Justifying the Judge's Hunch: An Essay on Discretion

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A major theme in Legal Realist literature is the importance of the intuition on "hunch." For the Realists, it was the judge's "hunch,"

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1. Legal Realism is a large and complicated phenomenon in which there has been a recent revival of interest. See, e.g., L. Kalman, Legal Realism at Yale: 1927-1960 (1986) (study of the interrelationship between intellectual theory and institutional factors of legal education); Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 Phil. & Pub. Aff. 205 (1986) (comparing Dworkin's Legal Realist theories and the Critical Legal Studies movement); Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buffalo L. Rev. 459 (1979) (describing the rise and fall of empirical legal research at Yale under the Legal Realism movement); Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 Harv. L. Rev. 465 (1986) (recognizing Llewellyn as a central figure in American Legal Realism and discussing his influence on the Uniform Commercial Code); Schlegel, The Ten Thousand Dollar Question (Book Review), 41 Stan. L. Rev. 435 (1988) (reviewing L. Kalman, Legal Realism at Yale: 1927-1960 (1986)). See generally W. Rumble, American Legal Realism (1968). While neither the time parameters of the Realist period nor the membership of the movement can be delineated precisely, I am referring primarily to that body of work on judicial decisionmaking written in the 1920s and early 1930s by people such as Jerome Frank, Karl Llewellyn, Joseph C. Hutcheson, and Max Radin. For a brief general discussion of the realist views on adjudication, see infra text accompanying notes 13-16. I do not include either Oliver Wendell Holmes or Benjamin Cardozo, although quotations from them regarding intuitive aspects of judging are found often in Realist work, and seem to have influenced the Realists considerably. Their views on judging, however, at least in some of their published work, differs substantially from that of the Realists. See Yablon, Judicial Process as an Empirical Study: A Comment on Justice Brennan's Essay, 10 Cardozo L. Rev. 149, 154-56 (1988) (describing differences between Cardozo's views and an "institutionalist" approach to decisionmaking).

2. See, e.g., Frank, What Courts Do in Fact, 26 Ill. L. Rev. 645 (1932) (recognizing that the "judicial hunch" cannot be described in terms of legal rules and principles); Haines,
more than any body of precedent, codes, or learned treatises, that represented and preserved the great traditions of the common law.3 Joseph C. Hutcheson, a Realist as well as an accomplished judge, describes the judicial hunch with a mixture of mystery and reverence:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.4

This quotation typifies the vague and often metaphorical descriptions of judicial decisionmaking that characterized much of the Realist

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General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges, 17 ILL. L. REV. 96 (1922) (examining the effect of extra-legal influences on judges’ decisions); Hutcheson, Lawyer’s Law and the Little Small Dice, 7 TUL. L. REV. 1 (1932) (judges attempt to follow precedents and give reasons for them); Hutcheson, The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision, 14 CORNELL L.Q. 274 (1929) (recognizing the presence of intuition in judicial decisions); Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431 (1930) (recognizing shift in study of law to interaction between behavior and rules); Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357 (1925) (priority given to decisions leading to “desirable results”).

Forerunners of this work, who had substantial influence on it, are B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921) (exploring judges decisionmaking process) and B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 59-61 (1928) (discussing the role of “feelings” in a judge’s decision) and Kocourek, Formal Relation Between Law and Discretion, 9 ILL. L. REV. 225 (1914) (recognizing that discretion is not a defect but rather an integral characteristic of law).

3. I came to see that instinct in the very nature of law itself is change, adaptation, conformity, and that the instrument for all of this change, this adaptation, this conformity, for the making and the nurturing of the law as a thing of life, is the power of the brooding mind, which in its very brooding makes, creates and changes jural relations, establishes philosophy, and drawing away from the outworn past, here a little, there a little, line upon line, precept upon precept, safely and firmly, bridges for the judicial mind to pass the abysses between that past and the new future.


This sounds dreadfully abstract but lawyers should be the last person to complain of abstractions. They have been very prone to state their categories—which are not really abstractions at all, but generalized types of conduct, pictures much more than anything else, as though they were philosophical principles. Fortunately lawyers have handed down the tradition that the abstract formula is really only the sum of the situations from which it was derived, and except as suggesting these situations means just nothing at all. Except for this admirable legal tradition, courts could never have managed their business at all.


work. Legal thought always has had difficulty developing a satisfactory criterion for distinguishing rule bound judicial actions from discretionary ones and, in turn, distinguishing appropriate exercises of discretion from "abuses." The singular achievement of the Realists was successfully attacking formalism and deductive method in law, which managed to muddy these distinctions still further.

Since the Realists, a major project of American jurispudential thought has been providing a coherent and accurate account of judicial decisionmaking that recognizes the discretionary character of the process yet provides a rational basis for evaluating or justifying decisions. Accordingly, jurisprudes have argued over whether legal decisions can or should be justified as applications of a preexisting body of legal norms, as a process calling for particular psychological attributes, or as manifestations of shared interpretative strategies. Others have extended the

5. The Realists themselves were aware of this vagueness. See infra note 20 and accompanying text.


7. For want of better terms, I will refer to the abstract philosophical perspective on discretion in law as "jurisprudential," and those who participate in it "jurisprudes." The discussion of discretion that focuses on its relation to institutional context will be called "procedural," and those who participate in it "proceduralists." Neither term is entirely satisfactory because they do not adequately describe two very rich bodies of legal thought and because they may, to some readers, convey unintended judgmental connotations. As I will make clear in the following discussion, jurisprudes and proceduralists basically are writing about the same issues but at different levels of generality.

8. Although describing a decision as discretionary is to concede, in some sense, that it is not the determinate result of a preexisting rule, some theorists have sought to explain discretionary decisions as the results of loose or vaguely defined legal norms. See R. Dworkin, Taking Rights Seriously 31-39 (1977) (defining and defending a liberal theory of law); H.L.A. Hart, The Concept of Law 121-32 (1961) (formalism and rule-skepticism).


