

Seattle University School of Law Digital Commons

Faculty Scholarship

1970

Discretionary Justice: A Preliminary Inquiry

Henry McGee

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>

 Part of the [Courts Commons](#), and the [Ethics and Professional Responsibility Commons](#)

Recommended Citation

Henry McGee, *Discretionary Justice: A Preliminary Inquiry*, 4 *GA. L. REV* 633 (1970).
<http://digitalcommons.law.seattleu.edu/faculty/611>

This Book Review is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.

BOOK REVIEW

Discretionary Justice: A Preliminary Inquiry. By Kenneth Culp Davis. Baton Rouge: Louisiana State University Press, 1969. Pp. 233. \$8.50.

Discretion remains the *terra incognita* of Anglo-American law. Though Kenneth Culp Davis' *Discretionary Justice* hardly makes him the Matthew Henson or the Francois Genet (or the Roscoe Pound for that matter)¹ of this uncharted jurisprudential continent, his lucid and forceful discussion of the cutting edge of justice could prove both catalyst and important phase in the achievement of order in the chaos of discretion.

For most lawyers, phrases such as "gross abuse of discretion" signal nothing more precise than the possibility of reversible error. In a particular factual matrix, the words may illumine the vaguest contours of judicial or administrative *faux pas* (or tyranny), but definitional or even conceptual precision is rarely hoped or striven for. The contribution of Professor Davis is his argument that the formulation of guides and standards for the application of discretion is very much within the grasp of the profession. The book assaults a comfortable citadel which meticulously applies rules in the solution of legal problems but leaves discretion—the effective limit on the power of a public officer which "leaves him free to make a choice among possible courses of action and inaction"²—pretty much to chance and hunch.³

Suggesting both that we are a government of men as much as of laws and that discretion begins where law ends, Davis sets out to determine how much unnecessary discretionary power can be contracted and how necessary discretionary power can be both confined and structured. Predictably, Davis, as a leading theoretician of the administrative law process, emphasizes discretion exercised by administrative agencies, not that of judges and juries. Moreover, he excludes policy-making (which overlaps discretionary justice) and the crucial issues of politics and economic interests which in the long run are probably more determinative of whether or not the quality of discretion is strained. It is arguable, for instance, that so long as blacks remain relatively powerless in the American social order, discretion will nearly

¹ Pound, perhaps as much as any American legal scholar, was concerned with the role of discretion in a rule-oriented system. One of his most compelling aphorisms is: "The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice." Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12, 20 (1910). For a summation of his thought on discretion, see 2 *R. POUND, JURISPRUDENCE* (1959).

² K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969) [hereinafter cited as K. DAVIS].

³ To be sure, hunch has its roles in the application of rules. Cf. Hutcheson, *The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929).

always be used *against* individual blacks in quite a different way than it is for most Americans. Policemen with discretion to arrest or not arrest frequently arrest black youths in situations where identical infractions by white youths result in, at worst, a warning.

But leaving aside the abiding issues of class and caste, *Discretionary Justice* treats an area of the law which has largely gone undiscussed but which affects far more citizens than the application of rules by courts of law. "Discretionary decisions number in the billions yearly, even though the yearly number of all civil and criminal cases commenced in all federal courts is under one hundred thousand and the number going to trial is under twelve thousand."⁴ More importantly, writes Davis, a "startlingly high proportion of all official discretionary action pertaining to the administration of justice is illegal or of doubtful legality. This is true in all units of American government—federal, state, and local."⁵ He suggests that a way to check official illegality is to reform discretionary justice so that it is not unnecessarily exercised; and so that when exercised, it is guided as much as possible by rules and standards in the way that in courts, cases are decided by the application or by the use of rules as guides for discretionary decisions.

