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Ministerial and Discretionary Official Acts

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MINISTERIAL AND DISCRETIONARY OFFICIAL ACTS

TWO recent cases, one in Michigan and one in Iowa, bring up again the insistent question of judicial control over administrative action and the oft-repeated distinction between "ministerial" and "discretionary" official acts.

In *Samuels* v. *Couzens*,[1] plaintiff sought *mandamus* to compel the mayor of Detroit to issue him a license to engage in the jewelry business under an ordinance "to regulate and license" such businesses. The ordinance, which was very short, provided that "no person * * * shall engage in the business of selling jewelry * * * without first having obtained a license from the mayor * * *" It required a written application to the mayor, containing an agreement on the part of the applicant that "he will accept the license, if granted him, and that it may be revoked at the will of the mayor." A third section required the filing of a "sufficient surety bond" in the sum of $200 "to cover any loss or damage to any citizen doing business with such licensee," and required the payment of a license fee of one dollar. Plaintiff tendered to the mayor a concededly proper application and bond, but the mayor refused to grant a license "for the reason that plaintiff had theretofore been in the habit of deceiving and defrauding the public as to the quality of the jewelry sold by him, and had so conducted his business that it was not in the public interest that he should be permitted to continue the same." A judgment for defendant was affirmed, the court saying that the ordinance conferred on the mayor "a reasonable discretion in the issue of such license." In a vigorous dissenting opinion, Wiest, J., urged that the ordinance was void as conferring on the mayor "arbitrary" and "uncontrolled" power.

In *Lloyd* v. *Ramsay*,[2] plaintiff sought *mandamus* and also invoked *certiorari* to compel the Secretary of State of Iowa and the Executive Council to issue a certificate of incorporation to the "Federal Oil Company." The statute[3] contains the following provision:

"When articles of incorporation are presented to the Sec-

[1] 183 N. W. 925 (Mich., 1921).
[2] 183 N. W. 333 (Iowa, 1921).
[3] Iowa Code Supplement, 1913, Sec. 1610.

> retary of State for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan of doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of the law, or that their object is an unlawful one, or against public policy, or that their plan of doing business is dishonest or unlawful, he shall refuse to file the same."

From an adverse decision of the Secretary an appeal to the Executive Council (consisting of the Governor, Secretary, Treasurer and Auditor of the State) was provided for, and the same grounds of decision were prescribed. The Secretary refused to file plaintiff's articles because of the gross disproportion between the amount of common and preferred stock ($5,000 common and $195,000 preferred), which he declared to be "against public policy," and the Executive Council sustained his decision on the ground that "the said articles were contrary to good business practice." A judgment for the plaintiff was reversed, the court unanimously holding that the approval of articles under this statute was not a "purely ministerial act," but involved the exercise of discretion, and that the Council had not exceeded its jurisdiction.

What is the basis for the distinction between "ministerial" and "discretionary" official acts? How do courts determine in which class a particular official act belongs? What are the legal consequences of the distinction? Upon what grounds or motives may "discretionary" official action be predicated? The present discussion will be devoted to attacking some of these problems by the methods of legal analysis. Public law problems have frequently been attacked by comparative, historical and sociological methods; more rarely by analytical methods.[4]

1. *"Executive" and "Judicial" Acts.* The term "ministerial" has often been invoked to describe non-judicial acts generally. Thus,

[4] E. g., BURGESS, COMPARATIVE CONSTITUTIONAL LAW; GOODNOW, COMPARATIVE ADMINISTRATIVE LAW; GHOSE, COMPARATIVE ADMINISTRATIVE LAW; Ehrlich, "Comparative Public Law and the Fundamentals of its Study, 21 COLUMBIA L. REV. 623.

in determining that a statute does not violate the "separation of powers" clause of the state constitution by conferring judicial powers upon non-judicial officers,[5] or that it does violate that clause by imposing non-judicial duties upon courts,[6] courts frequently seek to sustain their decisions by naming the official acts called for by the statute "ministerial acts." In other words, "ministerial" is used as synonymous with "executive." This use of "ministerial" is unfortunate, to say the least, but it may be rendered innocuous by subdividing "ministerial" acts into those "purely ministerial" and those "quasi-judicial."[7] Such discrimination is not commonly found, and this double use of "ministerial" has contributed to the confusion of the courts. Thus, the case of *Flournoy* v. *Jeffersonville,*[8] involving the question of separation of powers and the "definition" of "ministerial" therein attempted, has repeatedly been cited in cases where the issue was whether a concededly executive (that is, non-judicial) act was conclusive against attack in the courts.[9] No court would deny that there are some non-judicial (and non-legislative) acts which are "discretionary," as opposed to "ministerial," in the sense that they are conclusive against attack in the courts; yet the double meaning of "ministerial" ("executive" and

[5] Flournoy v. Jeffersonville, 17 Ind. 169 (1861); State v. Le Clair, 86 Me. 522, 30 Atl. 7 (1894).

[6] See 7 COLUMBIA L. REV. 603-5, for a discussion of this type of question.

[7] Bruce, J. (now Professor Bruce of the University of Minnesota Law School), in State ex rel. v. Stutsman, 24 N. D. 68, 139 N. W. 83 (1912), at p. 88.

[8] Flournoy v. Jeffersonville (*supra,* n. s.) was a suit by a city to enforce a special assessment for street improvements. Defendant, a property owner, urged that the statute under which the proceedings were had was void in that it authorized the mayor, council and city clerk to issue a precept for the amount of the assessment, which was really the commencement of a judicial action for the collection of the assessment. The question, then, was whether the statute conferred judicial powers on non-judicial officers; the court held that "the issuing of the writ is a ministerial act and may be performed by any person upon whom the law may cast the duty" (p. 172).

[9] Among the many subsequent cases in which this opinion is cited and quoted from, may be mentioned:—State ex rel. v. Nash, 66 Ohio St. 612, 64 N. E. 558 (1902) (*Mandamus* to compel Governor to exercise his power of appointing a Lieutenant-Governor); Stephens v. Jones, 24 S. D. 97, 123 N. W. 705 (1909) (*Mandamus* to compel county commissioners and county superintendent of schools to consolidate school districts).

"non-discretionary") appears to have led to a tendency, more perceptible in the cases a generation or two ago, to deny conclusiveness to all non-judicial official acts. It is not proposed to discuss here the meaning of "ministerial act" as opposed to "judicial act," *stricto sensu*.[10]

2. *The Kind of Judicial Remedy Invoked.* The distinction between "ministerial" and "discretionary" acts of non-judicial (and non-legislative) officers, which is the particular point to be examined here, has been applied chiefly in cases involving an attack by a private citizen upon the validity or conclusiveness of the act of such an officer. While it has been invoked most frequently where the particular judicial remedy used has been *mandamus*, it is not confined to such cases. The distinction has been applied in actions for damages against a public official for refusal to perform an act,[11] or for performing it negligently or improperly;[12] in suits to enjoin official action claimed to be erroneous;[13] in *certiorari* proceedings

[10] Some further examples of the confusion of terms are:—State v. Governor, 25 N. J. L. 331 (1856) (*Mandamus* denied, to compel Governor to issue a commission to an elected officer; the court saying (p. 350): "As contra-distinguished from judicial duties, all duties are ministerial".) People ex rel. v. Jerome, 36 Misc. Rep. 256, 73 N. Y. S. 306 (1901) ("The act of every public official is either ministerial or judicial" (p. 257)). Hamma v. People, 42 Colo. 401, 94 Pac. 326 (1908) (defendant was committed for contempt of court because he charged that a county judge had kept his accounts of fees and expenditures carelessly; *held*, not a judicial contempt, since the keeping of accounts was a "ministerial," not a "judicial" act).

[11] GOODNOW, PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES, pp. 295, 296; Grider v. Tally, 77 Ala. 422 (1884) (refusal of liquor license); Downer v. Lent, 6 Cal. 94 (1856) (refusal of pilot's license), Kendall v. Stokes, (U. S.) 3 How. 87, 11 L. Ed. 506 (1845) (removing credit from books of Postmaster-General's department, placed there by predecessor).

[12] Adams v. Schneider, (Ind. App. 1919) 124 N. E. 718, 4 MINNESOTA L. REV. 303 (members of school board liable to spectator by falling of defective stands at school athletic meet); People v. May, 251 Ill. 54, 95 N. E. 999 (1911) (clerk of circuit court liable for carelessly accepting non-resident surety on appeal bond). See, however, McCord v. High, 24 Ia. 336 (1868); Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942 (1904) holding officer liable for exercise of a discretionary power.

[13] Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894 (1904); I SPELLING INJUNCTION AND OTHER EXTRAORDINARY LEGAL REMEDIES, (Ed. 2, 1901) §§ 609-640, 22 CYC. 879 by Judge Henry Wade Rogers.

to review the acts of non-judicial officers;[14] and even in rare cases where the extraordinary remedy prohibition has been invoked.[15] Moreover, the distinction is frequently invoked in collateral proceedings where the conclusiveness of an official act is involved; as in *quo warranto,*[16] or in an action against a municipal corporation,[17] or by such a corporation or the state.[18] Perhaps it has been erroneously invoked in many of these cases; however, that cannot be determined until the distinction has been defined or the principles upon which it rests made clear. Taking into account the great variety of cases in which the distinction has been resorted to, it seems fair to say that it is, or is intended to be, one test of the propriety, extent and method of control by judicial tribunals, *stricto sensu,* over administrative (that is, non-judicial and non-legislative)[19] action, whether that control be direct or indirect, preventive or punitive.

Is there any underlying conception which runs throughout these cases and gives a rational unity to the entire conception? The courts usually speak as if there were. The term "quasi-judicial" is used so frequently in some connections (particularly in determining the scope of *certiorari*) in place of "discretionary" that it is not always clear whether the courts are contrasting "ministerial" with "discretionary" or with "quasi-judicial"; and undoubtedly there are official acts which are "discretionary" in the sense that *mandamus* will be refused, and yet are not "quasi-judicial" so that *certiorari* will lie.[20] Moreover, it has been said that the United States Supreme

[14] Drainage Commissioners v. Griffin, 134 Ill. 330, 25 N. E. 995 (1890); 6 Cyc. 752; Friedman v. Mathes, 8 Heisk. (Tenn.) 488 (1872).