Realist critique to conclude that no *rational* criteria exist for justifying judicial decisions.11

While this debate has continued, discretion has also been a major theme in legal proceduralist writing, which examines decisionmaking of public officials in specific institutional contexts. In much of this literature, often focusing on administrative law or civil or criminal procedure, discretion appears relatively unproblematic.12 It is assumed that decisionmakers can operate with various degrees of freedom or constraint on their decisionmaking powers. The goal of much of this work is to determine the appropriate degree of discretion to exercise in particular decisions such as sentencing, arrest, or granting injunctions. While skirting philosophical issues, such writing is often wonderfully sophisticated about the institutional and structural aspects of decisionmaking—recognizing that discretion appropriately may be thought of as a description of the power relationships among decisionmakers, rather than a description of a particular category of an individual judge’s thought processes.

The fundamental thesis of this Article is that these two perspectives and discourses, the jurisprudential and procedural, have something important to say to each other. By integrating the two perspectives it is possible to obtain a new understanding of discretionary decisionmaking. The jurisprudences, operating at the highest levels of generality and focusing on the paradigmatic case of the individual and unreviewed decisionmaker, tend to ignore the existence of discretion as a legal doctrine that describes certain types of institutional decisionmaking. Yet those lawyers (including myself) who argue that legal decisionmaking is indeterminate (that is, that formal legal materials do not provide right answers to legal questions) must account for the fact that practicing lawyers and judges often distinguish between judicial decisions that are discretionary and those that are not.

Conversely, the proceduralists must confront the question of what constitutes a right answer in law. Criticisms of the various structural relations among decisionmakers and calls for differing levels of discretion in particular fields or in particular kinds of decisions, are refuted easily if


12. *See infra* notes 46-90 and accompanying text.
The criticisms rely on formal deductive models of the decisionmaking process that were discarded fifty years ago in the theoretical literature. Rather, specific debates about appropriate levels of discretion in sentencing, arrest, or the granting of injunctions, for example, must incorporate the more sophisticated concepts of the nature of the judicial decision available in jurisprudential literature.

The integration of these two approaches makes it possible to consider the problems of judicial discretion at different levels of generality. It makes possible the study of the normative assumptions that decisionmakers use to justify discretion within an institutional context. When studied in this way, discretion ceases to be an insoluble philosophical conundrum and, instead, becomes an aspect of the social and institutional reality in which lawyers operate. This Article analyzes the assumptions implicit in the language judges use to justify particular kinds of discretionary decisions and develops a mid-range theory of judicial discretion. While not providing the general philosophical account of discretion sought by the jurispruduces, this theory can nonetheless be used to understand and critique existing institutional structures.

Part I of this Article critically analyzes some of the significant writings on discretion from both jurisprudential and procedural perspectives. Part II demonstrates the inadequacy of both approaches, reformulates the questions, and provides a new methodological focus for considering issues of judicial discretion. Part III responds to these reformulated questions and begins to answer them.

I. The Problem of Discretion in American Legal Thought

The Realists' fascination with judicial intuition grew out of their rejection of legal formalism. Relying in part on American pragmatism, and in part on German theorists like Eugen Ehrlich and Rudolph von Jhering, they launched a full scale attack on what they called "mechan-
ical jurisprudence.” The Realists rejected the notion that legal reasoning involved a deductive process. They denied that the actions of legal decisionmakers were the determinate results of applying general legal rules found in statutes or appellate cases. Rather, the Realists asserted that in virtually every case the legal decisionmaker, in the paradigmatic case the trial judge, was free to decide the case in directly contradictory ways (for example, either for plaintiff or defendant) and then find adequate grounds for justifying either result.

Whether or not this is an accurate picture of legal decisionmaking (and I believe that in most respects it is), the rejection of authoritative legal rules as a sufficient basis for judicial decisions left two other major possibilities. One possibility is that judicial decisionmaking is random or arbitrary. This does not necessarily mean that the judicial decision is unintentional or accidental, but rather that the causal agents are personal, or individual, and not necessarily tied to broader legal or social norms. Opponents of the Realists often took this as their position, reducing it to the derogatory slogan that legal decisions are determined by “what the judge ate for breakfast.”

The second possibility is that judges apply legal norms appropriately—to give answers that are “correct” and make sense within the existing legal and social context—even though those answers cannot be

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15. Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908). The relation between Pound and the Legal Realists was ambivalent and troubled. While recognizing his important role in debunking the notion of law as a formal science of rules, particularly in the article cited above, the Realists found much of Pound’s other work to present an overly determinate picture of the functioning of the legal system. Jerome Frank stated his ambivalence this way:

Notably Dean Pound was among the leaders of those who combated the naive notion that the work of lawyers and judges ends with legal rules. But he adopted the Holmes idea in a strange way. While brilliantly elaborating it in some directions, he nevertheless repressed it, obstructed its full growth.

Frank, Are Judges Human?, 80 U. PA. L. REV. 17, 18 (1931). See also Llewellyn, supra note 2, at 435 n.3 (criticizing the limitations of Pound’s writing).

16. R. DWORKIN, supra note 10, at 36. While this is perhaps the most popular formulation of the strong rule-skeptical position, and is still widely used, I have not been able to locate its precise origins. I suspect, however, that it may derive from a statement by Pound in which he contrasts a system of law to the arbitrariness of “cadi” justice. Pound refers to “the oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion. . . .” Pound, The Decadence of Equity, 5 COLUM. L. REV. 20, 21 (1905). Twenty-five years later, seeking to refute the notion that non-rule based decisionmaking necessarily involved arbitrariness, Jerome Frank made reference to Pound’s comment and answered, “no more than in France, Germany, England or the United States, is the judge in Mohammedan countries supposed to decide cases according to his passing whim or the temporary state of his digestion.” Frank, supra note 15, at 24.
deduced or determined by authoritative legal rules or principles. But if the legal rules themselves did not produce such "correct" judicial responses, then they had to be the result of some other looser interaction between societal norms and values and the thought processes of the individual judge. Thus, the stage was set for the serious study of the judicial hunch.

