair. This is only one of the complexities which preclude the satisfactory formulations of rules *ex ante*: and again the need for discretion springs from the attempt to regulate an area where the anticipatable combinations of relevant fact are relatively few and bring with them a relative indeterminacy of our aim. Of course, we hope to evolve rules in the course of experience: this will turn upon the extent to which common factors running through diverse situations may be found, and in some cases they have been found and afford either a satisfactory basis for certain rules or result in the identification of a factor which will always require attention by the body exercising the discretion in these fields. Of course, the ramparts of ICC determinations are strewn with the corpses of forlorn hopes for such rules (definitions of reasonable rates in terms of fair return on value in exchange, replacement value, investment value, etc.).

Pending the evolution of rules, discretion must take its place because the area is really one where reasonable and honest men may differ, however well informed of the facts in particular cases.

Hence, in such fields as these, the important matter, having diagnosed what it is that renders discretionary jurisdiction inevitable, is to identify what are the optimum conditions for the exercise of discretion, because where we cannot be sure of being right, we can at least do what we can to obtain the best conditions for decisions.

I think it not too much to say that decisions involving discretion are rational primarily because of the manner in which they are made, but of course the word "manner" here must be understood to include not only narrowly procedural factors and the deliberate exclusion of private interest, prejudice, and the use of experience in the field but also the determined effort to identify what are the various values which have to be considered and subjected in the course of discretion to some form of compromise or subordination.

## IX.

The foregoing is of course merely a preliminary account and necessarily far too general: what is now needed is to take the use of discretion in various fields such as those perhaps illustrated by the examples in section III and to characterize what in each field are the factors which require our attention if discretion is to be soundly exercised. I think that the optimum conditions for the exercise of discretion will prove to be very different in the case, say, where resort to discretion is had only tacitly or on the periphery of rules from other cases. It seems to me clear, for example, that where discretion is used in the course of judicial determinations in the attempt to apply rules, the weight of factors such as consistency with other parts of the legal system will be prominent, whereas they may be at their minimum in cases of Avowed Discretion exercised by, say, a rate-fixing body.

It is obvious that the interests of this group may be directed to different elements in the total phenomenon of discretion which I have tried to characterize: some members may think it of greatest importance to identify and characterize the factors attention to which will be part of the sound exercise of discretion; others will be more interested in the extent and scope of discretion to be entrusted to authorities in various different circumstances.

I have myself concentrated attention in this admittedly introductory paper on the "leap" necessarily involved in the exercise of discretion after we have done all we can to secure the optimum conditions for its exercise. This is important because phrases often used to describe the exercise of discretion, such as "intuition" [and] "recognition of an implicit guiding purpose," may encourage the illusion that we never reach the point where we have to reconcile conflicting values or choose between them without some more ultimate principle to guide us. I think the suggestion that we never reach the "leap" is just as wrong as a description of discretion as a mere arbitrary choice would be. It seems to me clear that just because there is a point at which we can no longer be guided by principles and at the best can only ask for the confirmation of our judgment by persons who have submitted themselves to a similar discipline before deciding, that we have in discretion the sphere where arguments in favour of one decision or another may be rational without being conclusive. No doubt we learn through successive exercises of discretion in a similar field and discovering what in the sense explained above appears to be vindicated to identify factors attention to which will be necessary if further decisions are to be justified. What would most merit examination in this field, I think, is the study of what standards we appeal to when looking back upon a range of discretionary decisions we say typically such things as, "That was a satisfactory compromise between different values." Do we here appeal to the judgment of a plurality of impartial spectators, or are there more determinate principles at work?