feelings of Mr. Justice Douglas when he said, "Absolute discretion, like corruption, marks the beginning of the end of liberty." But in 1971, as in 1962, I see no way of escaping the realities which affect our institutions for the administration of justice. One cannot ignore the necessity of resolving disputes on the basis of judgment, or the elements of personality that affect human judgment. Although seldom invested with specific authority to exercise "discretion," arbitrators could not reach or express their judgments without exercising their will. Justice demands that such exercise should not be wholly unrestrained, but it is simply not possible to restrain it to a degree that eliminates "discretion" in a sense comparable to "judicial discretion" or "administrative discretion."

Comment—

PHILIP G. MARSHALL *

Perhaps the soundest approach I could make in commenting on Gabe's dissertation would be to say "Amen" and be seated. But the program calls for something more than that, so for the next 10 minutes or so I shall try my analytical best to explore further the subject of "Discretion in Arbitration."

Gabe has said that he has "no bent for scholarly research," and indeed the very title of his paper gives evidence of that. The simple and descriptive title, "Discretion in Arbitration," has no scholarly clout. Anyone who pretends to be a scholar would have picked a title that has some real sock. Evidently Gabe doesn't know that at least 90 percent of all doctoral dissertations, papers, monographs, or just plain everyday academic speeches bear such titles as "The Impact of Something on Something Else" or "The Influence of Something Upon a Whole Flock of Other Things." Even though Gabe's original paper bore that simple title, "Discretion in Arbitration," the academicians on the Program Committee could not sit still for so simple and forthright a title. Hence, in the printed program, it was changed to "The Role of Discretion in Arbitral Decision-Making." Thus, we see that the key words to demonstrating erudition are "impact," "influence," and "role."

Quite properly, Gabe begins with a number of definitions of

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"discretion," each of which quarrels with the others. Recognizing this, he proceeds to differentiate between certain categories of discretion, that is, judicial discretion, administrative discretion, arbitral discretion, and also what he refers to as discretion in its "classical" sense. It was Cardozo who observed that there is an ancient maxim of the law which runs, "Peril lurks in definitions," [1] as, indeed, it does. If one consults *Words and Phrases*,[2] that legal reference work which preserves for posterity almost every judicial definition of every word or phrase which has been reduced to print in the entire West Publishing Company Reporter Series, you will find a curious but quite understandable variation in definitions, particularly by appellate judges, depending on whether they affirm or overrule a lower court or administrative body. A typical opinion overruling the exercise of discretion by an inferior judge reads as follows:

> "The discretion of a judge is said to be the law of tyrants. It is always unknown; it is different in different men; it is casual, and dependent upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."—Judgment reversed.

On the other hand, when appellate judges affirm the exercise of discretion by an inferior court, the opinion most frequently cryptically states: "Discretion is the freedom to act according to one's judgment."—Judgment affirmed. Thus, it appears that "discretion" can be defined or categorized in many different ways, depending on whether there is approval or disapproval of the manner in which it has been exercised and the resultant judgment.

I find it difficult to determine any real difference between the proper exercise of judicial discretion, administrative discretion, or arbitral discretion. All must be judicial and all must be based on sound reasoning. It is likewise true that in every case there should be no abuse of discretion, nor should discretion be improvidently exercised.

In the early 1940s there was a great hue and cry about the unbridled, improvident, and uncontrolled exercise of discretion by federal administrative bodies and the executive branch of the Federal Government. To correct these alleged abuses, Senator

[1] Cardozo, Address before the New York State Bar Association Meeting, Jan. 22, 1932, *New York State Bar Association Report* (1932), 274.
[2] *Words and Phrases* (St. Paul: West Publishing Co.), Vol. 12A, 327 *et. seq.*

Pat McCarran in 1944 introduced a bill into the Congress which subsequently was enacted as the Administrative Procedure Act. Section 10 of that Act provided for judicial review of any administrative action "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." [3] When Senator McCarran was asked whether this provision would preclude judicial review of "an abuse of discretion," he denied that such would be the case and explained: "It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning." [4] Thus, we see that Senator McCarran was equating "administrative discretion" with "judicial discretion."

Of course, it is true that administrative bodies are generally ceded the right to exercise discretion in many areas where a judge in an ordinary suit at law is bound by the rigor of statutes or the common law, as fortified by the doctrine of *stare decisis*. However, though the area of discretion is admittedly broad in the field of administrative law, the manner in which it is exercised should nevertheless be subject to the same limitations that apply in courts of law or in arbitration proceedings.

Arbitrators, as well as judges or administrative bodies, are bound by the written word of the statute, regulation, or contract under which the dispute is being resolved; each is bound in equal measure. The area within which each is empowered to exercise his discretion, however, may vary markedly. In many cases the arbitrator's area of discretion is the broadest of all. Very often the parties in effect say to the arbitrator, "We got a problem. Here it is. Give us your solution." Very often neither side even alludes to the contract, and frequently the contract consists of a recognition clause, a termination clause, and little or nothing in between that bears any relationship to the issue presented. It isn't even a question of resolving an ambiguity; it is purely a question of judgment unconfined. A colleague of ours, Mike Ryder, in a paper delivered at our 21st Annual Meeting, put it another way: "After all, an arbi-

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[3] Administrative Procedure Act, Public Law 404, 79th Cong., 2d Sess., Sec. 10.