A. The Jurisprudential Debate

Jerome Frank's 1932 article, *What the Courts Do in Fact,*\(^{17}\) provides a good example of the centrality of the judicial hunch in the jurisprudence of the Realists.\(^{18}\) As its title indicates, Frank's article is intended as an objective empirical description of the activities of trial court judges from the point of view of the practicing lawyer or litigant. From this perspective, Frank derides the notion that lawyers, merely because of their knowledge of legal rules, can predict judicial actions with any degree of certainty. He argues that the legal rules are of marginal importance in most trials, particularly jury trials. When judges act as factfinders, Frank argues, they have much the same discretion as jurors to decide the case for either the plaintiff or defendant with little concern for legal rules.\(^{19}\)

Thus, Frank concludes, the primary determinant of the judicial decision is not the legal rule structure but the "personality of the judge" or the "judicial intuition," that is, the whole set of characteristics that lead the judge to perceive the world, including the plaintiffs, the defendants, and the witnesses, in a particular way. Frank is quite aware of the vagueness of this concept. As he says:

"The personality of the judge" is a phrase which too glibly describes an exquisitely complicated mass of phenomena. The phrase "judicial hunch" is likewise beautifully vague. But those phrases will do for present purposes. Be it noted then that "the personality of the judge"

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18. Although Frank is sometimes thought to represent an extreme position among the Realists, this is a matter of some dispute among contemporary scholars. *Compare* L. Kalman, *supra* note 1, at 164-76 (Frank as father of Legal Realism) *with* Schlegel, *supra* note 1, at 470 n.6 (Frank as figure peripheral to Legal Realism).
19. Frank emphasized the fact-centeredness of most litigation and the contested nature of facts at a trial. For Frank, cases are decided by what and who the judge believes, not by legal rules. Frank also points out that when a judge says that he believes A and not B, that statement is unreviewable by higher courts. Higher courts play only a minor role in the decision-making process. At most, they can tell the trial judge to go back and write his decision for the winning party in a different way, or to hold another trial where the judge is still free to believe the testimony of either A or B. Frank, *supra* note 2, at 658-62.
and the “judicial hunch” are not and cannot be described in terms of legal rules and principles.\footnote{20}{Id. at 655.}

For Frank and for other Legal Realists, the vagueness of the “judicial hunch” concept was part of its appeal. It helped shake lawyers out of a mind set in which every legal problem had a deductively demonstrable “right answer.” This notion that legal certainty could be achieved by careful study of legal rules and concepts was the prime focus of the Realist attack.\footnote{21}{A few other aspects of Frank’s concept of judicial discretion should be noted. It is an attempt to describe, not evaluate, the actions of judges and to describe them from the particular perspective of a lawyer or litigant concerned primarily with the outcome of a particular case. In pointing out the inability of legal rules to determine outcomes, Frank stresses the importance of factual determinations, a matter that traditionally has been viewed as within judge or juror discretion (although he recognizes that legal rules may themselves be “ambiguous”). \textit{Id.} at 657-63, 657 n.28. Finally, while Frank tries hard to avoid making normative judgments about the actions he describes, he clearly is not troubled by the fact that judges can decide cases either way without much constraint from formal legal rules. \textit{Id.} at 654-55.}

The next generation of legal theorists, responded to the Realists’ rejection of legal rules as the basis for judicial action.\footnote{22}{See \textit{infra} notes 23-33 and accompanying text.} While acknowledging the existence of a certain amount of “discretion” in judicial decisionmaking, that is, the judicial ability to decide a case either way consistently with the preexisting rule structure, such discretion was seen as existing at the margin of the legal system, in the extreme or “hard” cases. These theorists insisted that judges, in their ordinary endeavors, were in fact limited and constrained in significant ways by legal rules.

The primary exponent of this view was H.L.A. Hart, who devotes considerable energy to refuting “rule-skepticism,”\footnote{23}{H.L.A. HART, \textit{supra} note 8, at 135. It is clear that Hart associates “rule-skepticism” with the position of the Legal Realists. He cites Llewellyn’s statement that “rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings,” as one version of a rule-skeptical position. \textit{Id.} at 135 (quoting K. LLEWELLYN, THE BRAMBLE BUSH 9 (2d ed. 1960))).} which he views as the claim that application of preexisting legal rules are never the source of judicial decisions.\footnote{24}{\textit{Id.} at 121-50.} Hart stresses the binding or obligatory quality of rules, and offers an “internal perspective” on the way rules affect decisionmakers. For Hart, the distinguishing feature of laws (unlike the orders of an armed bandit) is that people feel obliged to obey them even when the likelihood of sanctions is small or nonexistent. Thus, Hart is not overly disturbed by the Realists’ claim that knowledge of authoritative legal rules is not particularly useful in predicting judicial decisions. He recognizes that rules cannot always be written so as to determine
actions precisely, but may often be loose or “open textured.” For Hart, the fact that judges still feel bound to apply these loosely written rules (or at least to act within their scope in areas where they apply) indicates that the rules, however “loosely” applied, are still determining judicial decisions. 25

Hart thus divides the judge’s role into two kinds of decisionmaking—those in which the decision clearly is constrained by a preexisting rule or precedent (the clear or paradigmatic case) and those in which it is not. Hart calls these latter cases “indeterminate” or “discretionary.” 26

The judge’s role in such cases is a legislative or lawmaking one, choosing between possible outcomes on various policy or equitable grounds, and thereby creating new legal rules for subsequent cases. 27 For Hart, there is no uniquely discretionary form of decisionmaking, no magical judicial hunch. Rather, discretion is simply what occurs when the guidance of authoritative legal rules runs out. The judge then has the authority and role of a legislator.

Hart does not take very seriously the Realist insight that judges decide cases by intuition rather than by applying authoritative rules. Viewing this as simply a statement about the psychological behavior of judges (and not about the nature of legal rules) Hart replies, rather offhandedly, that one need not think about a rule in order to follow it. 28

For example, when a driver sees a red light and steps on the brake, she is following a rule even though the action appears intuitive. 29 For Hart, this is rule-following behavior because, if questioned, she would cite the rule as a justification for her action. 30 Judges, he points out, behave similarly when they cite legal rules in support of their decisions. 31

25. Id. at 134-36.
26. Id. at 122, 124.
27. Id. at 124-28. On this point, Hart substantially agrees with Cardozo, who argued that in cases where no precedent was applicable, the judge, like the legislator, was essentially free to make the law:

Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . Nonetheless, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator’s wisdom.

29. Id.
30. Id.
31. Id. at 136-37. It is a pity Hart did not pursue this example further because it raises a host of questions that go to the center of this issue. Must one know the rule in order to follow it? (If I simply imitate the other drivers’ behavior am I following the traffic rules?) Must one
Hart refutes the argument that judicial decisions that are unreviewable (such as those of a highest court) are therefore not determined by legal rules. He cites the example of a group of individuals playing a game (perhaps cricket or baseball) who, after keeping score themselves for some time, decide to appoint an official scorer. The scorer's decisions are final and not subject to appeal. Hart argues that the scorer must follow the rules of the game, but also can exercise judgment in close calls. If the scorer began to drastically depart from the rules, the game would no longer be cricket or baseball, but an entirely different game, which Hart calls "scorer's discretion." In the same way, Hart argues, it is perfectly appropriate to describe a high court judge as acting unlawfully when she does not conform her decisions to legal rules.  