Davis of course concedes that the need for individualized justice makes discretion indispensable to our (indeed any) legal system. "Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a *government of laws and of men*."⁶ Indeed, the need to confine the unnecessary exercise of discretionary power or to bring it under the optimum degree of control proceeds from the reality that discretionary power has continued to grow apace as the legal system has adapted itself to the demands of government in an age of technology. More important, however, is Davis' insight that real and viable creativity is impossible in any legal system without discretion. "Everyone recognizes the necessity for creative action through legislation, but the most difficult creative thinking is usually introduced through executive or administrative solutions of specific problems. . . . Without discretionary power to create in the process of deciding particular cases, the tribunal, whether judicial or administrative, might never be able to develop rules. The crucial point in the process is discretionary power to be creative in particular cases."⁷

This book is, then, no exaltation of formal adjudication pursuant to previously articulated rules. Indeed, Davis recognizes that

not many questions for discretionary justice ever reach the stage of adjudication, whether formal or informal. Discretionary justice includes

⁴ K. DAVIS, *supra* note 2, at 9.

⁵ *Id.* at 12.

⁶ *Id.* at 17.

⁷ *Id.* at 20-21.

initiating, investigating, prosecuting, negotiating, settling, contracting, dealing, advising, threatening, publicizing, concealing, planning, recommending, supervising. Often the most important discretionary decisions are the negative ones, such as not to initiate, not to investigate, not to prosecute, not to deal, and the negative decision usually means a final disposition without even reaching the stage of either formal or informal adjudication. . . . All along the line an enormous discretionary power is the power to do nothing.⁸

Admitting the role and value of discretion, Davis suggests that it has as many dangers as advantages, that "[i]n a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules."⁹ Davis regards the present state of affairs as wholly out of balance, that governmental and legal systems are suffused with excessive discretionary power which needs to be controlled and checked.

Davis would have agencies make constant use of their rule-making power to clarify the vagueness inherent in statutes which delegate power. As experts in a given area, agencies are far better equipped to develop and promulgate rules than legislatures, argues Davis. Rather than invalidating administrative action because it is taken pursuant to legislative direction unsupported by standards, Davis would have courts require that administrators supply standards. "*The requirement should gradually grow into a requirement that administrators must strive to do as much as they reasonably can do to develop and to make known the needed confinements of discretionary power through standards, principles, and rules.*"¹⁰ And rather than striving for rules which contain abstract generalizations applicable across the board in varying factual contexts, he would limit rule-making to the resolution of one or more hypotheticals. Rule-making by hypothetical would go a long ways towards clarification of uncertain law, a major function of the administrative process.

Another important Davis tenet is that administrative power should be structured as well as confined. While confining discretionary power keeps it within designated boundaries, structuring controls the manner of exercise within the boundaries. Administrative rule-making confines as well as structures discretionary power—rules which establish limits on discretionary power confining it and rules which specify what the administrator does within the limits structuring the administrator's power. "The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure. . . . Openness is the natural

⁸ *Id.* at 22.

⁹ *Id.* at 25.

¹⁰ *Id.* at 59.

enemy of arbitrariness and a natural ally in the fight against injustice."¹¹

Before turning to the most provocative and probably ultimately the most controversial suggestion in the book—Davis' idea that police should make policy through rule-making procedure—notice should be taken of his emphasis on openness as a means of structuring discretionary power. What makes the exercise of administrative discretion so terrifying is the impenetrable mystery which enshrouds its exercise. Various provisions of the Administrative Procedure Act,¹² as well as the Information Act,¹³ recognize the need for openness as a check on arbitrariness. Yet, as Davis points out, "*more than 90 percent of the American administrative process is behind closed doors . . .*"¹⁴ Hearings, of course, are generally open, but informal proceedings and records are just as generally secret. It is in the informal procedures that the bulk of agency work is accomplished. Davis believes lawyers should abandon the all or nothing stress on trial-type procedure or total informality. A middle ground is possible with procedural protections that fall short of the elaborate rules which surround formal trials or administrative hearings, but which apprise a party of the nature of the evidence upon which the agency action is predicated and the rationale for the agency decision.