[15] State ex rel. v. Stutsman, *supra,* n. 7; Goodwin v. State, 145 Ala. 536, 40 So. 122 (1906).

[16] State v. Fidelity and Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108 (1888) (*semble,* insurance commissioner's license to foreign insurance company not conclusive as to its right to do business in the state; interpretation of statute involved).

[17] Rio Grande County v. Lewis, 28 Colo. 378, 65 Pac. 51 (1901).

[18] State v. Howard, 83 Vt. 6, 74 Atl. 392 (1909).

[19] "Non-legislative", is not meant to exclude the exercise of powers of a legislative character by officials not constituting a recognized legislative body.

[20] In re Saline County Subscription, Thompson et al. Petitioners, 45 Mo. 52 (1869); People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570 (1906).

Court has treated the same act as "ministerial" in *mandamus* proceedings and "discretionary" in an action for damages;[21] but a careful reading of the decision in question discloses that this opinion is not well founded,[22] and it is opposed by several other cases which have declared the test to be the same in the two classes of cases.[23] As a matter of policy, there may be excellent reasons for holding that a public official may be coerced by *mandamus*, a preventive remedy, to do a particular act, and yet may not be sued for damages, after the harm is done, for refusing to do the same act; but analytically, it would seem that both remedies postulate the existence of a legal duty to do or not to do the act in question, and that to treat an act as "ministerial" in one proceeding and "discretionary" in another would deprive these phrases of all rational content as substantive concepts to be utilized and applied in reaching conclusions in concrete cases, and would indicate that they are mere labels to be placed upon conclusions already arrived at on other grounds.

3. *"Acts Involving the Exercise of Discretion or Judgment."* Among the attempted definitions one often finds such statements as these: "The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode, and occasion of its

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[21] GOODNOW, PRINCIPLES, p. 400.

[22] In Kendall v. U. S. 12 Pet. 524, 9 L. Ed. 1181 (1838), the court held that the Postmaster-General could be compelled by *mandamus* to credit the relators with the amount found due him by the Solicitor of the Treasury under a special Act of Congress; in Kendall v. Stokes, 3 How. 87, 11 L. Ed. 506 (1845), the court held the Postmaster-General was not liable in an action for damages, brought by the relators in the previous case, for erroneously causing to be erased or suspended certain credits in favor of plaintiffs placed there by the defendant's predecessor in office, the immunity being based on the theory, that this was a "discretionary" act. In another count plaintiffs claimed damages for refusal to pay the claim *after* the special act of Congress and the decision of the Solicitor of the Treasury pursuant thereto, which was the same refusal involved in the *mandamus* case. As to this count, the court confined itself to saying that plaintiffs could not have both *mandamus* and action for damages for the same wrong (election of remedies). See 3 How. 99-103.

[23] Grider v. Tally, 77 Ala. 422 (1884); Rains v. Simpson, 50 Tex. 495 (1878). *Contra*:—Partridge v. General Council of Medical Education, 25 Q. B. D. 90 (1890).

performance with such certainty that nothing remains for judgment or discretion,"[24] and "But where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial."[25]

Such statements would seem to postulate a class of official acts in which the official is an automaton; the facts and the statute are placed in the machine, a lever is pressed, and out comes the official act. Such an official never was on land or sea. Human action always involves the exercise of some judgment or discretion.

But, it may be said, "judgment" or "discretion" means something more than a mere mental operation; it involves intelligent choice between two courses of action, where the decision is doubtful or difficult of ascertainment. In short, the difference is merely one of degree. This explanation, while inconsistent with the dogmatic form in which the distinction is usually stated, may serve to point to a class of clerical acts which are "ministerial", such as entering figures in a book,[26] or copying a deed into the records. That is, *granted that the act is to be done,* the details as to which the official exercises judgment or discretion — the kind of pen he will use, whether he will write in long-hand or with a typewriter — are such that his choice does not affect individual interests, and in this sense

[24] Grider v. Tally, 77 Ala. 422 (1884), a leading case, widely quoted, For similar statements, see WYMAN, ADMINISTRATIVE LAW, § 34; People ex rel. v. Rosendale, 5 Misc. Rep. 378, 379 ("A ministerial duty is one in respect to which nothing is left to discretion; it is a simple definite duty arising under conditions admitted or proved to exist and imposed by law.") Wailes v. Smith, Comptroller, 76 Md. 469, 477, 25 Atl. 922 (1893) ("And by 'ministerial' we mean where one is entrusted with the performance of an absolute and imperative duty, the discharge of which requires neither the exercise of official discretion or judgment".); People v. Jerome, 36 Misc. Rep. 256, 257, 73 N. Y. Supp. 306 (1901) ("A purely ministerial duty is one to which nothing is left to discretion"); Morton v. Comptroller General, 4 S. C. 430, 473, (1873); State v. Howard, 83 Vt. 6, 14, 74 Atl. 392 (1909).

[25] A. L. Sanborn, "Mandamus", 26 Cyc. 160; Grider v. Tally, 77 Ala. 422 (1884) 425; Wailes v. Smith, 76 Md. 469, 477, 25 Atl. 922 (1893); People v. Jerome, 36 Misc. Rep. 256, 73 N. Y. Supp. 306 (1901); Friedman v. Mathes, 8 Heisk. (Tenn.) 488, 502 (1872) (*Certiorari* to review tax assessments, "If an officer do an act depending on the exercise of the slightest judgment or discretion on his part, then the act is judicial * * *"); State v. Howard, 83 Vt. 6, 14, 74 Atl. 392 (1909).

[26] Kendall v. U. S., *supra,* n. 22.

the "discretion involved" in doing such an act, is so unimportant that it may be ignored.

But this reasoning will not solve very many actual controversies. In most cases arising under *mandamus,* for instance, the issue is whether the official will do the act, or not, at all. Assuming that the official is honest and diligent, and eager to exercise properly the statutory powers conferred on him, there still remains the exercise of judgment and discretion in choosing the statute applicable, in interpreting it, in ascertaining the facts in the particular case, and in applying the statute to them. Rarely indeed will it happen that these processes will not "involve", in a *substantial degree,* the exercise of judgment and discretion. The recorder of deeds, for instance, when an instrument is presented for record, must interpret the recording act, and likewise interpret the instrument, and apply the statute to the particular facts; the sheriff in levying on personal property must ascertain that the judgment debtor is the owner of it. The "judgment and discretion" involved in either case is the same as that which the judges exercise when the same questions are brought before them; yet they hold that the official acts "ministerially". Why? Is it not because tangible property rights are affected and the controversy assumes the aspect of private litigation, the kind of questions the courts are constantly deciding, and which they consider it their province to decide finally? In other words, the courts regard it as a proper case for judicial control?[27]

A slightly different definition is that given in *Flournoy* v. *Jeffersonville,*[28] a statement frequently quoted:—"A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."[29]

The first part of this definition is fairly descriptive of acts done by subordinate employees in obedience to a specific command of a

[27] In the case last cited the problem is attacked fundamentally, and when the court says the act is ministerial, it appears to mean that judicial control over such acts will not unduly invade the sphere of executive freedom.

[28] 17 Ind. 169, 174 (1861).

[29] Similar statements in 33 HARV. L. REV. 465; State ex rel. v. Nash, 66 Ohio St. 612, 618, 64 N. E. 558 (1902).

superior administrative official. Originally it seems that *mandamus* was such a command from the King, as head of the administrative system, to the royal subordinates, prescribing the thing to be done, the command created the duty.[30] Perhaps the description is sufficiently accurate to designate official acts commanded by special Acts of Congress, as in *Kendall* v. *United States*,[31] where the statute directed the Postmaster-General to credit the relators, naming them, with the amount ascertained and fixed by the Solicitor of the Treasury—thus, in effect, for that purpose making the Postmaster-General subordinate and subject to the orders of the Solicitor. However, for cases where the official acts under a statute, general in its terms, which does not command any particular act or identify the state of facts except in generic terms, and where the particular command is to be issued, not by a superior administrative official but by a court which has fallen heir to the vicarious prerogative jurisdiction of the King's Bench in *mandamus*, it is unsound. Statutes are not and cannot be interpreted and applied automatically; the legislature does not and normally cannot command a particular act. Now it is the courts which issue the specific command; and they are able the more readily to disguise from themselves the fact that they are doing so by means of the nineteenth century illusion that statutory interpretation was a mechanical process.[32]

The word "propriety" has a convenient ambiguity which veils the latter part of the above quotation. "Propriety of the act being done" may include the "propriety" of carrying out the legislature's policy as expressed in the statute conferring the official powers. Where the official acts or refuses to act in manifest disregard of the policy expressed in the statute, a proper case for judicial control is usually presented. This control is usually justified on the ground that the case is one of "arbitrary and illegal" exercise of discretion, or "abuse of discretion";[33] sometimes, however, on the ground that

[30] GOODNOW, PRINCIPLES, pp. 421, and 422, n. 4; HIGH, EXTRAORDINARY LEGAL REMEDIES, (Ed. 3) § 2; SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY LEGAL REMEDIES, § 1365; MERRILL, MANDAMUS, 52.

[31] *Supra*, n. 22.

[32] GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (Ed. 2, 1919) §§ 13, 26; POUND, "Courts and Legislation", in THE SCIENCE OF LEGAL METHOD, p. 206.

[33] E. g. Reg. v. Boteler, 4 Best & S. 959 (1864); In re Gross' License, 161 Pa. 344, 29 Atl. 25 (1894).

a "ministerial duty" exists to do the act.[34] The real basis of judicial control in such cases is that the official has exercised his power from improper motives, upon improper grounds; he has not even attempted to apply the statutory norm governing his official action to the case in hand. Examples are: Where the licensing board refuses an applicant a license to practice dentistry because he is a graduate of a dental college which is a rival of the one with which the members of the board are connected[34]; where an official empowered to issue licenses on certain terms refuses to issue any licenses at all.[35] The emphasis is now shifted from some quality or characteristic of the official act to the grounds or motives on which the decision of the official, to do or not to do it, is based. If "propriety" has the meaning above suggested—propriety of the legislative policy—, if all official acts are "ministerial" which the official performs without wilful disregard of the legislative policy, the class of ministerial acts will be extended far beyond the limits laid down by the actual decisions.