This argument, which has received great attention from subsequent legal scholars, was a turning point in the jurisprudential debate we have been following. Hart's argument divorces the question of the judge's internal thought processes from the judge's position in a bureaucratic structure. In Hart's model, the judge's internal apprehension of preexisting legal rules constrains her independently of any power relationships, simply because the judge perceives rules as creating legitimate legal obligations. The effect of authoritative rules on a Supreme Court Justice, a trial court judge, and a game scorer are presumed to be similar.

For Hart, understanding the law meant understanding the way legal rules could create constraints and obligations on individuals, including judges, while still permitting flexibility and judgment. Since the effect of the legal rules on the judge's internal deliberations was the key jurisprudential issue for Hart, he, and the writers who followed him, tended to separate consideration of the judge as individual decisionmaker from considerations of: (1) the judge's role in a bureaucratic hierarchy; (2) the allocation of decisionmaking power within that hierarchy; and, (3) the relation between a judge's internal deliberations and the external constraints on her behavior. This tended to exacerbate the dichotomy between the jurisprudential debate over discretion and the more institutional, procedural perspective.

Hart's analysis also involves a subtle change in its approach toward the judge. Frank's perspective is of a practicing lawyer or litigant, and he asks the question most relevant from such a perspective: How can I pre-
dict what the judge will do, and with what degree of certainty? Hart's question, however, is quite different. It considers when we can say that a judge is acting lawfully. (The payoff of the "scorer's discretion" argument, after all, is that if the scorer departs too drastically from the rules we must change the name of the game.) This is not the perspective of the lawyer, or even the litigator (who may frequently accuse judges of acting unlawfully, to little effect), but that of the legal theorist. It is a form of empiricism—Hart is trying to explain observed phenomena (like the fact that Supreme Court decisions are, and can be, critiqued). Hart, however, is concerned with explaining such empirical phenomena qualitatively as conforming to a generalized and highly abstract concept of law. The result is to lose some of the practitioner oriented perspective of Frank's analysis and to move toward a description of an ideal theory of judging.

Ronald Dworkin continued and extended Hart's attack on discretion as the source of judicial decisions. 33 Unlike Hart, Dworkin denies that a judge is ever without authoritative legal norms for deciding a case. 34 Accordingly, Dworkin denies that discretion in any "strong sense," ever enters into judicial decisionmaking. 35 Dworkin's "strong sense" of discretion appears equivalent to the freedom a legislator has to promulgate new laws on any basis he deems appropriate. Dworkin carefully notes that exercises of strong discretion can be criticized as unwise or ill considered, but he does not think the term "abuse of discretion" can be applied appropriately to such actions. 36

Dworkin distinguishes strong discretion from two weaker senses of discretion, termed "discretion as judgment" and "discretion as finality," which are found in judicial decisionmaking. 37 "Discretion as judgment" occurs when a judge, in order to apply the rule, must utilize her own evaluative powers and judgment. 38 Dworkin's example is a sergeant ordered to take his five most experienced soldiers on patrol. 39 Obviously, the sergeant must make an evaluation of his soldiers in terms of the somewhat nebulous concept of "experience," and different sergeants may select somewhat different groups. Nonetheless (and this is of key importance to Dworkin) such a decisionmaker is still following a rule, though a somewhat vague and "open textured" one, because the decisionmaker

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34. Id. at 39-40.
35. Id. at 35-39.
36. Id. at 33-34.
37. Id. at 32-33.
38. Id.
39. Id.
still seeks to conform his conduct to the authoritative norm of "experience."  

With Dworkin, the debate moves much closer to a prescriptive theory of judging. His theory provides a basis for critiquing not just judicial outcomes but judicial methodologies. Dworkin tells us that the appropriate role of the judge is to consider various potentially applicable norms in reaching her decision. Indications that no such consideration was given are sufficient grounds for criticizing the decision, even if the same result would have been reached after such consideration. Because Dworkin operates at the same theoretical level as Hart, and asks the same primary question (what is appropriate to say about judging?) the fact that judges actually may not decide cases in the way he suggests has little effect on his theory.

Kent Greenawalt has criticized Dworkin’s notion of discretion as judgment, pointing out that as the rules become more vague, judgment appears to collapse into strong discretion. Suppose that instead of being asked to pick the “five most experienced soldiers” Dworkin’s sergeant was asked to pick “the five best soldiers for the job.” He might still pick the five most experienced, but he might also, while still following that “rule,” appropriately select other people (perhaps a new recruit with excellent night vision). If he were told to “pick five soldiers in a fair

40. Id. In this weaker sense of discretion, however, Dworkin seems to have revived the Realist notion that there is a uniquely judicial form of decisionmaking, neither as constrained as formalist jurisprudence indicates nor as free as a legislator. The difference between Dworkin’s judicial judgment and Frank’s judicial hunch is Dworkin’s presupposition that the judge perceives and consciously attempts to apply the preexisting legal norm. Frank’s judicial hunch, by contrast, presumes an unmediated perception of the appropriate legal response.

41. Id. at 38.


43. His treatment of “discretion as finality” is essentially the same as Hart’s scorer’s discretion argument. He agrees with Hart that the fact that some judges can make decisions that are final does not imply that the decisions are not made in accordance with rules. Dworkin, supra note 33, at 32-33.


45. Id. at 365-66. Greenawalt agrees with Dworkin that decisions that truly are unconstrained by any criteria whatsoever are simply matters of free choice (e.g., whether to go to the movies, whether to order chocolate or vanilla ice cream) and are not usually referred to as “discretionary” at all. Rather, that term is reserved for decisions that are in some sense limited or constrained by shared standards of behavior. Greenawalt, however, points out that these are not limited to the legal context. We would, for example, say a surgeon “exercises discretion” in deciding whether to operate. Dworkin might reply that this was precisely his point, that such discretion was really just the exercise of judgment, a matter of applying the appropriate norms.
way,” the sergeant might decide that the fairest way (in terms of the welfare of the entire group) is to send the most experienced; or he might decide, utilizing the same “fairness” criterion, to send the least experienced (since that would help equalize the amount each had been exposed to danger); or he might decide that fairness mandated random selection by lot. In short, if the rule is sufficiently open textured, the sergeant’s selection of any five people may be justified in accordance with the rule. At that point, however, the judge seems to be exercising discretion in Dworkin’s “strong sense.”