To lawyer and layman alike, agency operation and procedure is, to say the least, baffling. Many lawyers are at home, or nearly so, in court. Almost all are strangers in the land of the administrative agency. Exhausting administrative remedies often exhausts the lawyer as well as the client. Simply finding out what the agency has done and why it did it is for most lawyers a herculean task for which few clients can really afford to pay. Because the rules by which agencies operate are so little known, because agency policy is often both impalpable and arcane, the most resourceful of lawyers, not to say clients, are at a serious disadvantage when it comes to obtaining relief at the agency level. Openness, the kind which exists in a courtroom (but without its ceremony and formality), would check any tendency of administrators to act improperly, either through a lack of or because of false information and data, and would expose, both within and without the agency, decisions which are demonstrably irrational.

Davis' paradigm of completely unstructured discretionary power is that wielded by the United States Parole Board. He comments:

In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has

¹¹ *Id.* at 98.

¹² *See, e.g.*, 5 U.S.C. § 553(c) (Supp. IV, 1968) (providing for written statement of the grounds for denial of requests made in connection with agency proceedings).

¹³ 5 U.S.C. § 552 (Supp. IV, 1968).

¹⁴ K. DAVIS, *supra* note 2, at 113.

no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safe-guards are almost totally absent. Moreover, checking of discretion is minimal; board members do not check each other by deliberating together about decisions; administrative check of board decisions is almost non-existent; and judicial review is customarily unavailable.¹⁵

Although the board makes fifteen thousand decisions per year granting or denying parole, it has, says Davis, never announced rules, standards, or guides. Moreover, it has never publicly stated any substantive principles that guide it in determining the probability that a prisoner will commit another crime or stated the kinds of cases in which parole will be usually granted or denied. "Because parole cases involve vital interests of individuals, and because the performance of the Parole Board seems on the whole about as low in quality as anything . . . in the federal government,"¹⁶ Davis believes that courts should reexamine the doctrine that parole is only a privilege and that parole decisions are not reviewable for abuse of discretion. Knowledge of reviewability may provide incentives for Parole Board reform. Finally, Davis would not limit structuring to Parole Board decisions but calls for structuring of the sentencing power so as to avoid the unjustified and sometimes fantastic disparity and inequality in sentencing.

The discussion of discretion in the administration of criminal justice is perhaps the most challenging aspect of the book. The administration of the criminal law is the *cause celebre* of the American legal system, in fact of American political life. Davis is clearly one of the most perceptive of contemporary legal scholars; and, while his view of the criminal justice system is not the most informed, it is certainly one of the most imaginative. *Discretionary Justice* is an important work if only because it directs a first-rate intelligence to a vital aspect of the criminal justice system—the exercise of discretion by police.

Davis' consideration of discretion in the context of law enforcement recalls Dean Roscoe Pound's (whom Davis once upon a time raked over intellectual coals because of Pound's idiosyncratic view of administrative agencies)¹⁷ concern with discretion and the administration of criminal justice. "On the one hand," wrote Pound, "a body of criminal law is made up of rules prohibiting specific items of conduct. On the other hand, it is made up of checks and limitations on the enforcement of those prohibitions, and so on the activity of those who are charged with enforcing them."¹⁸ Both aspects of the criminal justice process are vital, indeed in-

¹⁵ *Id.* at 126.

¹⁶ *Id.* at 133.

¹⁷ Davis, *Dean Pound and Administrative Law*, 42 COLUM. L. REV. 89 (1942); Davis, *Dean Pound's Errors About Administrative Agencies*, 42 COLUM. L. REV. 804 (1942).

¹⁸ Pound, *Individualization of Justice*, 7 FORDHAM L. REV. 153 (1938).

dispensable. Not only general security but also individual life are threatened by the unchecked enforcement of the law. But unregulated human conduct is equally destructive of the social order, which has the two-fold task of maintaining the general security while protecting the quality of individual life.

Another side of this inherent conflict is expressed in the abiding reality that "[l]aw must be stable and yet it cannot stand still."¹⁹ The drive for certainty and security constantly exerts pressure for an immutable basis for the ordering of human life. But life is ever in flux, and thus, as Harry W. Jones has suggested, "law cannot be stable, in any effective sense, if it stands still."²⁰ And so the proverbial pendulum swings:²¹ the task of law to provide certainty and regulate change, to ensure order without denying freedom, continues. Without stability and certainty, the ensuing chaos would make both progress and liberty impossible.