If "propriety of the act being done" means the propriety of doing the particular act in the particular case, including the doing or not doing of it as well as the method of doing it, it may be noted that officials are sometimes held liable in damages for the doing of acts which they might have refused to do at all,[36] or which they could not have been judicially coerced into doing in a particular way.[37] Yet the nature of the "act" is not changed by the nature of the proceeding.

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[34] E. g. Illinois State Board of Dental Examiners v. People ex rel. Cooper, 123 Ill. 227, 13 N. E. 201 (1887).

[35] See People v. Perry, Mayor, 13 Barb. (N. Y.) 206 (1852), where, however, the court does not refer to the act as "ministerial". In State v. Nash, 66 Ohio St. 612, 64 N. E. 558 (1902), where the governor had refused to exercise his power of appointing a lieutenant-governor, the court said he was under a "ministerial duty" to appoint someone, though he had "discretion" in selecting the person to be appointed.

[36] Adams v. Schneider, (Ind. App. 1919) 124 N. E. 718, 4 MINN. L. REV. 303 (the court said the members of the school board acted "ministerially" in having stands erected for a school athletic meet, though it seems clear they would have violated no statute in refusing to hold the meet at all).

[37] In McCord v. High, 24 Ia. 336 (1868), the late Judge Dillon held a road supervisor liable for diverting a stream of water from plaintiff's land in the course of repairing a highway, though he conceded that the defendant

Assuming, as we are here, that the official is not wilfully disregarding the legislative policy as expressed in the statute, then the "propriety of the act being done," as just defined, involves the interpretation of the statute, the ascertainment of the facts of the particular case, and the application of the statute to the facts. Once more we are led back to the illusion that these processes are mechanical, that in performing a certain class of official acts, the official acts automatically, "without regard to, or the exercise of, his own judgment." No doubt in many instances the official goes through these processes unconsciously and simultaneously, but nevertheless they go on. Recording a deed, for example, is one of the simplest official acts having far-reaching consequences upon private interests; yet even here, however routine the operation may be, the official exercises judgment.

But even if we concede that the official does not exercise "judgment" in the routine cases, the same certainly cannot be said of the abnormal cases in which litigation arises, in the course of which the distinction between ministerial and discretionary acts may be come important. The court would hardly concede that *its* decision of the very questions which the official—the recorder of deeds, for instance—has already passed upon, involves no judgment or discretion. Moreover, taking the definition literally, if the official does *in fact* exercise his judgment in regard to the propriety of the act being done, it is not ministerial; the definition becomes useless when most needed.

If it is meant that an act is "ministerial" when the official *ought not* to exercise his judgment or discretion as to the propriety of the (particular) act being done, we come back to the question whether there is a class of acts—indeed, any act—which the official ought to do without the exercise of his own judgment. One might assume that an administrative official ought to use his intelligence in performing his duties as much as a judge. It is believed the "definition" will not stand analysis, and that the repetition of such a

had "discretion" in improving the highway. Perhaps the *mandamus* decisions may be distinguished from the cases where the official is held liable in damages, on the ground that the "duty" is different in the two cases. See Pound, "Legal Rights," 26 INTERN. JOURN. OF ETHICS, at pp. 94-95. In the one case the duty is both affirmative (to do) and negative (not to do); in the other, it is merely negative. *Sed quaere?*

shibboleth can only serve to obscure the nature of the real questions involved. Attention will be called further on to certain glimmerings of sense in these definitions.[38]

4. *The Nature of the Interests Affected.* It is believed that much of the confusion in American administrative law is due to the circumstance that, historically, two opposite cross-currents of juristic and political tradition have come into play. In the first place, the King's Bench, by reason of the fiction that the sovereign sat in person as a member of the court, exercised the functions of a superior administrative tribunal[39] through its writ of *mandamus* (originally a command from a superior to an inferior administrative official) and to some extent through other extraordinary proceedings. In the exercise of this jurisdiction, it became settled that the court could review only questions of law, as distinguished from questions of fact or expediency; the latter were reviewed by the Privy Council.[40] The court's jurisdiction survived the abolition of the Star Chamber.[41] From this division of functions our American courts inherited the principle that courts will not overturn administrative decisions on questions of expediency.

The line between questions of law and questions of expediency was no more distinct, in England, than the division between the respective functions of the two tribunals. In general, the Privy Council reviewed only those extraordinary cases which could not be settled by the common law courts by the application of the ordinary principles of law.[42] In short, the distinction was not conceptual, but functional. It is not surprising, then, that American courts, in the absence of any complementary administrative appellate tribunal comparable to the Privy Council (or to the Quarter Sessions, which later absorbed many of its functions) have had considerable difficulty in giving a rational content to the concept, "discretionary

[38] *Infra,* sub-headings 12 and 13.

[39] GNEIST, HISTORY OF THE ENGLISH CONSTITUTION (Ashworth's trans., 1886) II, Ch. 48, especially pp. 364, 365, 368-370; GOODNOW, PRINCIPLES, p. 421. See also MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 134.

[40] GOODNOW, op. cit., p. 423; GNEIST, op. cit., II, p. 218, p. 363.

[41] 16 Car. I, c. 10.

[42] GNEIST, DAS ENGLISCHE VERFASSUNGS—UND VERWALTUNGSGESCHICHTE, I (Geschichte und heutige Gestalt der Aemter in England) (1857), §§ 20, 21, 30.

act." And while the absence of any effective administrative appeal has led American courts to extend their control over the administrative field of action further than the English courts did, yet it is still true that the courts will generally refrain from interfering with administrative decisions involving merely questions with which courts do not ordinarily deal—e. g., whether a particular individual is a proper person to engage in the jewelry business,[43] or whether a corporation's plan of doing business is contrary to public policy.[44] Generally the courts have not interfered with the exercise of the licensing power as a mode of police regulation.

The other current of tradition flows from a directly opposite function. The common law courts came to be looked to as the guardian of individual rights of person and property against oppressive administrative action. Here the courts were not using a vicarious administrative jurisdiction derived from the crown, but were invoking the Teutonic conception that the King rules under God and the law—and the courts refused to renounce their jurisdiction to administer the law. This characteristic Mr. Dicey has unduly exaggerated under the name of "the rule of law."[45] It became paramount during the struggle between the courts and the crown in the seventeenth century.[46]

The statute which abolished the Star Chamber serves as a guide to the scope of the individual interests thus judicially protected. They include the "lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom"[47] and freedom of the physical person.[48] The courts have been much more willing to interfere with administrative action which directly invades the tangible property or the physical person of the individual, than where in-

[43] Samuels v. Couzens, *supra,* n. 1.

[44] Lloyd v. Ramsay, *supra,* n. 2. The idea that the Secretary of State and the Executive Council can decide this question without the aid of the court is apparent throughout the opinion.

[45] DICEY, THE LAW OF THE CONSTITUTION, (Ed. 5), chap. IV.

[46] POUND, THE SPIRIT OF THE COMMON LAW, ch. 3.

[47] 16 Car. I, c. 10, sec. 5. The prohibition in this section extends only to the King and the Privy Council; but the preamble, referring to Magna Charta, c. 29, and the principle of the act, lend color to judicial control over all officials. GNEIST, HISTORY II, 364 n.

[48] 16 Car. I, c. 10, Sec. VIII, (relating to *habeas corpus*).

tangible interests of substance or of personality are infringed.[49] Where individual interests of the former kind are involved, the courts will not be balked of their jurisdiction because the official may, for other purposes, be regarded as having "discretion." As the late Judge Dillon said:—"The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin."[50] A property lawyer might say that the "absolute rights of property" end where the official's "discretion" begins. The subjective nature of the concept "discretion" becomes apparent. Mr. Justice Holmes reasons more intelligibly[51] in *Miller* v. *Horton*[52] when he argues that the direct invasion of physical property is a strong motive for interpreting the statute so that no discretionary power is conferred.

On the other hand, where intangible interests of substance or of personality are involved, such as that of engaging in a particular vocation, courts have been much more willing to concede the existence of a "discretionary power" to make decisions which will be conclusive against judicial attack. The cases of judicial attack on the exercise of the licensing power illustrate this tendency.[53] Thus, in *Samuels* v. *Couzens*,[54] administrative action which virtually deprived an individual of his interest of substance in the pursuit of a lawful calling (engaging in the jewelry business) was held con-

[49] It is true that the broader term "liberties" is used in Magna Charta, c. 29; and Coke interpreted this as including freedom to engage in a business or vocation. SECOND INSTITUTE, I (1792), 47.

[50] McCord v. High, 24 Ia. 336, 350; see *supra*, n. 38. See Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942 (1904): "The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another."

[51] Judge Dillon, in McCord v. High, *supra*, argued that the absence of other redress was a reason why the property owner should be allowed to sue the official, thus introducing the argument *ab inconvenienti*.

[52] 152 Mass, 540, 26 N. E. 100 (1891).

[53] See HIGH, EXTRAORDINARY LEGAL REMEDIES (Ed. 3, 1896), § 327; 31 YALE L. JOUR. 354. Cf. McCord v. High, *supra*, n. 38, where the official was held liable for an erroneous physical invasion of a tangible property right, with Beeks v. Dickinson County, 131 Ia. 244, 108 N. W. 311 (1906), where officials were held not liable for merely *ordering* plaintiff, erroneously, to remain in quarantine, without putting any direct physical compulsion on his person.