Dworkin may still reply that it matters that the judge is seeking to conform her behavior even to such nebulous concepts as “fairness,” “the interests of justice,” or other vague terms. At that point, however, his theory would be only a psychological theory of judging, a reliance on judicial openness and good faith. In these cases, there is no basis for critiquing any outcome, since any result is justifiable under the rules so long as the appropriate incantations of general norms are cited.

Dworkin might also escape the problem by denying that such vague rules are actually the rules applied by judges. Certainly, it is not uncommon to see doctrinal formulations such as “fairness” or “reasonableness,” but perhaps the rules as actually perceived by the judges are narrower and more constraining. In much the same way, Dworkin’s sergeant might well be subject to discipline for sending the five newest recruits out on a dangerous patrol, even though his actions could be justified as “fair” on certain ethical theories. But to explore the implications of these arguments concerning actual legal practice requires a level of specificity and attention to context that the theoretical debate has tended to avoid.

We have seen that the theoretical debate concerning discretion began with the Realist insight that, as a matter of actual practice, judges did not decide cases in accordance with preexisting legal rules, but with some looser, discretionary form of intuition. This insight was recognized and incorporated into new theories of judging by Hart and Dworkin, who attempted to show that judges, even though not bound by determinate rules, nonetheless could act in normatively appropriate ways within a system of law. But in seeking to show that certain forms of discretion might be theoretically justified within a particular jurisprudential theory, these theorists gave little attention to whether discretionary decisionmaking, as practiced by actual judges, bore any resemblance to the normatively justifiable discretion posited by their theories. Rather, the attempt to describe the actual process of discretionary decisionmaking was the
subject of a separate body of work among legal scholars, which I have chosen to call the proceduralist debate.

B. The Proceduralist Debate

The jurisprudential or theoretical debate is not the only legal literature dealing with discretion. Describing a decision as “discretionary” has important practical implications for how that decision is made, constrained, and reviewed. A decisionmaker with discretion has power to decide either way, without fear that the decision will be nullified or reversed, unless the discretion is “abused.” It is not surprising, therefore, that some legal scholars have chosen to analyze discretion as a characteristic of power relationships in certain institutional arrangements.46

These scholars generally share three characteristics: (1) concern with discretion as a matter of power, often focusing on the institutional arrangements, if any, that constrain or limit that power; (2) greater emphasis on the practical problems of decisionmaking (proceduralists tend to analyze and cite actual cases more frequently than the jurisprudes who are often content with a few paradigmatic examples or thought experiments); and, (3) constant awareness of (and often great frustration with) the desire for predictable and general rules of conduct and its inevitable conflict with the needs of individual justice in particular cases.

Proceduralist works do not take the form of a debate like that of the jurisprudes, with each writer expressly responding to the position of a predecessor. Some of the work is categorized in particular subject matter areas, primarily administrative law, criminal procedure, and civil procedure. Yet a common perspective on discretion unites them and a debate of sorts can be created by looking at different writers’ responses to the same types of issues.

Once again, Legal Realism posed the question and set the terms of the debate. Thurman Arnold’s article, The Role of Substantive Law and Procedure in the Legal Process,47 was contemporaneous with Jerome Frank’s piece and shared many of its assumptions. Arnold also believed that legal rules do not determine the actions of decisionmakers. In con-

46. I do not mean to imply that this “proceduralist” literature deals only with technical or doctrinal matters. While the writers in this area often show great ability at technical analysis, what distinguishes their work from the jurisprudes is not the level of specificity or technicality at which it is written (some are very abstract and general), but the perspective and approach to the subject of discretion. In a broad sense, the jurisprudes approach the question of discretion from the point of view of philosophers; the proceduralists’ perspective is closer to that of the political scientist.

Considering the implications of that central Realist insight, however, Arnold looked at more than the paradigmatic case of the trial court judge rendering final judgment. He was aware that judges "sometimes sit as 'courts', sometimes as 'commissions' and sometimes as 'bureaus'."48 Once judges are seen as independent decisionmakers unconstrained by formal rules, the distinction between judges and other governmental decisionmakers (such as bureaucrats) seems rather artificial. Indeed, judges seem to be bureaucrats who have somehow managed to avoid the obloquy of their colleagues.49

Proceeding from the assumption that discretion as exercised by courts is not fundamentally different from that exercised by bureaucrats, Arnold argues for a discretion that is publicly recognized and acknowledged, exercised by those with expertise in the subject, open to public criticism, and subject to modification if subsequent conditions warrant. One does not find any reverence in Arnold for the magical judicial hunch. Rather, he argues that courts simply do covertly, with little understanding, what bureaucrats do openly and often with greater expertise.50 Arnold, in short, argues for the creation of the bureaucratic state.

Even as he derides popular misconceptions about the different roles of courts and bureaucrats, Arnold is aware of the importance of that public perception. He feels that any reform movement that attacks directly that perception is doomed to fail.51 Arnold does believe, however, that judicial reform is possible, if that reform is through revisions of procedure rather than substantive law.52