In the criminal justice process, the role of discretion is paramount in the mediation of the rigors of the law's precepts. Police ignore or take notice of offenses, prosecutors *nolle prosequi* or prosecute;²² grand juries have the power to indict; juries return general verdicts of not guilty despite the most careful instruction and in the face of certain proof; judges have discretion in sentencing and, indeed, may not sentence at all but grant instead probation. Finally, there is the power of parole and pardon,²³ exercised so capriciously in the federal system. Throughout the administra-

¹⁹ R. POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

²⁰ Jones, *The Creative Power and Function of Law in Historical Perspective*, 17 VAND. L. REV. 135, 139 (1963).

²¹ "Legal history shows a constant swinging back and forth from an extreme reliance upon systematic administration of justice according to legal precepts, and an unsystematic administration according to the will of magistrates or administrative officials for the time being." Pound, *supra* note 18, at 155.

"Legal history shows a constant movement back and forth between wide judicial discretion on the one hand, and strict confinement of the magistrate by detailed rules upon the other hand." Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 699 (1913).

²² In the prosecution of alleged violators of the draft laws, former U.S. Attorney Robert M. Morgenthau of New York City was charged by the New York Civil Liberties Union with displaying "unparalleled harshness and vindictiveness." Asserting that prosecutors in Morgenthau's office were "apparently unable to distinguish crimes of violence from acts of conscience," a spokesman for the Union suggested that Morgenthau was not dictated to by the Justice Department since "other United States Attorney's offices around the nation do not handle these cases in the same ways." The attack on Morgenthau came after a divinity student received a two-year sentence after indictment and prosecution for a range of infractions of the draft law, including failure to report for a physical examination, failure to fill out a questionnaire, failure to possess a draft card and failure to submit to induction. "This piling on of charges can only be likened to a vendetta." N.Y. Times, Jan. 17, 1969, § 1, at 3, col. 2.

²³ The process has been called "the sieve effect." A. BLUMBERG, CRIMINAL JUSTICE 50-55 (1967). For another recent study of the operation and impact of discretion, see D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 40-43 (1968).

tion of criminal justice, there is and will always be this constant readjustment of claims and interests, the achievement of "practical compromise between over-minute lawmaking and over-wide discretion."²⁴

It hardly needs saying that police departments almost uniformly fall short of the Olympian detachment envisioned by Pound for law enforcement agencies. Thus it is that in discussing discretion Davis is forced to deal with masters of its abuse. Though he recognizes that discretionary power is central to the police mission, Davis argues that police make policy and should do a large portion of their policy-making through rule-making procedure similar to that required by the Administrative Procedure Act. Although on balance his conception of the police bureaucracy is in turn naive and lacking in sophistication, it deserves serious consideration because of its originality and the intellectual vigor with which it confronts a problem more experienced and knowing students of the police usually skirt.

Davis conceptualizes law enforcement agencies as just that—agencies in which 420,000 policemen work for some 40,000 separate entities. (All seven major federal independent regulatory agencies employ only about 10,000 persons.) These policemen spend most of their time in peacekeeping and related service activities which involve the making of policy:

Policy has to be made about what private disputes to mediate and how to do it, breaking up sidewalk gatherings, stopping undue noisiness during sleeping hours, legally or illegally tapping wires and using listening devices, helping drunks, deciding what to do with runaway boys who refuse to go home, breaking up fights and matrimonial disputes, deliberately destroying valuable property such as gambling devices even when admissible evidence that it has been used illegally is lacking, engaging in preventive detention in violation of the Constitution, stopping citizens on the street, entering and searching premises, and deciding which crimes not to investigate for lack of manpower. Policy has to be made for the enormous field of police control of juveniles. Policy has to be made on such huge and troublesome subjects as the relations between the police and various minority groups.²⁵

Davis argues that the public and the police must shed their reluctance to confront the facts that the police do make policy, that the police are not ministerial officials enforcing all laws, and that the police exercise the most sweeping kinds of discretionary power. Indeed, not only is discretion at the very core of the police function, much of police policy-making is "unauthorized by statute or ordinance" or is "directly contrary to statutes and ordinances."²⁶ Moreover, much of this illegal policy-making is beyond the

²⁴ R. POUND, *CRIMINAL JUSTICE IN AMERICA* 42 (1930).