[4] Administrative Procedure Act, Legislative History, 1944-46, 79th Cong., 2d Sess., Senate Document No. 248, 310 ff.

trator is engaged in a legislative function when he is asked to interpret and decide a negotiated ambiguity." [5]

Perhaps the closest approach to the exercise of this kind of unbridled discretion is to be found in the old English Court of Requests, which first appeared in 1493: "Under Henry VII it was, in effect, a committee of the Council for the hearing of poor men's causes and matters relating to the King's servants." [6] The sole curb on its discretion was that its decisions were required to square with the King's conscience, which was notoriously flexible. And let the institution of labor arbitration beware, as Professor Plucknett in his *History of the Common Law* observed, "Toward the end of its career it lost its reputation owing to the growing complexity, slowness and expense of its proceedings." [7]

Gabe quotes our Program Chairman as being principally concerned with "the many unstated assumptions and judgments which enter into our awards." I suspect that if the full truth be known, hunch or intuition is frequently the principal ingredient. Cardozo, to whom I must credit this observation, in an address before the New York State Bar Association in 1932 stated:

> "In the business of choosing between . . . competitive offerings in the legal mart, we hear a great deal now-a-days of the intuitive judgment, more picturesquely styled the hunch, as the real arbiter of values (Hutcheson, The Judgment Intuitive; The Function of the Hunch in Judicial Decisions, 14 Cornell L.I. 274)." [8]

Cardozo points out, however, that pure hunch or intuition, or what might more properly be called the "intuitive flash or inspiration," seldom comes to those who are untutored and inexperienced in the field which gives rise to the intuitive flash. As he explains:

> "Accidental discoveries of which popular histories of science make mention never happen except to those who have previously devoted a great deal of thought to the matter. Observations

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[5] Meyer S. Ryder, "The Impact of Acceptability on the Arbitrator," in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 107.

[6] Theodore F. T. Plucknett, *A Concise History of the Common Law* (Rochester, N.Y.: Lawyers Co-operative Publishing Co., 1929), 142.

[7] *Id.* at 142.

[8] Cardozo, *supra* note 1, at 285.

> unillumined by theoretic reason is sterile. . . . Wisdom does not come to those who gape at nature with an empty head." [9]

In other words, pure and unadulterated hunch without the "value of conceptions, rules and principles" is tantamount to being a denial of "the value of all logic" and to proclaim that "Whirl is King." [10]

As arbitrators we have been frequently accused of being inconsistent, as indeed we are—and so indeed are all who serve as judges. As Oliver Wendell Holmes observed:

> "The truth is, that law hitherto has been, and it would seem by the necessity of its being is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." [11]

I think that there are really only two characteristics which distinguish arbitral discretion from judicial discretion. The first is that the judgment of an arbitrator, once given, is rarely subject to review. Every trial judge faces the prospect of having his judgment scrutinized by an appellate court, while an arbitrator can walk away from his mistakes with only the curse of the immediate parties in his wake.

The second characteristic of arbitral discretion which is different from the manner in which judicial discretion is normally exercised is the absence of a jury to decide the issues of fact.

These two characteristics—the absence of review and the absence of a jury—place upon the arbitrator a responsibility which is grave indeed, and transcends that of the average trial judge.

The area which Gabe and Abe and I are attempting to explore today has been better and more thoroughly done by Cardozo in his *The Nature of the Judicial Process,* by Karl Llewellen in his *Bramble Bush,* and by Morris Cohen and Jerome Frank in their numerous books and articles. As the three great jurisprudential scholars have observed, anyone who hears con-

[9] *Id.* at 286.
[10] *Id.* at 287.
[11] *Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers* (Brooklyn, N.Y.: Central Book Co., 1936), 12.

flicting sides of an issue, exercises discretion, and renders a judgment, is more influenced by subconscious forces than conscious ones. Indeed, if we could rule out the subconscious decision-making forces, we wouldn't need judges, commissioners, or arbitrators at all; we could resort to a computer.

As Cardozo observed, ". . . it is through these subconscious forces that judges are kept consistent with themselves and inconsistent with one another." [12]

Comment—

ABRAM H. STOCKMAN *

Gabe Alexander has told us, in essence: first, that under our system of grievance arbitration, arbitrators in their role as decision-makers do exercise discretion; second, that notwithstanding they are seldom granted such authority, they inescapably must do so in resolving disputes; and finally, that the professional nature of the arbitrator's calling, the need to substantiate decisions by written opinion, and the desire to maintain respect among colleagues and clients all serve as restraints upon the possibility of an unrestrained exercise of discretion.

There is little to quarrel with what Gabe has said. The fact of the matter is that, somewhat uncharacteristic of Gabe—at least insofar as Academy meetings are concerned—he has not adopted a polemical position. On the contrary, as I construe his paper, he has merely sought to explore and explain certain aspects of the decision-making process as seen through the eyes of a professional arbitrator. And need I add that, as a professional arbitrator, Gabe is among the most experienced as well as among the most esteemed in the profession.

There have been other occasions at these meetings which have been devoted to discussions of the decision-making process. Who can forget that tour de force in 1962 by none other than Peter Seitz on the subject, "How Arbitrators Decide Cases: A Study in Black Magic"? [1] You may recall that it was Peter's conclusion

[12] Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 12.

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[1] *Collective Bargaining and the Arbitrator's Role,* Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962), 159.