48. Id. at 621.
49. As Arnold notes (somewhat tongue in cheek):
   The distinction between bureaus and courts is important. Courts are bound by precedent, and bureaus are bound by red tape. Of course courts are forced to follow precedent even when it leads to absurd results because of their solemn obligation not to do anything in the future very much different from what they have done in the past. But bureaus, in allowing themselves to be bound by red tape, do so out of pure malice and lack of regard for the fundamentals of freedom. They have taken no oath not to violate the rules and analogies of the past. Therefore, they are much worse than courts because courts only act unreasonably when they can't help it, and bureaus act unreasonably when it is in their power to do differently.
   Id. at 624-25.
50. Id. at 626-27.
51. As he says: "Our judicial system, objectively examined, seems to be founded on so many imponderable psychological factors that it can never be molded by a direct attack upon its ideals without impairing its prestige." Id. at 642.
52. Because of the efforts of such men as Clark, Pound and Sunderland to make procedure a practical thing . . . we find that today, by calling a body of doctrine procedure, we can take an entirely different attitude toward it from that which we take where we call it substantive law. Anyone can say that procedure is not fundamental, that it has only to do with the legal process, that it does not govern the
Arnold does not believe that “procedure” and “substantive law” denominate different kinds of legal rules. Rather, calling a rule “procedural” is a rhetorical strategy, one that makes use of the flexibility and malleability of the rule structure to bring about changed attitudes on the part of judges. The very usefulness of the strategy, however, indicates that decisionmakers respond differently when an action is described as “substantive” or “procedural.” Arnold describes this as simply a difference in “attitude.” But attitude, after all, is the prime determinant of judicial response from a Realist point of view. Thus, Arnold, as a jurisprude, may deny any fundamental difference between decisions on constitutional issues, procedural rulings, and administrative determinations. As a practical political reformer, however, Arnold recognizes that the institutional response to these categories of decisions may be quite different, and that courts may be more flexible and more willing to exercise discretion in procedural matters. Arnold does not face the problem of reconciling this notion of discretion in a process sense with the strong Realist position that all decisions are discretionary. He simply indicates that the attitudes (the type of “hunch” the judge obtains) will differ in the various cases.

Arnold's political agenda was extremely successful. The New Deal vastly expanded the power and number of administrative decisionmakers. The adoption of the Federal Rules of Civil Procedure was also a victory for his reform program, incorporating and institutionalizing discretion in various parts of the judicial process.

Kenneth Culp Davis’ book, Discretionary Justice: A Preliminary Inquiry, was, in a sense, a look at the legal world that Arnold, and others like him, had created. Davis, author of the major treatise on administrative law, was intimately familiar with the decisionmaking process at various levels in the legal system. His conclusion, simply put, is that there is too much “unnecessary” discretion in the system.

Davis’ definition of discretion is interesting. While seeming to agree with Hart that discretion is what occurs when the law runs out, his

outside world, that it always needs reform, and finally that the reform may be accomplished by a consideration of the problem involved, not by analyzing the fundamental principles involved in doctrine.

Id. at 642-43.
53. Id.
54. Id. at 643-44.
55. Subrin, supra note 6, at 956-75.
58. K. DAVIS, supra note 56, at 217.
59. Id. at 3.
operational definition has nothing to do with the guidance imparted by the rules to the decisionmaker, but solely with power relationships. He states: "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."60

Davis carefully notes that, under his definition, discretion can exist to perform illegal acts,61 if the actions, even though prohibited by authoritative legal materials, are not effectively limited by institutional power arrangements.62

Davis believes that the primary problem with the American legal system is that there is too much unnecessary discretion. This leads to disparate treatment of similar cases and, therefore, to injustice. He illustrates his thesis empirically, spending much of the book detailing specific instances in which administrative power, often unchecked and unreviewed, is used to treat individuals unjustly. The emphasis on illustrative examples is both the strength and weakness of the book. Many of the examples of discretionary power abuses are quite convincing. Davis' vast experience with, and study of, administrative decisionmaking leads one to accept his conclusion that, in many areas of the law, there is too much discretion, that it is often unnecessary, and that discretionary decisions are not subject to appropriate review.63

The problem is that Davis' methodology requires us to accept his conclusion because he never sets forth criteria as to when there is "too much" discretion or proposes a jurisprudential theory that would enable us to distinguish necessary from unnecessary discretion. Davis seems to rely on his own (and our) intuitive notions of justice, which is somewhat ironic in a book that seeks to constrain intuitive judgments by public officials.64

Davis' proposed solution to the problem of too much discretion is, in effect, better rules. He would like to see more rules promulgated, particularly at the agency level, that constrain and limit the discretion of

60. Id. at 4.
61. Id.
62. He also recognizes that discretion is inevitable in any complex legal system and that it is often useful in tailoring individual decisions to appropriate circumstances. He recognizes that lack of discretion can sometimes lead to injustice and sees the role of the legal reformer as achieving the optimum balance between discretion and rules thus eliminating the "unnecessary" discretion and preserving only that which is necessary and justifiable. Id. at 17-21.
63. Id. at 216.
64. It is not always apparent, however, that Davis' view of the injustices of prosecutorial discretion or the pardon power comport with that of his readership, and if it does not, he has no other theory of "just" or correct responses to rely on.
decisionmakers. Davis notes that such rules need not always be written in general terms, but may sometimes function, like precedents, to adjudicate a paradigmatic case, thereby providing guidance in future cases. Some of Davis' previous statements about discretion, however, raise questions about his proposed solutions. Davis already has stated that some discretionary actions are "illegal." Can new and better rules constrain in the absence of changes in power relationships? But Davis also has indicated that such constraints, in the form of administrative or judicial review, may simply move discretion to a different level of the process. If so, the question becomes not how much discretion, but whose discretion is appropriate?

Davis is well aware that a change in the form of the rules would not be a panacea and that rules can often be bent or ignored. Operating under a clearer and more explicit set of rules, however, would nonetheless change the attitudes administrative decisionmakers have toward their role and the decisions they are called upon to make, leading to greater responsibility and equality of treatment. Davis is making the other side of Thurman Arnold's argument. Whereas Arnold thought that describing the judicial process in terms of practical matters of procedure would lead to a more flexible and discretionary attitude on the part of judges, Davis believes that describing the administrative process in terms of clear and explicit rules would shift the attitude of administrators toward greater consistency and equal treatment.

Though both arguments are valid, they rely on a particular set of assumptions about the relationship of decisionmakers to legal language and rules—relationships that are assumed but never delineated. Indeed, Davis' book reveals the difficulties of analyzing and critiquing discretion as a matter of process, without the theoretical framework of the jurisprudences. His call for an end to "unnecessary" discretion invites discussion of the role of law in society and what it means to say that a certain legal arrangement is "necessary." His description of certain discretionary decisions as illegal, despite the fact that they are permitted by the institutional power arrangements, calls for a discussion defining the "law." Most importantly, the notion that it is sometimes desirable to move discretion to different levels in the system points out the need for a theory of

65. Id. at 219-21.
66. Id. at 220.
67. Id. at 4, 12.
68. Id. at 43-44.
69. See id. at 106-16.
70. Id. at 219-22.
institutional competence, an account of why certain decisionmakers are most appropriate to make certain decisions.