[54] *Supra*, n. 1.

clusive[55] against attack by *mandamus*. Especially is this apt to be true where the liberty or privilege curtailed is one which the legislature *might* constitutionally prohibit entirely. Thus, in *Lloyd* v. *Ramsay*[56] the court took as its starting point the premise that the legislature could grant or refuse corporate charters as it saw fit; there was no inalienable right to incorporate. *A fortiori,* then, the legislature can impose any restrictions it may see fit, including the approval of an administrative official. This vicious argument *a fortiori* has been invoked time and again, sometimes to sustain arbitrary administrative action.[57] It is submitted, then, that the nature of the individual interest involved and of the method in which it is infringed by administrative action, is often a decisive factor in determining whether the courts will call the official act "ministerial" or "discretionary" for purposes of judicial control.

5. *Importance of the Official.* While it is often said that the ministerial or discretionary character of the official act is to be determined with reference to the particular act to be done in the particular case rather than to the importance of the official's "duties" in general,[58] nevertheless courts are in varying degrees influenced by the importance or prominence of the office. Aside from the holdings that mandamus will not lie against a chief executive,[59] other cases have emphasized the importance of the office as a potent factor in determining whether the "duty" is ministerial or discretionary. Thus, in *State ex rel.* v. *Stutsman,*[60] Bruce, J., pointed

[55] The court found that the discretion was exercised "reasonably."

[56] *Supra,* n. 2.

[57] See HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, *passim,* especially Chapter VI.

[58] See GOODNOW, PRINCIPLES, p. 401.

[59] GOODNOW, *op. cit.,* p. 435; 3 CORNELL L. QUART. 308; State v. Governor, 25 N. J. L. 331 (1856). In other cases, refusal to mandamus the chief executive is based largely on the discretion of the court to refuse to issue the writ, such discretion being affected by the doctrine of separation of powers.

[60] 24 N. D. 68, 139 N. W. 83, at p. 89 (1912). See also State Publishing Co. v. Smith, 23 Mont. 44, 57 Pac. 449 (1899) (approval of state printing contract by governor and state treasurer); Louisiana v. McAdoo, 234 U. S. 627, 34 Sup. Ct. 938 (1914) (suit to enjoin Secretary of Treasury from lowering duty on sugar); Martin v. Mott, 12 Wheat. 19 (1827) (conclusiveness of President's determination that imminent danger of invasion exists, before calling out the militia).

out the difference between the approval of a bond by a clerk of a court and the approval of a bond by the Board of Railroad Commissioners. A little further on the court says:—"For good faith in such matters they are responsible to the public, and not to the sureties."[61]

The prominence of the office, if it be an elective one, is important in determining the probability of effective control by the electorate. The judiciary is only one agency of several which can exercise control over administrative action,[62] and in determining whether or not it will exercise control in a particular case, the court may, not improperly, consider the probability of other methods of control being effective. However, the prominence or pettiness of the official does not characterize the act; the approval of a bond by a clerk is the same kind of official act as the approval of a bond by a state railroad commission. The differences between the two, for purposes of judicial control, rest upon grounds of pure expediency, which are often concealed beneath the words "ministerial" and "discretionary."

6. *Investigation or Determination of Facts.* Does the circumstance that the official must investigate and reach a conclusion as to the existence of facts before doing the official act make it a "discretionary" act? One would hardly think so, since the official does not live in a vacuum, is not completely walled in by the pages of a statute book; and must inevitably ascertain the existence of some facts in order to perform the simplest official act. Accordingly, it is commonly said:—"That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and specific duty, does not operate to convert it

[61] 139 N. W. 91. See also State Publishing Co. v. Smith, *supra*, n. 60, where it is said that the governor and treasurer are responsible to the people alone. "It is not for the court to correct their consciences." The possibility of control by non-judicial agencies is strongly emphasized.

[62] MATHEWS, PRINCIPLES OF STATE ADMINISTRATION, p. 9, enumerates five forms of control over administrative action: "Popular, political, legislative, judicial, and administrative." See also GOODNOW, PRINCIPLES, 370 *ad fin.*

into an act judicial in its nature. Such is not the judgment or discretion, which is an essential element of judicial action."[63]

This negative form of statement has led to an affirmative form, the converse of the foregoing, which if logically applied would unduly widen the scope of judicial control:—"That the duty is ministerial when it is to be performed upon a certain state of facts, although the officer or body must judge according to their best ability whether the facts exist, and whether they should perform the act, seems to be the rule established by the weight of authority; otherwise, it is obvious that no mandamus could ever lie in any case against public officers."[64]

On the other hand, it is said:—"If the duty is one that necessarily involves an inquiry of fact and an exercise of judgment upon the case presented it is not ministerial, and the disposition made of it will be binding on the courts."[65]

Inasmuch as every official act must be preceded by the ascertainment of some fact by the official, and "involves" the exercise of *some* judgment (unless "judgment" means an exceptional degree of intelligence, though the matter is not usually put as a question of degree), obviously this statement offers no criterion.

One of the most unlearned yet enlightening opinions on this subject which the writer has seen is that in *Morton* v. *Comptroller General*,[66] an application for a mandamus to compel the defendant, comptroller, to levy a tax to pay the interest on state bonds. In granting the writ, the court said:—

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[63] Grider v. Tally, 77 Ala. 422 (1884), at p. 426; quoted with approval, GOODNOW, PRINCIPLES, p. 405; People v. May, 251 Ill. 54, 57, 95 N. E. 999 (1911), and in many other cases. "The ascertainment of a fact which raises the duty, or is collateral to its performance, is not such an exercise of judgment as will deprive the duty of its ministerial character." State v. Howard, 83 Vt. 6, 14 Atl. 392 (1908), citing Grider v. Tally.

[64] Stephens v. Jones, 24 S. D. 97, 102, 123 N. W. 705 (1909) (county commissioners and county superintendent decided a "majority of the qualified electors" had not signed a petition for consolidation of school districts; *mandamus* issued, the court having decided to the contrary).

[65] State v. Howard, 83 Vt. 6, at p. 14, 74 Atl. 392 (1908) (allowance of claims for traveling expenses of official by state auditor, conclusive in action by state to recover back the "sums" paid). See also Wailes v. Smith, 76 Md. 469, 25 Atl. 922 (1893).

[66] 4 S. C. 430 (1873).

"The fact that a reasonable doubt exists as to some necessary fact on which the duty of performance depends does not interfere with the certainty of the duty *where the ascertainment of such fact is the proper subject of judicial inquiry,* for in that case the officer, if doubtful as to the fact, may put the party demanding performance to proof of such fact in a proper judicial proceeding, as in mandamus . . . where, as is sometimes the case, a public officer or a public body is clothed with power to determine *conclusively* the existence of any fact as bearing on the performance of a public duty, a discretion on the part of the officer may exist interfering with the certainty of the duty demanded, so that a court might not be justified in treating such fact as a matter for judicial entertainment, when the remedy seeks to enforce specifically such a duty."[67]

The naive suggestion that official action can wait until the salutary judicial remedy has dissipated the official doubt, may be passed over. The engaging candor of the court in stating that an official has discretion *because* his determination of fact is conclusive, rather than the reverse, that his determination of fact is conclusive *because* he has discretion, reminds one of the small boy, in the fable about the magic garment which only the virtuous could see, who cried out that the king had nothing on.

Since most offices in America today are created and regulated by written law, constitutional or statutory, the written law may provide or indicate whether or not the official's determination of facts is to be conclusive against all or some forms of judicial attack. To this extent the exercise and extent of exercise of judicial control over the administration will (assuming the statute to be constitutional) be settled by the legislature and the courts have merely to obey. Where, as is usually the case, the legislature, which is more apt to think of the interests of society than of individual interests,[68] fails to indicate clearly the effect to be given to administrative decisions of fact when judicially questioned, the courts must determine this effect by reference to a wide variety of factors.

Where the statute empowers the official to administer oaths and

[67] 4 S. C. 474. The italics are the present writer's.

[68] Freund, "Interpretation of Statutes," 65 UNIV. OF PA. L. REV. 207, at p. 215 (1917).

take evidence on certain issues of fact, the official determination of fact is more apt to be treated as conclusive than where no such procedural details are prescribed, not only because this indicates a legislative intent to confer discretionary power, but also because the "due process" requirement is in many cases met by such provisions.[68a] Where the statute enumerates the facts on which official action is to be predicated, the courts will frequently call such facts "jurisdictional" and hold the official's determination of such facts not conclusive on judicial attack.[69] Where the official's determination of fact is wholly subject to judicial review, (as in the nuisance cases) he really has no "jurisdiction" in the proper sense of the term and it seems useless to call the facts "jurisdictional."

7. *Acts Involving the Interpretation of Statutes.* The powers and functions of American administrative officials are, in theory at least, enumerated and defined in statutes; there are no unenumerated or residuary administrative powers.[70] In order to perform most, if not all, of his official acts, the official must, therefore, have recourse to and interpret the statute or statutes which purport to constitute the breath of his official being. Perhaps the "interpretation" may be so simple as to be scarcely the result of conscious thought; or perhaps it may require a high degree of intelligence. At all events, every official act, broadly speaking, "involves" the interpretation of a statute (or, a constitutional provision), and therefore that an official act "involves" the interpretation of a statute or even of several statutes would seem to be no ground for classifying it as "discretionary." Such is the view generally accepted. Thus, it is said:—"A decision which rests solely upon the

[68a] North German Lloyd, etc., Co. v. Hedden, 43 Fed. 17 (1890); Interstate Commerce Commission v. Illinois Central R. Co., 215 U. S. 452, 30 Sup. Ct. 155 (1909); Provident Saving Life Assur. Soc. v. Cutting, 181 Mass. 261, 63 N. E. 433 (1902).

[69] Holmes, J., in Miller v. Horton, 152 Mass. 540 (1891) (action for killing sound horse under statute authorizing killing of horse infected with farcy or glanders; *held,* that the officials had jurisdiction to kill only horses actually—*i. e.,* found by the court—so infected). Hutton v. Camden, 39 N. J. L. 122 (1876) (abatement of nuisance; existence of nuisance, judicially found, was "jurisdictional"); People ex rel. Copcutt v. Board of Health, 140 N. Y. 1, 35 N. E. 320 (1893).