²⁵ K. DAVIS, *supra* note 2, at 81-82 [footnotes omitted].

²⁶ *Id.* at 84.

reach of the courts or without any legislatively imposed guidelines whatsoever. Finally, this policy-making is not confined to the upper echelons of the law enforcement hierarchy, but is made by subordinates, the "cop on the beat." The book argues that the acquiescence in the unbridled power of the individual police officer to make policy stems from the pervasive misconception that the police do not make policy. Davis declares:

In general, top officers refuse to acknowledge that their departments are making important policy determinations and that they must accordingly plan a system for making such determinations. The legislative bodies have never knowingly delegated policy-making power to the police, and the heads of the departments have never explicitly sub-delegated such power to their subordinates. Yet the policy-making power has grown tremendously. And the principal place of growth is in the lower levels of police organizations.²⁷

How, then, would Davis halt widespread weighing of social values by single individuals whose median education is 12.4 years, less than half a year of college, according to the President's Crime Commission?²⁸ Pursuing vigorously the administrative agency model, Davis argues for guiding the discretion of policemen with "administrative rules adopted through procedure like that prescribed by the federal Administrative Procedure Act."²⁹ Formulation of rules by top officers of the department and other local governmental officials about when and where not to make arrests or enforce laws will, in his view, curb much of the oppressive use of discretion by individual policemen. Davis believes that if the community participates in the development of the rules and if the police know they must obey them (unlike the "rules" in current police manuals systematically violated by policemen with acquiescence by their superiors), police abuse of discretion and illegal use of their power can be significantly curbed.

Visionary is not the word that comes most immediately to mind when describing the sum of Professor Davis' scholarly work. True, he has fused the is and the ought as well as most; his landmark treatise is proof of his mastery of present things and future hopes.³⁰ Yet in *Discretionary Justice* he has reached beyond even his own grasp and in apparent frustration and impatience with the official anarchy that passes for law enforcement has presupposed the existence of a political technique for change which more now than ever before seems nonexistent. Surely there is in part an intentionality to the apparent capriciousness of police exercise of discretion.

²⁷ *Id.* at 89.

²⁸ PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 10 (1967).

²⁹ K. DAVIS, *supra* note 2, at 219.

³⁰ K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958).

Police behavior which appears irrational to the legal scholar and cruel to the oppressed may be highly functional in a society which uses the police in sometimes subtle, but frequently cruel ways to check social unrest and change.

Davis may be deceived, but much of the silent majority are not. Police discretion is as broad as the necessity to check the blacks, to curb dissent, requires. Discretion's handmaiden is often terror, and terror masked in blue and badge is sometimes the receipt for civil peace. Some will find this a bleak, absurd caricature of the present state of law enforcement. But that is a question of perspective—like the recent polls which indicate that three of every four whites think integration is proceeding too swiftly, three of four blacks the reverse.

Regardless, however, of how benign the view of the police, Davis' analysis takes no account of the art of the possible—that is to say, politics and the prevailing power relationships in American society which insulate the police from the kinds of changes he advocates. It is no accident that recent efforts to "professionalize" the police aim not at reducing discretion but at making them more efficient. Efficient, it must be asked, to do what? To the young and the black the police are all too efficient (except, it must be added, in enforcing the law in the ghetto).

To return in closing to the world of the conceptual, which is to say away from Harlem and Watts (and, if Professor Davis will not think rude, away from Chicago's Woodlawn), there is a kind of apples and oranges unreality in comparing police departments to Washington bureaucracies. As Wittgenstein said in another context, the similarities should be noted but so too the differences.

HENRY W. MCGEE, JR.
Acting Professor of Law
University of California,
Los Angeles, School of
Law