The beginnings of such an institutional competence theory are found in Maurice Rosenberg's article, *Judicial Discretion of the Trial Court, Viewed From Above.* 71 Rosenberg's emphasis is on trial and appellate procedure, particularly the discretion of trial judges, rather than administrators. Nonetheless, his work builds on Davis' and seeks to supply some of the theoretical framework that Davis lacks.

Rosenberg, strongly influenced by Hart, begins with a distinction between "primary" and "secondary" forms of discretion. 72 Primary discretion is the freedom of the individual decisionmaker to act in any way she chooses. Closely corresponding to Hart's internal perspective, a judge exercises primary discretion when "decision-constraining rules do not exist." 73 As Rosenberg says, "In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer." 74 Primary discretion then, corresponds roughly to Hart's discussion of decisionmaking when the law runs out. It is the freedom of the legislator.

Rosenberg recognizes, and is ultimately more interested in, secondary discretion. Secondary discretion involves an external perspective and "has to do with hierarchical relations among judges." 75 It occurs when "the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept." 76

Hart had argued, in the scorer's discretion example, that a judge might have institutional power to decide any way she wanted, without fear of reversal, yet still internally be obliged to follow and apply the rules. In Rosenberg's terms, such a judge has secondary but not primary discretion. 77 But Rosenberg points out that discretion, as lawyers commonly use it, often refers to the instances when trial courts, not appellate courts, have the final say, when trial judges may "be wrong without incurring reversal." 78

72. Id. at 637.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id. at 639.
78. Id. at 637.
Discretion for Rosenberg, at least in its "secondary" form, is a matter of institutional arrangements and power relationships. Accordingly, it is permitted to the extent that appellate courts are willing to restrain their reviewing power.79

Yet, like Hart, Rosenberg's strong separation of internal and external perspectives of decisionmaking leads him to miss certain problems in his analysis. As an example of a very strong form of trial court discretion, Rosenberg cites a case in which Judge Jerome Frank vigorously criticized a trial judge for failing to grant defendant's request for special verdicts, yet affirmed the verdict on the ground that the Federal Rules gave the trial court "full, uncontrolled discretion" in this matter.80 Was the trial judge in this example "wrong without incurring reversal?" How can it be "wrong" when the Rules, Frank tells us, expressly permit it? But if it is not legally wrong, on what basis is Frank criticizing it? On the same basis one criticizes a legislator who has passed an unwise law?81 Frank seems to be saying that the trial judge's decision was not just unwise, but failed to follow some kind of rule for the proper conduct of trials. Rosenberg cannot answer these questions, which imply that one's external role can affect one's internal perception of the right answer, because Rosenberg describes the realms of internal decisionmaking and external constraint as separate.82

Rosenberg's article is a first step toward a theory of institutional competence, and he sets forth criteria for determining when trial judges, rather than appellate courts, should receive deference in the decision-making process. Yet, while his criteria are clearer and more theoretically grounded than Davis' criteria, they still rest on vague and sometimes dubious jurisprudential assumptions. Rosenberg provides three grounds for conferring discretion on the trial judge: (1) when it is "impracticable" to formulate a rule of decision; (2) when the issue before the court is new

79. Id. at 650.
80. Id. at 651.
81. That, of course, is the only basis on which Hart can criticize such exercises of discretion. See supra note 27 and accompanying text.
82. Rosenberg also considers the language of rules, sharing the assumption of Davis and Arnold that the language in which they are written can foster or limit discretion. Rosenberg's approach is very careful and empirical. He provides a set of hypothetical rules to trial judges and asks them to indicate which ones, in their opinion, conferred discretion. He found that loosely phrased rules, stating what the court "may" do or advising it to act "in the interests of justice," were perceived as conferring as much discretion as rules that expressly used the term. His conclusion, in the area of trial procedure, is much the same as Davis' in administrative law. Lawmakers, in an effort to provide greater flexibility to decisionmakers have put too much discretion into the system, often without considering what level of discretion was actually needed. Rosenberg, supra note 71, at 653-60.
or unsettled; and, (3) when circumstances critical to the decision are "imperfectly conveyed" by the record on appeal. But because of Rosenberg's purely external, institutional perspective, he fails to deal with the internal jurisprudential issues raised by his criteria. For example, is there a correct response to a discretionary decision when it is impracticable to formulate a rule of decision or when the issue is new or unsettled? There would not seem to be, yet if that is the case, then how can they be reviewed for "abuse of discretion?" Nonetheless, Rosenberg's article represents an important first step in the attempt to combine jurisprudential and institutional perspectives on discretion. This Article will expand on this attempt.

Judith Resnick's article, Tiers, presents an extremely careful and sophisticated theory of institutional competence, while eschewing any position on the existence or nonexistence of "right answers" in law. In this sense, Resnick's work represents the polar opposite of Dworkin's, which, while providing a theory of right answers for the individual and unconstrained judge, eschews discussions of institutional power relationships.

Although Resnick is unwilling to describe certain legal outcomes as "correct" in light of a larger normative theory, she recognizes that the process of adjudication itself incorporates various "values." The first rule of the Federal Rules of Civil Procedure, which calls for "just, speedy, and inexpensive" determination of every civil action, aptly illustrates that we want many things from the litigative process. Some, like speed, may conflict with others, like justice. Resnick carefully delineates a series of such process values and shows how various forms of judicial review enhance certain values at the expense of others. For example, a single judge whose decisions are final may be optimal for increasing speed and reducing expense. At the same time, a provision for limited review at the appellate level may promote other values, such as greater autonomy by litigants who may choose, at some expense, to pursue their case on appeal, and the added formality and ritual of a "higher" court examining the "correctness" of the lower courts' decisions.

Resnick shows how various types of proceedings utilize each of these models of judicial review and implicitly invites us to decide what

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83. Id. at 662-64.
85. Id. at 848.
86. Id. at 845.
87. FED. R. CIV. P. 1.
88. Resnick, supra note 84, at 860, 865-66.
process values are most important and to what degree. She criticizes recent Supreme Court opinions on review of habeas corpus proceedings because, she believes, the Court gave too much weight to certain process values and none at all to others. She makes it clear that her criticism is based not on some jurisprudential theory of correct answers, but on her belief that most Americans disagree with the Court's concern with speed and reduction of expense over other process values.

