Discretion is inevitable
Discretion is all pervasive
Legal discretion defined:
“The space between and within legal rules where legal actors can and do exercise choice”
Discretion may be formally authorized
Discretion may reflect the reality of implementation

Rigidity of strict rules
Inability of rules of be comprehensive
Rules inevitably require interpretation
Interpretation by its nature involves discretion
Rules often conflict or are inconsistent
Choice among rules inevitably involves discretion
Tension between strict application of rules and notions of justice
The “Problem” of Discretion

- Discretion can be exercised in a discriminatory fashion
- Discretion can be exercised in an arbitrary and capricious manner
- Discretion results in inconsistency
  - Disparity in sentencing
- Actor’s may establish norms that limit their discretion

Varieties of Discretion

- Extent and nature of discretion varies
- Types of discretion
  - Actions that cannot be reviewed
    - Formally unreviewable (Supreme Court)
    - Practically unreviewable
  - Discretion whether to act
  - Discretion about what to do given a decision to act
- Example of criminal justice

Discretion in Criminal Justice

- 1,000 serious crimes
- 500 crimes reported to the police
- 400 crimes unsolved
- 100 people arrested
- 500 crimes unreported
After Arrest

- 100 people arrested
- 35 juveniles go to juvenile court
- 65 adults considered for prosecution
- 30 cases dropped
- 35 cases accepted for prosecution
- 5 jump bail or abscond
- 30 put on probation

Results of Prosecution

- 30 adult cases prosecuted
- 7 go to trial
- 4 convicted
- 23 plead guilty
- 27 sentenced
- 9 placed on probation
- 3 acquitted

Incarceration

- 1000 serious crimes
- 100 arrests
- 8 juveniles incarcerated
- 18 adults incarcerated
Constraints on Discretion

- Formal limitations
  - Statutes
  - Policies
- Informal limitations
  - Practical limitations
    - Ability to monitor
    - Pressures of work situation
  - Interrelationships among actors
    - Dependence of Prosecutors on Police
    - Ability of defense to make trial demands

Limiting Discretion

- Formally denying discretion
  - Mandatory sentencing laws
  - Banning plea bargaining
- Formally bounding discretion
  - Sentencing guidelines

Managing Discretion

- Developing routines to deal with factually similar cases
  - Formal policies
  - Informal practices
- Housing board
  - Creating “precedents”
  - “Canalizing” discretion
- Criminal justice
  - Policies within the prosecutor’s office
  - “Normal Crimes”
Decision Makers Role Conception

- How does the decision maker see his or her role?
  - “Judicial Role”
  - Does judge have discretion to “make” law?
    - “Law maker”
    - “Law interpreter”
- What role does a jury see for itself?
  - “Jury nullification”

Illusions and Realities

- Legal decision makers have a range of discretion
- Decision makers may be more bound that s/he feels because of self-imposed limits
- Decision makers may be bound by social forces as much as by the law itself

Exercising Discretion

- Economic model
  - Rationality
  - Maximization
  - Satisficing
- Process model
  - Routinization
  - Standard Operating Procedures (SOP)
- Psychological model
  - Attitudes
Example: Economic Model

- Trial vs. settlement in a civil case
  - $20,000 at stake
  - 70% chance that plaintiff will win
  - cost plaintiff $4,000 to go to trial
  - cost defendant $3,000 to go to trial
- "expected" gain for plaintiff:
  \[ \text{prob} \times \text{stakes} - \text{cost} = 20,000 \times 0.7 - 4,000 = 10,000 \]
- "expected" loss of defendant
  \[ \text{prob} \times \text{stakes} + \text{cost} = 20,000 \times 0.7 + 3,000 = 17,000 \]
- Should settle for between $10,000 & $17,000

Settling a Civil Case

Example: SOPs

- Worker’s compensation: what compensation should be awarded for a back injury?
  - Role of administrative law judge
  - What level of impairment or loss have I sustained?
- Loss of earning capacity
  - What kind of work can I still do?
  - Expert testimony from vocational expert
- Functional impairment
Example: Psychological Model

- Preferences along a single dimension
  - Liberal vs. Conservative
  - Each individual has an ideal point along the continue

- Choice alternatives fall along that same dimension, but at specific points

- Supreme Court Justices

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Discretion as Creating Injustice

- Disparity in treatment of like cases
- Discrimination among groups
  - Harsher sentencing for minorities
  - More lenient sentencing for women
  - Racial profiling
- Allows values of decision maker to displace the values of the policy maker
  - Discretion as anti-democratic

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Discretion as Necessary for Justice

- Rigidity inevitably fails to cope with complexity
- Discretion necessary to take into account individual factors in a given case
- Policy typically made to deal with most egregious situations not the typical situations
Discretion Is a Double-Edged Sword

- Discretion is inevitable
- Struggle to control negative features of discretion is ongoing
- Efforts to eliminate or too tightly control discretion has unintended consequences that are frequently negative