DISCRETIONARY JUSTICE

A PRELIMINARY INQUIRY

BY KENNETH CULP DAVIS

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Preface

If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and the most frequent injustice? I believe that officers and judges do reasonably well at the rules end of the scale, because rules make for evenhandedness, because creation of rules usually is relatively unemotional, and because decision-makers seldom err in the direction of excessive rigidity when individualization is needed. And probably injustice is almost as infrequent toward the middle of the scale, where principles or other guides keep discretion limited or controlled. I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.

The question whether injustice is more common at the discretion end of the scale should be pondered in the light of another significant question: With which portion of the scale is research primarily concerned? This question has an obvious answer. The further we go toward the rules end of the scale, the greater the quantity of useful literature; the further we go toward the discretion end of the scale, the fewer the books and articles. Indeed, I know of no sys-

tematic scholarly effort to penetrate discretionary justice.[1] Writers about law and government characteristically recognize the role of discretion and explore all around the perimeter of it but seldom try to penetrate it.

A few oversimplifications about the literature of jurisprudence, of public administration, and of administrative law can quickly sketch the general nature of the inadequacy of those bodies of literature with respect to discretionary justice: Jurisprudence misses many realities about justice because it is too much concerned with judges and legislators and not enough with administrators, executives, police, and prosecutors. Furthermore, jurisprudence acknowledges the law-discretion dichotomy and then spends itself almost entirely on the law half. Public administration writers, instead of observing, describing, and criticizing governmental processes, as I think they should do, hid their heads in the sand for several decades while denying that administration involved policy-making, and then they became preoccupied with trying to construct a value-free science of administration. That focus, happily, may be about to shift, for leaders in the field have asserted in a recent report: "Efforts to make it [public administration] a science have run afoul of reality." [2] The literature of administrative law is likewise singularly unhelpful to a study of discretionary justice, except peripherally here and there. Administrative law literature is devoted mainly to the 10 or 20 percent of administrative action that involves either formal proceedings or judicial review, and it largely neglects the 80 or 90 percent that escapes both formal proceedings and judicial review.

Doing the research needed for a developing legal system may be compared with keeping in repair an old roof of an enormous building. Our scholarly roof in its present condition is strange to behold.

1 Writings whose primary focus is substantive policy (e.g., prison administration, regulation of railroads, sentencing) often deal with exercise of discretion and may involve problems of justice. But I think a primary focus on discretionary justice cutting across all kinds of subject matter is altogether different.

2 John C. Honey, "A Report: Higher Education for Public Service," 27 Pub. Ad. Rev. 294, 301 (1967). See also Norton Long, "Politicians for Hire—The Dilemma of Education and the Task of Research," 25 Pub. Ad. Rev. 115, 118 (1965): "The problem of education of public administrators has been clouded by the misconception that only scientific knowledge constituted reliably useful instruction." And see footnote 52 of Chap. 8, below.

Most of it at the rules end is extremely strong, but portions at the discretion end have rotted away, leaving big holes where the water rushes in and does great damage. Only an occasional worker gives attention to the big holes, while the majority of workers swarm over the rules end, stopping or preventing slow leaks, and reinforcing at points where leaks seem impossible. The reinforcements are both excessive and spotty. The roof is a hundred feet thick in some spots, but these are the very spots that attract still more workers. Not much is attempted except patchwork, and that is one reason the workers ignore the big holes, many of which call for structural changes requiring architectural imagination.

For every new book that tries to do something about the big holes in the scholarly roof, a thousand seek to reinforce the portions that are already strong.

Of course, I do not mean to imply that I can repair the holes or even draw the blueprints for doing so. Although this essay does advance a number of proposals designed to improve our system of discretionary justice, I regard such proposals as incidental to my main purposes, which are (1) to dispel the virtually universal impression that discretionary justice is too elusive for study, (2) to open up problems that seem susceptible of further research and thinking, and (3) to formulate a framework for further study.

My hope is that this essay may induce some of the workers who are crowding the rules end of the roof to direct their talents to the areas of discretion that are so urgently in need of repair. The construction work that is needed will require many workers for many decades.

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K.C.D.

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I

The What and the Why of Discretion

1. *Where law ends.* Engraved in stone on the Department of Justice Building in Washington, on the Pennsylvania Avenue side where swarms of bureaucrats and others pass by, are these five words: "Where law ends tyranny begins." [1]

I think that in our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.