[70] MATHEWS, *op. cit.,* pp. 10, 12; FREUND, 9 POL. SCI. QUAR. 413; GHOSE, COMPARATIVE ADMINISTRATIVE LAW (1919), p. 256.

construction of a statute does not involve the exercise of judgment which the law contemplates."[71] For *mandamus* cases the following statement is typical:—"Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act, and although in so doing he must to such extent construe a statute by which the duty is imposed."[72]

The statement is so self-contradictory as to be meaningless. No doubt it represents an attempt to reconcile the cases which have held the official interpretation of the statute to be conclusive, with those where it has been held clearly not. The latter are more numerous. For instance, even where the statute expressly called for the construction of a statute by the attorney-general, it was held that his act was "ministerial."[73]

The process called "interpretation" usually is more complex than the word indicates; it involves the application of the statute, filling in gaps, and even choosing the statute to be applied; it is therefore frequently so bound up with the official act itself that to review the one would be to deny conclusiveness to the other.

The United States Supreme Court has on several occasions held that it will not overturn the interpretation of a statute by an executive official.[74] In other cases it has denied conclusiveness to the

[71] State v. Howard, 83 Vt. 6, at p. 14, 74 Atl. 392.

[72] Judge A. L. Sanborn in 26 Cyc. 161, quoted in Stephens v. Jones, 24 S. D., at p. 102. Similar statements occur in a number of other cases.

[73] People ex. rel. v. Rosendale, 5 Misc. Rep. 378, 25 N. Y. Supp. 769 (1893). See also State ex rel. Jones v. Cook, 174 Mo. 100, 73 S. W. 489 (1903) (secretary of state's refusal to issue certificate to private bankers, based on erroneous interpretation of statutes; *mandamus* granted).

[74] Decatur v. Paulding, 14 Pet. 497 (1840) ("A resolution of Congress, requiring the exercise of so much judgment and investigation, can, with no propriety, be said to command a mere ministerial act to be done by the secretary"); U. S. v. Black, 128 U. S. 40, 48 (1888); U. S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698. See also Wailes v. Smith, Comptroller, 76 Md. 469, 25 Atl. 922; American Casualty Ins. Co. v. Fyler, 60 Conn. 448, 22 Atl. 494 (1891) ("The construction of a statute is not a ministerial act").

official's interpretation.[75] In *Roberts* v. *U. S.*,[76] Peckham, J., distinguished *U. S.* v. *Black*,[77] a very similar case, by saying that in the latter case the official act involved the interpretation of *two* statutes, in the former, only *one*. Absurd as this distinction may seem at a glance, it is not necessarily absurd if it represents an arbitrary line between two conflicting principles which shade off into one another by insensible degrees. However, it is believed there are no such principles. On the contrary, it would seem that the interpretation of two statutes, being a more difficult task, would be a clearer case for judicial interference than the interpretation of one. The more doubtful it is whether the official is right, the less chance there is of correcting his mistakes.[78] *Summa jus, summa injuria.*

8. *"Ministerial Duties" and "Discretionary Duties."* Instead of "ministerial acts" and "discretionary acts", the distinction is often drawn between "ministerial duties" and "discretionary duties". Thus, Professor Goodnow says:—"As opposed to the ministerial or mandatory duties are the discretionary or judicial duties."[79]

How can one speak of a "discretionary duty"? On its face the expression is a contradiction in terms, for one cannot be under a duty to perform an act, or to refrain from performing it, if he has a discretion, i. e. a choice, as to whether or not he will perform it. A closer analysis will disclose that the contradiction in terms is due to the use of "discretion" and "duty" in different senses.

(a) In the first place, "duty" has a narrow and a broad meaning. One speaks of the "duties" of a public official, meaning his functions as such. Thus, it is the "duty" of the President to call out the militia in time of invasion, it is the "duty" of the prosecuting attorney to institute criminal proceedings against violators of the laws, and it is the "duty" of the recorder of deeds to file or record conveyances of real estate. In these cases we are not thinking of

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[75] Roberts v. U. S., 176 U. S. 221, 230 (1899); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33 (1902).

[76] 176 U. S. 221, at p. 230.

[77] *Supra*, n. 74.

[78] This line of reasoning is neatly brought out in State ex rel. v. Governor, 25 N. J. L. 331, at p. 350.

[79] GOODNOW, PRINCIPLES, p. 296. The same terminology is found in many of the above quotations and in many other cases.

specific redress through judicial process, for the violation of the "duty." The word does connot, loosely, the idea of obligation; but the obligation may be one which can be enforced only through some non-judicial agency, if at all. Thus, in the two examples first named—the President and the prosecuting attorney—no judicial remedy would be available for a breach of the duty. The legislature might impeach the official, the electorate might repudiate him or his party at the polls, public opinion might bring pressure to bear upon him; or, in other cases, the official might be removable by a higher administrative authority. Professor Goodnow calls these latter "moral duties."[80] This terminology seems inaccurate; since "moral duties" are generally those for which there is no governmental sanction at all; whereas here there is a definite sanction operating not alone through the force of unorganized public opinion but also through such definite and organized governmental organs as the electorate, the legislature, and removing officials.

In another sense, "duty" means obligation, a violation of which is followed by redress through judicial action. If the dominant theory of the nature of law—rules laid down by the courts for the determination of legal rights and duties[81]—is accepted, then only these latter duties are "legal duties." Since it is conceded that courts will not interfere where the "duties" are "discretionary," it follows that these "duties" are not *legal* duties at all and ought not to be called by that name where the object of the discussion is to determine whether or not the courts will review official action.[82]

(b) The word "discretionary" has a double meaning here, too. In a sense, all duties, even legal duties, are "discretionary" in that the subject of the duty has the *power* to violate the duty. Thus, if a health official is under a legal duty not to destroy innocuous property, he *may actually* destroy it nevertheless.[83] In this sense

[80] GOODNOW, *op. cit.*, pp. 297, 299.

[81] GRAY, THE NATURE AND SOURCES OF THE LAW, Chap. IV. The element of *judicial* enforcement was not insisted upon by the earlier analytical jurists. HOLLAND, JURISPRUDENCE (Ed. 10), p. 40; AUSTIN, JURISPRUDENCE (Ed. 4), Lecture I.

[82] Professor Goodnow was discussing other means of control over official action in addition to the judiciary, and hence his use of "discretionary duties" is not so objectionable.

[83] Of course, he may be enjoined from destroying it, or be prevented by the owner's exercise of self-help, or be physically unable to get at it.

he has "discretion". But he has no *privilege* of destroying the innocuous property, nor is he immune from action at the suit of the individual injured. In this sense, then, he has no "discretion"; and this is the sense in which "discretion" is used in those cases where the official action is directly attacked, as by injunction, *mandamus*, or action for damages. Hence, the term "discretionary duties" is, for purposes of judicial reasoning, a misnomer.

9. *Legal Consequences of the Official Act.* In a few instances an effort has been made to throw light on the nature of the official act by analyzing the legal consequences attending its performance or non-performance. Thus, in *People ex rel. Schwab* v. *Grant*,[84] cited and relied on in *Samuels* v. *Couzens*,[85] where a statute provided that "the mayor *shall have authority* to grant licenses" to auctioneers, the court said:—"A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to exercise such privilege. The requirement that a person must secure leave from someone to entitle him to exercise a right, carries with it, by natural implication, a discretion on the part of the other to refuse to grant it, if in his judgment, it is improper or unwise to give the required consent."[86]

The reasoning here is: The mayor has a power[87] to grant a license; therefore he has power to refuse a license; therefore he has a privilege (absence of duty) to refuse a license, and (or) an immunity from *mandamus* suit for such refusal. The reasoning is a *petitio principii*, for the very point to be determined is whether or not he has such a privilege or immunity. One could as well argue that because a recorder of deeds has a power to record a deed (thereby affecting the rights of claimants to the property described in the deed), therefore he has a power to refuse to record the deed

[84] 126 N. Y. 473, 27 N. E. 964 (1891).

[85] *Supra*, n. 1. The reasoning in this extract is about all that the court gives by way of explaining its decision.

[86] 126 N. Y., at p. 481.

[87] The terminology here is based on Pound, "Legal Rights," 26 INTERN. JOUR. OF ETHICS 92; BEALE, CONFLICT OF LAWS, I, 1, § 139; Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning," 23 YALE L. JOUR. 16; Corbin, "Legal Analysis and Terminology," 29 *ibid.* 163. The writer is not, however, prepared to accept the Hohfeldian scheme of "jural opposites" and "jural correlatives."

(he undoubtedly has such a naked power, though it may result in a breach of duty), therefore he has a privilege of refusing, a proposition which by no means follows. The danger of attempting to solve the problem purely by legal analysis is apparent. Legal analysis never solves problems; it merely clarifies thought and clears the ground for a discussion of the real issue involved.[88]

A similar attempt to define "ministerial duty" in terms of legal consequences is found in *Morton* v. *Comptroller General*[89]:—"A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual."

While this gives no answer to the crucial question whether the particular neglect which harms some individual interest is a *legal* wrong, i. e. a breach of a judicially enforceable duty owed to a private individual, it does indicate that the duty in question is one owed to a private individual as distinguished from one owed to the state. In England the writ of *mandamus* was issued in the name of the King, the private individual being merely a relator; and the duty sought to be enforced was conceived of as a duty to the Crown—what Austin calls an "absolute duty".[90] This distinction, it seems, is still maintained in England, where there is a "writ of *mandamus*", corresponding to the ancient writ, and an "action of mandamus" which is purely a proceeding for the breach of a duty owed to an individual as such.[91] In most jurisdictions in this country, *mandamus* is treated as a civil action for the breach of a duty owed to an individual, *i. e.*, a "relative duty." The shifting of emphasis has not always been perceived, as is shown by the use of such loose phrases as "discretionary duties."

Analytically, then, the problem of distinguishing between ministerial and discretionary acts resolves itself into determining the existence or non-existence of such a relative legal duty. Ordinarily, a court will inquire into all the facts and circumstances, and determine for itself whether the defendant was under a legal duty to the plaintiff, and if so, whether or not it was violated; the court's

[88] Corbin, *op. cit.*, 29 YALE L. JOUR. 237.

[89] 4 S. C. 430, at p. 474.

[90] AUSTIN, JURISPRUDENCE (Ed. 4), Lecture 17; POUND, *op. cit.*, p. 94.

[91] ODGERS, THE COMMON LAW OF ENGLAND (Ed. 10 of BROOM'S COMMENTARIES, 1911), II, 1142-3, 1163-6. See also SPELLING, *op. cit.*, § 1363.

investigation will not be precluded or even, for most purposes, affected by the circumstance that the defendant has decided that he was under no such duty. If officials were uniformly held to answer in judicial proceedings as individuals are, were uniformly subjected to what Mr. Dicey calls "the rule of law," all official acts would be "ministerial." But it is just here that the official differs from the private citizen. The official may have the power, by deciding or acting in certain ways or under some circumstances, of creating in himself a privilege (absence of duty) of acting or not acting so as to affect injuriously individual interests, even though a court might later think he made a mistake; and of creating an immunity against judical investigation to determine if he did make a mistake.

The official *may* have the power to affect the legal rights, duties, privileges or immunities of the individual, to others than the official, as in the case of a licensing official[92] or a recorder of deeds (perhaps), by his refusal to act; or he may not have such a power, as in the case of a sheriff selling a third person's property on execution (the sale being void because the sheriff has no power to transfer title). It is not the presence or absence of this power which enables one to class the official act as ministerial or discretionary,

[92] A licensing official has the power of depriving (by refusal) an applicant of a privilege or immunity against criminal prosecution, and thus the denial produces legal consequences, even though the official was, for some purposes, acting "ministerially." Thus, it is generally held that the circumstance that an applicant for a license might have compelled its issuance by *mandamus* or have maintained an action against the official for the damage caused by its refusal, is no defense to a prosecution for engaging in the particular vocation without a license. State v. Myers, 63 Mo. 324 (1876) (broker's tax license); New York v. 503 Fifth Avenue Co., 90 Misc. 277, 153 N. Y. Supp. 7 (1915) (sign license); Armour & Co. v. Comm., 115 Va. 312, 79 S. E. 328 (1913) (merchant's tax license); State v. Stevens, 78 N. H. 268, 99 Atl. 723 (1916) (lightning-rod agent's license); State v. Doerring, 194 Mo. 398, 415, 92 S. W. 489 (1905) (dentist's license); People v. Ratledge, 172 Cal. 401, 156 Pac. 455 (1916) (chiropractor's license); 23 Cyc. 120 (n. 70, citing many other cases) and 15 R. C. L. 392, as to liquor licenses. But see Royall v. Virginia, 116 U. S. 572, 6 Sup. Ct. 510 (1886) (lawyer's tax license; the license is a mere receipt for the tax); State v. Cooper, 11 Ida. 219, 81 Pac. 374 (1905) (physician's license). In all these cases except the last two the court apparently assumed that the issuance of the license would have been "ministerial" in a *mandamus* suit.

but the presence or absence of the power in the official to create a privilege and (or) an immunity in himself, by his own decision or action, in relation to the individual whose interests are affected. This latter kind of official power may, in order to preserve the traditional terminology, be called "discretionary official power." The term "discretionary power" is coming more and more to be used in place of "discretionary act"—*e. g.*, in the two cases cited at the beginning of this article.

This is only a way of stating the problem, analytically. The courts have still to determine whether, under the circumstances of the particular case, this discretionary power exists. Where no individual interests are affected by the act of the official, no question of discretionary power arises; this follows from the limitation of the concept to judicial proceedings brought to protect or vindicate individual interests. The official's duty to the state, whether judicially enforceable or otherwise enforceable, is not taken into account. Only by narrowing the concept can it be made useful.

From the preceding discussion, one might infer that the courts have no law on the subject of discretionary powers, that each case is decided subjectively, and the result is not predicable. Certainly there is a basis for such pessimism. In many of the cases in *mandamus*, for instance, the court seems to reach its conclusions on grounds of policy and then attempts to "rationalize"[93] this conclusion by some shibboleth, such as those above quoted.[94] One may even be led to assume that the courts veer toward interference or non-interference in time-cycles,[95] and that "administrative law," if there be such a thing, is a purely negative concept.[96] It is believed, however, that this overstates the case. To the present writer it seems that, with the increasing willingness of courts to recognize administrative agencies as coördinate and independent governmental organs, the problem of judicial control resolves itself more and more into a problem of statutory interpretation. And while legislative draft-

[93] Professor JAMES HARVEY ROBINSON, in "THE MIND IN THE MAKING" (1921), p. 40, has an interesting discussion of this type of thinking.

[94] *Supra*, under subdivisions 3, 6, 7, and 8.

[95] Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. JOUR. 781, especially p. 796, n. 55.

[96] *Ibid.*, p. 783.

ing is rudimentary (particularly so in regard to administrative provisions) and judicial notions of interpretation are elemental, yet certain factors may be predicated as having, shall we say, "more or less to do" with the result. It is now proposed to expose summarily some of these factors.

10. *Policy or Purpose of the Legislation.* Functionally, the problem of discretionary power has been stated thus: "The best service administrative law can perform in this particular field (individual rights) is: (1) First, to see that the administration is not allowed to make its own laws, be judge of its own cause and execute its own decrees except where these may be absolutely necessary. It must, in other words, discriminate (1) between cases where the administration must take the law from the legislature direct and others where, owing to the special information at its [the administrative agency's] command, the legislature must be content to leave it to the administration to work out in detail the principles which alone the former is in a position to prescribe by statute; (2) between cases where the rule of law can and should be framed in unconditional language (in which case its enforcement must, as a rule, be left to the law courts), and cases where that is not possible (in which case, necessarily, the administration must be given power to exercise a quasi-judicial jurisdiction); and (3) between cases where public interests will not suffer if the administration was (*sic*) to appeal to the law courts for the enforcement of its orders and others where they must suffer irreparable injury if the administration were left to enforce them through the litigious procedure of the law courts."[97]

This states the legislature's problem as well as the court's problem. The court's problem is to ascertain the policy and purpose of the statute and the means adopted for giving effect to that policy, in order to decide whether or not the official empowered to act is given discretionary power in reference to a given decision or act. Thus, in *Lloyd* v. *Ramsay*,[98] the court said: "We cannot be unmindful

[97] GHOSE, COMPARATIVE ADMINISTRATIVE LAW (Calcutta, 1918), p. 588.

[98] 183 N. W., at p. 338. The reference to other statutes is an interesting departure from the traditional common-law view that statutes do not declare principles but merely make rules for exceptional cases. In Roman law, principles were derived from statutes as well as from the traditional juristic materials. See Dig. I, 3, 12, 18, and 26-28.

of the history of the times in which we live nor can we shut our eyes to the declared policy of the state, *not only by this, but by other statutes,* to bring corporations organized under the laws of the state of Iowa under the direct investigation of a competent tribunal, so that corporations whose methods of business may be against public policy or 'otherwise objectionable' shall not be permitted to organize and do business in this state."

Again, in *People ex rel. Sheppard* v. *Illinois State Board of Dental Examiners*[99] the court discusses the policy of the statute regulating the practice of dentistry, and concludes that, to effectuate the purpose of the act, the board had discretionary power in determining what was a "reputable college," although the statute was mandatory in its language. In *People ex rel. Schwab* v. *Grant*[100] the court reviewed the history of the regulation of auctioneers, and concluded that the purpose of the particular statute was to limit the *number* of auctioneers and that the mayor had discretionary power in determining that number. On the other hand, in *People ex rel. Empire City Trotting Club* v. *State Racing Commission,*[101] the same court concluded the object of the statute as to licensing race-tracks was not to allow the commission to limit the number or to restrict competition, but to insure honest and "proper" races. Examples of this sort might be multiplied indefinitely.

On the other hand, some courts shy at this type of reasoning. In *Samuels* v. *Couzens* there is not a word as to the object of the ordinance, except that it is a regulatory license and not a taxing license. This conclusion is reached by adverting to the smallness of the fee exacted for the license. The licensing power is usually conferred with one of three objects in view: regulation, revenue, or registration. Sometimes it is a combination of two or all three of these objects. Where the object is to raise revenue (as in the case of many municipal license taxes[102]) or for mere registration (*e. g.,* automobile licenses, in many instances), the official has generally no, or a narrowly limited, discretionary power. Where the object is

[99] 110 Ill. 180 (1884).

[100] 126 N. Y. 473, 27 N. E. 964 (1891).

[101] 190 N. Y. 31, 82 N. E. 723 (1907).

[102] See State v. Myers, *supra,* n. 92; Armour & Co. v. Comm., *ibid.;* Royall v. Virginia, *ibid.*

regulation,[103] the official is generally, but not universally,[104] conceded to have discretionary power within some limits and the controversy usually raises the question whether he has acted within those limits in acting as he did upon particular grounds and with reference to particular facts. To determine these limits, resort may be had by the court to the particular policy or object of the statute, as in *Lloyd* v. *Ramsay*,[105] *People ex rel Schwab* v. *Grant*,[106] and many other cases. On the other hand, it seems unsatisfactory to solve a particular problem, as in *Samuels* v. *Couzens*, by merely saying that the official had discretionary power, without a more exact analysis to determine whether the particular official act falls within the limits of that power. The distinction often made between "absence of discretion" and "abuse of discretion" is not of much practical importance in deciding particular controversies.

To allow the court to determine the policy or purpose of the statute involves certain dangers. At best, it introduces an element of uncertainty which can never be wholly avoided, no matter how carefully a statute is framed.[107] At worst, it gives the individual judge an opportunity to give vent to his hostility toward governmental encroachments on the sphere of individual liberty, which has made much of our voluminous legislation ineffective in operation. Furthermore, the legislature frequently leaves the policy of legislation indefinite, and the court must resort to extrinsic sources to determine the precise scope of the regulation.