One who enters that Department of Justice Building may quickly find that the workers there who are exercising governmental power are concerned with applying law, with making discretionary determinations, and with various mixtures of law and discretion. They are much more occupied with discretion than with law. Not one of them who understands his job would agree that where law ends tyranny begins. Every conscientious employee of the Department of Justice, from the Attorney General on down, is striving to assure that where law ends, wise and beneficent exercise of discretionary power will begin.

The central inquiry of this essay is what can be done to assure that where law ends tyranny will not begin. More precisely, the central inquiry is what can be done that is not now done to minimize injustice from exercise of discretionary power. The answer is, in broad terms, that we should eliminate much unnecessary discretionary power and that we should do much more than we have been

1 The quotation is from William Pitt.

doing to confine, to structure, and to check necessary discretionary power. The goal is not the maximum degree of confining, structuring, and checking; the goal is to find the optimum degree for each power in each set of circumstances.

The two subjects on which the literature of administrative law primarily focuses—trial-type hearings and judicial review—are here de-emphasized, because our main concern is with the vast mass of discretionary justice that is beyond the reach of both judicial review and trial-type hearings.

2. *What is discretion?* A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

Some elements of this definition need special emphasis. Especially important is the proposition that discretion is not limited to what is authorized or what is legal but includes all that is within "the *effective* limits" on the officer's power. This phraseology is necessary because a good deal of discretion is illegal or of questionable legality. Another facet of the definition is that a choice to do nothing—or to do nothing now—is definitely included; perhaps inaction decisions are ten or twenty times as frequent as action decisions. Discretion is exercised not merely in final dispositions of cases or problems but in each interim step; and interim choices are far more numerous than the final ones.[2] Discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors.

An officer who decides what to do or not to do often (1) finds facts, (2) applies law, and (3) decides what is desirable in the circumstances after the facts and the law are known. The third of these three functions is customarily called "the exercise of discretion," and it is the subject of this essay.

Even though no position here taken depends upon further refinement of the meaning of discretion, the full reality about discretion is somewhat more complex. A decision as to what is desirable may include not only weighing desirability but also guessing about unknown facts and making a judgment about doubtful law, and the mind that makes the decision does not necessarily separate facts,

2 Sec. 8 of this chapter discusses interim decisions.

law, and discretion. Furthermore, the term "discretion" may or may not include the judgment that goes into finding facts from conflicting evidence and into interpreting unclear law; the usage is divided. And still another complexity must be reckoned with: An officer who exercises discretion needs not only the facts which give rise to the discretionary problem; he may also need facts to guide his exercise of discretion. For instance, the policeman finds facts that the boy has committed a misdemeanor, but his determination whether to lecture and release the boy or whether to arrest him may depend upon his finding facts about the comparative effects on such a boy of either discretionary choice; appraising this second set of facts, or guessing about them, is clearly a part of the exercise of discretion. So the reality may be rather untidy: Exercising discretion may be a part of finding facts and applying law, and finding facts may be a part of exercising discretion.[3]

When we isolate what we regard as the exercise of discretion, we find three principal ingredients—facts, values, and influences. But an officer who is exercising discretion seldom separates these three elements; most discretionary decisions are intuitive, and responses to influences often tend to crowd out thinking about values.[4]

3. *Discretionary justice to individual parties, social justice, and policy-making.* Without trying to draw precise lines, this essay is concerned primarily with a portion of discretionary power and with a portion of justice—with that portion of discretionary power

3 Finding facts may also be a part of determining law. The facts about the parties, to which the law is applied, are called adjudicative facts. The facts that are used for the purpose of determining law or policy or exercising discretion are called legislative facts. See 2 Davis, *Administrative Law Treatise* § 15.03 (1958).

4 One approach to a study of discretionary justice—not the one here taken—could be to penetrate the mental, psychological, and emotional mechanisms that operate in the making of a determination involving discretionary justice. Perhaps all choices of values are ultimately determined by the emotions, but even if that is true, the intellect may still play a major role. One appealing position is the following: "The great insight of modern philosophy . . . is that ultimate convictions can be based neither on intellectual intuition nor on proofs which must after all depend on premises. . . . That our valuations are tied up with our emotions and not grounded in a rational vision of absolute values is surely right, but we should not ignore the difference between untutored emotion and cultivated emotion. . . . [T]here is a vast difference between an informed and an uninformed choice, a responsible and irresponsible decision." Walter A. Kaufmann, *Critique of Religion and Philosophy* (1961), 410.