11. *"Mandatory" or "Permissive" Language of the Statute.* It is frequently said that the distinction between ministerial and discretionary acts is the same as that between mandatory and directory statutes.[108] The most that can be said is that such words as "shall," "must," tend to negative a very wide scope of discretionary power, while "may," "shall have authority to," etc., tend even more strongly

[103] As in Samuels v. Couzens, *supra*, n. 1; People ex rel. Sheppard v. Illinois State Board, *supra*, n. 99; People v. Grant, *supra*, n. 100.

[104] *E. g.*, State ex rel. Drake v. Doyle, 40 Wis. 175 (1876) (insurance commissioner); Guy L. Wallace & Co. v. Ferguson, 70 Ore. 306, 140 Pac. 742 (1914) (same).

[105] *Supra*, n. 98.

[106] *Supra*, n. 100.

[107] GENY, METHODE D'INTERPRÉTATION (Ed. 2), §§ 54-59.

[108] See GOODNOW, PRINCIPLES, pp. 295, 296; 26 CYC. 162.

to support the existence of such power. Yet such language is not controlling. Thus, permissive language—"may"—is sometimes held to impose a duty judicially enforceable;[109] while mandatory language has frequently been held not to negative a wide discretionary power. Thus, in *Lloyd* v. *Ramsay,*[110] the statute read "he (Secretary of State) *shall* file them," yet the "shall" was qualified by conditions which were held to confer discretionary power. So, in *People ex rel. Sheppard* v. *Illinois State Board,*[111] the statute read: "But said board *shall* at all times issue a license to any regular graduate of any reputable dental college, without examination, upon the payment by such graduate to the said board of a fee of one dollar." Yet it was held that the board had discretionary power in determining whether a particular dental college was "reputable." These examples are not isolated. It seems clear that, in the absence of express provisions as to judicial control, no literal interpretation will suffice to determine the broad question whether the legislature has conferred a certain discretionary power upon an official in the discharge of a particular function.

12. *Words Denoting Mental Operation.* Of somewhat greater force in the interpretation of statutes is the use therein of words denoting mental operation on the part of the official. Thus, in *Lloyd* v. *Ramsay,* the statute contained such phrases as "if he is satisfied that," "if he is of opinion that," "if the council determines that," and this language is emphasized by the court. In *Samuels* v. *Couzens,* no such words are found, except the provision that the applicant must agree that the license "may be revoked at the will of the mayor." Usually such language is taken to indicate that the statute confers discretionary power.

At first blush, it seems absurd to say that the mere fact that the legislature authorizes an official to use his mind in performing his official functions implies that he is to be "elevated to the bench," so to speak, and that his decisions are to be conclusive against judicial attack. No official can perform even the simplest official act without reaching a mental decision, and one might assume that the

[109] Mayor v. Furze, 3 Hill (N. Y.) 612; GOODNOW, *op. cit.*, p. 296; ILBERT, THE MECHANICS OF LAW MAKING, p. 121.

[110] *Supra,* n. 2.

[111] *Supra,* n. 99.

legislature contemplated some mental operation on the part of the official in every case. Such an assumption would probably not be correct; legislatures are (or perhaps were) conspicuously thoughtless as to methods of administration; and the prevailing attitude of the courts has been that statutes are interpreted and applied more or less mechanically.[112]

Where, however, the decision of the official is made a condition precedent to the performance of an official act affecting individual interests, the official is in a position to plead his own decision as a defense to a *mandamus* proceeding or an action for damages, and thus escape liability to the injured individual. In other words, his decision in reference to the particular subject gives him a privilege or immunity, and thus he has discretionary power. *Warne* v. *Varley*[113] is a leading case. A statute authorized defendants to seize skins that were not thoroughly dried. In an action of trespass for seizing plaintiff's skins, defendants pleaded the statutes and that *in their judgment* they were not thoroughly dried. The plea was held bad on demurrer, the court saying that the statute did not authorize defendants to seize any leather which was thoroughly dried, and intimating that if the words "in their judgment" had been in the statute the seizure would have been upheld. The privilege was held to be co-extensive with the power. On the other hand, in *Seaman* v. *Patten*,[114] a meat inspector was held privileged in refusing to approve meat on the express ground that the statute read, "if in his opinion," "as shall appear to him," etc. A literal interpretation of such a statute sustains the conclusion that the individual's right is conditioned on the decision of the official.

However, the official may be held not to possess a privilege or immunity in relation to an injured individual, even though the statute contains words of mental operation, such as "in his judgment."[115]

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[112] Pound, "Enforcement of Law," 20 GREEN BAG, 404.

[113] 6 Durn. & E. 443 (1795). See also Miller v. Horton, *supra*, n. 69, a better reasoned opinion.

[114] 2 Caines (N. Y.), 312 (1805). An interesting example is found in Kansas Home Ins. Co. v. Wilder, 43 Kan. 731, 23 Pac. 1061 (1890), where the amendment to the statute striking out the words "if he shall find that" was held practically to have annulled a prior decision of the supreme court that the insurance commissioner had discretionary power in the particular instance.

[115] Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942 (1904) (action for dam-

On the other hand, the absence of such phrases is not conclusive against the existence of discretionary power.[116]

13. *Definiteness or Indefiniteness of the Statutory Administrative Norm.* Statutes conferring official power may or may not lay down or designate the terms upon which the official is to exercise it, the norm which is to be applied by the official in the exercise of his power. If they do, the power is regulated; if they do not, it is unregulated. Such norms vary greatly in definiteness. Much of the talk about "questions of law" and "questions of fact," in regard to judicial review of administrative decisions, resolves itself into a question of the degree of definiteness of the administrative norm.[117] The hard and fast distinction between these two classes of questions appears to be based upon the assumptions of mediaeval logic,[118] or upon the Kantian metaphysics of *noumenon* and *phenomenon.* No hard and fast line can be drawn; the most satisfactory mode of treatment seems to be to classify the statutory provisions on the basis of degrees of indefiniteness.

Professor Freund has recently given an excellent classification of this sort.[119] He gives three classes: "precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree." The present writer prefers a slightly different classification into "rules," "principles," and "standards," on the basis of the classification of legal norms recently advocated by Dean Pound.[120] The difference between the two classifications is chiefly in the third class. Any attempt to elaborate the difference would be beyond the scope of the present discussion. An example must suffice. A term such as "against public policy," found in the statute in *Lloyd* v. *Ramsay*,[121] would fall in Professor

ages against health officer). The nature of the interest affected influences the judicial attitude in this class of cases. See *supra*, subdivision 4, and n. 50.

[116] See, for example, People ex rel. v. Illinois State Board, *supra*, n. 99; Devin v. Belt, 70 Md. 352, 17 Atl. 375 (1899) (liquor license); Decatur v. Paulding, 14 Pet. 497 (1840) (Secretary of Navy, pension).

[117] See Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. JOUR. 781.

[118] See Isaacs, "The Law and the Facts," 22 COLUMBIA L. REV. 1.

[119] Freund, "The Use of Indefinite Terms in Statutes," 30 YALE L. JOUR. 437.

[120] Pound, "The Administrative Application of Legal Standards," 44 AM. BAR ASSN. REP. 445.

[121] *Supra*, n. 2.

Freund's third class, but would not fall in Dean Pound's third class, "standards." It seems better to regard such a provision as not laying down any legal norm at all, as a case of "unregulated" discretionary power. On the other hand, such a term as "reputable college,"[122] which Professor Freund places in his third class, seems to set up a "standard" calling for the exercise of expert judgment and yet limiting the scope of the inquiry and circumscribing the grounds of action in a much greater degree than does "against public policy" in the other statute.

At all events, the courts are much more likely to find that the statute confers discretionary power where the terms or norm of the statute are indefinite than where they are definite and sharply defined.[123] Professor Freund probably does not overstate the case when he says: "The use of indefinite or flexible terms in the grant of official powers means the grant of discretionary powers."[124] On the other hand, where the statute lays down a definite norm to guide official action, the courts will tend to hold that the power is not discretionary,[125] although the definiteness of the statute is not in all cases held to be conclusive against the existence of discretionary power.[126]

The first part of the much-quoted definition in *Flournoy* v. *Jeffersonville*,[127] "A ministerial act may, perhaps, be defined to be one which a person performs in a *given state of facts*, in a prescribed manner, in obedience to the mandate of legal authority, without * * *" is probably an attempt to state this distinction between definite and indefinite statutory norms. And the corresponding definition of "discretionary act" embodies the same idea: "When an officer is ordered by law to do certain things, but the law is *general in its*

[122] People ex rel. Sheppard v. Illinois State Board, *supra*, n. 99.

[123] *Ibid.*; Devin v. Belt, *supra*, n. 116. The decisions that support this conclusion are numerous.

[124] 30 YALE L. JOUR. 451. But see Grider v. Tally, 77 Ala. 422 (a case often cited), where the statute contained such indefinite terms as "respectable freeholders," "good moral character."

[125] People v. May, 251 Ill. 54, 95 N. E. 999 (1911) ("resident surety"); Stephens v. Jones, 24 S. D. 97, 123 N. W. 705 (1909); Roberts v. U. S., *supra*, n. 75.

[126] U. S. v. Black, 128 U. S. 40 (1888); Decatur v. Paulding, *supra*, n. 116.

[127] *Supra*.

phraseology, so that the application of it involves inquiry and decision, then it is said the duty is a discretionary one."[128]

In a way this result is absurd; it seems directly contrary to what one would expect of the courts in their role of guardians of individual interests against oppressive action of executive officials. The more definite the statutory norm, the easier its application, and hence the less the danger of error and oppression by an honest but over-zealous official. The more obvious, too, will be the official's violation of the statutory norm, and the easier will be the appeal to the non-judicial agencies of control, if these are worth anything. On the other hand, the more indefinite norm will be more difficult to apply and will offer greater opportunities of error by honest officials, to say nothing of discrimination and favoritism by dishonest ones.[129] This line of reasoning has sometimes been taken by courts, not to prove that the official's action is subject to judicial control, but as indicating that the absence of judicial control over such indefinite powers renders the provision unconstitutional.[130] However, the decided trend of recent authority is to support the constitutionality of such statutes,[131] and the decided trend of legislative practice is to use them more and more.

But if we look at the problem functionally, and *assume that the legislature* has so looked at it, the distinction is more intelligible. The problem is to discriminate "* * * between cases where the administration must take the law from the legislature direct and others where, owing to the special information at its (the administrative official's) command, the legislature must be content to leave it to the administration to work out in detail the principles which

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[128] WYMAN, ADMINISTRATIVE LAW, § 34.

[129] As said in State v. Governor, 25 N. J. L. 331, 350 (1856) (*mandamus* against the governor denied): "If this be the test, it follows that wherever the executive duty is clear the judiciary is authorized to interfere; but in all cases of doubt or difficulty, or uncertainty, the responsibility of acting rests upon the executive alone."

[130] Schaezlein v. Cabaniss, 135 Cal. 466, 67 Pac. 755 (1902) ("to a great extent" too indefinite); Czarra v. Board of Medical Supervisors, 25 App. (D. C.) 443 (1905); Matthews v. Murphy, 23 Ky. Law Rep. 750, 63 S. W. 785 (1901); Welch v. Maryland Casualty Co., 47 Okla. 293, 147 Pac. 1046 (1915) ("suitable person" as insurance agent).

[131] Mutual Film Corporation v. Ohio, 236 U. S. 230, 35 Sup. Ct. 387 (1915), 7 IOWA L. BUL. 38, 39.

alone the former is in a position to prescribe by statute * * *"[132] In other words, indefinite terms in statutes indicate that the legislature has delegated to the administrative tribunal the function of further amplifying the legislative policy, and the negative conception of "separation of powers" leads to the conclusion that the courts cannot interfere with the legislative delegate in the exercise of his delegated powers. If this analysis be correct, the conclusion that indefinite statutes mean discretionary powers rests upon two assumptions: first, that the legislature has deliberately chosen indefinite rather than definite terms in order to more fully effectuate its policies; and second, that the statute delegates legislative power in greater or less degree. The latter assumption runs counter to the dogma that legislative powers cannot be delegated; but this dogma, though not expressly repudiated, no longer constitutes a serious obstacle, so far as judicial decisions are concerned, to indefinite terms in statutes. The first assumption seems scarcely justified by present legislative practices. While considerable progress has been made in legislative drafting, there is still the need for accurate information as to types of administrative provisions and the exercise of a careful choice as to the type to be used in a particular statute. Professor Freund has recently presented an admirable preliminary summary of such information,[133] which should be of great value to the legislative draftsman in making the deliberate choice which the foregoing theory presupposes.

14. *Unregulated and Uncontrolled Discretionary Power.* In the absence of a legal norm in the statute, which the official is to apply in performing his official acts, his power is unregulated. It by no means follows that it is never to be subjected to judicial control. It is sometimes said:—"Discretion may be defined, when applied to public officials, as the power or right conferred upon them by law of acting officially, under certain circumstances, solely according to the dictates of their judgment and conscience."[134]

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[132] GHOSE, COMPARATIVE ADMINISTRATIVE LAW, p. 588.

[133] Appendix C, Report of the Special Committee on Legislative Drafting, American Bar Association, 1921 meeting.

[134] 33 HARV. L. REV. 465. The case cited to support this statement, State v. Hultz, 106 Mo. 41, 50, 16 S. W. 940 (1891), involves discretion in making an apportionment of jury elisors by the court; and the opinion distinctly states that the decision would be subject to review if "arbitrary or unjust."

This statement is too broad. In a case of regulated discretion, the statutory norm delimits the scope of the discretionary power, and acts in excess of that power are subject to judicial control as "abuse of discretion". In a case of unregulated discretion, how can the court determine when the official has exceeded his power, has abused his discretion? This question used to bother the courts, and at one time there was a decided tendency to declare unconstitutional grants of unregulated discretionary power.[135] However, the decided weight of authority today is to the contrary,[136] and the question of unregulated discretion has passed from the realm of constitutional law to the domain of legislative policy.[136a]

The power of an official who acts with entire freedom from judicial control may be called "uncontrolled". This does not mean that he is entirely free to act as he pleases, for he will always be subject in greater or less degree to some form of non-judicial control—political, administrative, legislative, etc.; and he will likewise be subjected, as a rule (the chief executive may be an exception), to criminal prosecution for bribery, corruption and perhaps other statutory offenses involving gross misfeasance in office. "Uncontrolled" is thus a relative term. However, in view of the absence of effective administrative control in our decentralised state administrations, and of the feebleness of other forms of control, the absence of judicial control means practically a wide opportunity for oppressive administrative action affecting individual interests. Consequently, examples of uncontrolled discretionary power should be, at least until effective administrative control is provided, rare. The power of appointment to public office is a prominent example of such power.

Unregulated discretionary power is found in two forms: first, where the statute contains no language specifying the grounds or facts upon which, or the purposes toward which, administrative ac-

[135] Yick Wo v. Hopkins, 118 U. S. 356 (1886), is the leading case. See also Schaezlein v. Cabaniss, *supra*, n. 130; Welch v. Maryland Casualty Co., *supra*, n. 130.

[136] Wilson v. Eureka City, 173 U. S. 32, 19 Sup. Ct. 317 (1899). See Powell, "Administrative Exercise of the Police Power," 24 HARV. L. REV., at pp. 277-8; 21 COLUMBIA L. REV. 275, 819.

[136a] Thus approaching close to the position which in England is openly recognized. See ILBERT, THE MECHANICS OF LAW MAKING, p. 145.

tion is to be taken. *Samuels* v. *Couzens*[137] presents an example of this sort. The ordinance laid down no conditions upon which an individual was to be granted a jeweler's license; and the individual was required to agree (which would be tantamount to a provision in the ordinance;[138] that it should be revocable "at the will of the mayor". The only clue to the purpose of the licensing power (aside from the smallness of the license fee) was the provision that a bond should be given to cover loss to a citizen doing business with the licensee. This would indicate that the object of the ordinance was regulatory, and was to protect the customers of the licensee against some form of conduct by the licensee which would cause them loss or damage. The reasons given by the mayor for his refusal—that the applicant had deceived and defrauded the public—fall clearly within this implied purpose. The court did not concede the mayor uncontrolled discretion, since it is distinctly said that the ordinance confers a "reasonable discretion". One would like to know, however, how the court would deal with a case arising under this ordinance where the mayor's refusal was based on the inexperience or incompetency of an honest applicant, or upon the ground that there were too many jewelers in Detroit already.[139] The court would then be called upon to formulate a half-baked legislative policy, to fill a vacuum in the legislative mind. It is a task for which courts are not well fitted.

The second type of unregulated discretionary power is exemplified by statutes which lay down the conditions of the exercise of that power in language so indefinite that it does not rise to the degree of expressiveness of a legal rule, a principle, or a standard. *Lloyd* v. *Ramsay*[140] involves this type of statute. "Against public policy" does little more than indicate that the power is to be exercised to secure social interests as distinguished from the interests of particular official favorites; but it is a wholly unformulated policy. The word "honest" gives a clue to this policy, but does not

[137] *Supra*, n. 1.

[138] See Metropolitan Milk & Cream Co. v. New York, 113 App. Div. 377, 98 N. Y. Supp. 894 (1906).

[139] *E. g.*, in People v. Grant, *supra*, n. 99, it was held that the mayor had power to refuse an auctioneer's license on this ground.

[140] *Supra*, n. 2.

necessarily restrict the power of refusal to cases of actual dishonesty. There was, in fact, no direct evidence in that case to show that the incorporators had any dishonest purposes; and the record shows (though the published report does not) that the Secretary of State had previously issued certificates of incorporation to other companies (not oil companies, however) with a similar disparity between the amounts of common and preferred stock. Here again the court was obliged to formulate the unformulated policy to the extent that the particular case demanded. The opinion clearly indicates that neither the Secretary nor the Executive Council is given uncontrolled power.

Statutes conferring unregulated discretionary power are becoming more common. The judicial veto is being withdrawn; such statutes are no longer declared unconstitutional *per se,* without regard to the way in which they are applied in the particular case. There is a real danger that the judicial abdication in favor of executive justice will go too far, that unregulated power will become uncontrolled. Herein lies a menace to the common law tradition of the supremacy of law;[141] for, as Coke says in his commentary on Chap. 29 of Magna Charta:—" * * * hereby the crooked cord of that which is called discretion appeareth to be unlawful, unless you take it, as it ought to be, *discretio est discernere per legem, quid sit justum.*"[142]

In view of the amorphous condition of that mass of juristic materials which some of us are bold enough to call "administrative law," it may seem futile to offer proposals of reform, to do more than sit and watch the rising tide of executive justice. Yet this is no time for "futilitarianism". The spirit of the times is that the administration of justice can be improved through conscious human effort. "There will be no withdrawing from these experiments. We shall expand them whether we approve theoretically or not . . ."[143] The immediate task of the lawyer is to develop the technique of administrative justice, not only of the administrative itself, but of the legislature and the courts.

The following conclusions are submitted with deference:—

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[141] POUND, THE SPIRIT OF THE COMMON LAW, p. 7 and Chap. III.

[142] COKE'S SECOND INSTITUTES, I, p. 56.

[143] ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP, p. 533.

1. The terms "ministerial act" or "ministerial duty" and "discretionary act" or "discretionary duty" either have no meaning or so many meanings that they are useless, and should be discarded.

2. The term "discretionary power", a purely analytical concept, is more useful, and is coming into use in place of the terms just mentioned.

3. "Discretionary power" means the power of an official to create a privilege or immunity against direct judicial attack by an aggrieved individual.

4. Statutes should be so drawn as to express: (a) The norms to be applied by the official invested with power; (b) the method and extent of judicial control.

5. A system of administrative appeals should be provided by which a review may be had of those questions of "expediency," or "fact," which fall within the cope of discretionary power, and therefore beyond the scope of judicial control. The appeal to the Executive Council in *Lloyd* v. *Ramsay* is an example.

6. On the other hand, the courts should not abandon the task, difficult though it is, of circumscribing unregulated discretionary power.

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