The proceduralist debate has provided a number of important insights into the relationship among institutional structure, rules, and discretionary decisionmaking. Arnold first pointed out that both society's attitude toward legal decisions, and the attitudes of legal decisionmakers themselves, were the result of certain preconceptions about institutional categories. Describing decisionmakers as "judges" applying "substantive law" made for a far more rigid, formalized decision structure than one in which "administrators" determined matters of "process." Davis, Rosenberg, and Resnick each sharpened and expanded this insight, pointing out how different rule structures and systems of review can promote or discourage discretionary decisionmaking and other systemic values. But just as the theoretical debate slowly lost its empirical grounding, the proceduralist debate has slowly lost its normative grounding. The proceduralists can demonstrate different ways in which discretion can be encouraged, checked, or channeled to different institutional levels, but increasingly have become reluctant to justify any particular structure as providing better, fairer, or normatively preferable results.

II. Reformulating the Questions of Judicial Discretion

The two discourses just reviewed ask different questions about discretion and its role in the legal system. This Part will analyze those questions to show that each discourse, by itself, is incomplete. The questions each discourse asks cannot be answered without resort to the perspectives or insights of the other discourse. The Part concludes with a discussion of the "right" questions to ask about discretion, and how to go about looking for answers to them.

A. The Inadequacy of the Existing Perspectives

The jurisprudential debate, from Frank to Hart to Dworkin, attempted to answer the question: What are the characteristics of a discretionary decision that render it legally valid? Such a question

89. Id. at 957-64.
90. Id. at 874-920.
presupposes, in a limited way, the truth of the Realist critique. It assumes that a legal decision can be valid even if it is not logically deductible from preexisting legal rules.\textsuperscript{91} As we have seen, however, the jurisprudences' accounts of such discretion and how it is validly exercised, varied widely.

I want to put aside those manifold answers, however, to focus instead on the shared question: What makes a discretionary decision valid? One problem with the question is the ambiguity of the term "valid." It can be understood (1) in a purely descriptive, indeed instrumental sense (valid decisions are those actually enforced by instrumentalities of the state); (2) in a way that reflects a certain degree of normativeness, but is still empirically grounded (valid decisions are those that reflect, and are consistent with, the legal rules governing a particular society); or, (3) in a strongly moral sense (valid decisions are good or right decisions). Indeed, we have noted the frustrating way the jurisprudential debate shifts from descriptive to prescriptive claims about discretionary decisionmaking. The shifting reflects a similar ambiguity in the question which seeks an appropriate account of "valid" discretionary decisionmaking.

This ambiguity is, however, pervasive in law and deeply embedded in legal language. One may also describe as ambiguous the position of a practicing lawyer as to the "validity" of a judgment he seeks to reverse on appeal.\textsuperscript{92} I am doubtful that it is either useful or possible to derive normative or even ethical considerations out of a discussion of what judges and other governmental decisionmakers do.\textsuperscript{93} Rather, I will focus on two other assumptions of the jurisprudential question that are both more questionable and more amenable to further analysis.

By seeking a single account of valid discretionary decisionmaking, the jurisprudential question assumes that discretion is a single thing that

\textsuperscript{91} While various theorists disagree as to how many cases fall into the category of valid discretionary decisions (for Hart relatively few, for Frank, virtually all) theorists agree that judges have discretion at least in the weak sense that they can make valid decisions even when the formal rule system does not compel a single result.

\textsuperscript{92} Such a lawyer would recognize the trial court's judgment as "valid" in the sense that it will be binding on his client unless reversed, yet declare to the appellate court that it is "invalid" because it is contrary to law and, perhaps, even an abuse of discretion.

\textsuperscript{93} Both of these claims raise some rather serious methodological issues. Hart's discussion of the need to explicate law from the "internal point of view" constitutes a recognition that normative considerations, the "oughtness" of law, are a necessary part of any jurisprudential account of law. H.L.A. Hart, supra note 8, at 86-87. The role of ethics in elucidating these normative considerations is even more controversial, yet many have held that such ethical considerations are necessary, either because the legal system itself is ethically grounded, J. Finnis, Natural Law and Natural Rights (1980), or because ethical considerations are a part of the legal discourse. See R. Dworkin, supra note 10.
can be described or, more precisely, that there are at least some attributes that all discretionary decisions share that may be usefully described at the appropriate level of generality. But as we have seen, the shared presumption of the jurispruders is a negative one, that not all valid decisions are logically derivable from preexisting rules. It does not support the positive assumption that these other valid decisions, lumped together as “discretionary,” share any common distinguishing features or characteristics that make possible a positive account of “discretion.” As Ludwig Wittgenstein demonstrated, the mere fact that one can use a single word to refer to a group of different things does not mean that one has named things with a common set of characteristics.94 It is highly doubtful, for example, that all the things named by the word “game” share a set of common features. It is similarly doubtful that the actions included within the term “discretion” share such common features.

Such an assertion calls for an analysis of the language of lawyers to determine what kinds of actions by legal decisionmakers are actually referred to as “discretionary.” Only against this baseline of actual usage could one begin to examine whether such discretionary decisions share common characteristics. As we have seen, however, the jurispruders, by and large, tend to eschew such a perspective.95 They prefer to begin from a theoretical or ideal form of judging and then to identify what aspect of that decisionmaking process is appropriately labeled “discretionary” within the confines of the theory. Any claims made about usage are accordingly self-fulfilling and are refuted easily (as Greenawalt refutes Dworkin) by reference to external usages that do not comport with the theory.96

95. Again, it is those who have taken a more procedural, institution-oriented approach who have noticed and commented on the different ways the term “discretion” is used in the legal system. See Christie, An Essay on Discretion, 1986 DUKE L.J. 747; Fletcher, Some Unwise Reflections About Authority, 47 LAW & CONT. EMP. PROBS. 269, 281-83 (1984); Rosenberg, supra note 71.
96. To determine whether discretion is a single type of decisionmaking whose characteristics may be explicated, therefore, one must turn from the perspective of the jurispruders to that of the proceduralists. Here one confronts the troubling fact that discretion, as the term is used by practicing lawyers, refers to a far narrower set of judicial decisions than the jurispruders’ concept of discretionary decisions. For the jurispruders, decisions involving statutory interpretation or common law development seem “discretionary” in that judges are free to choose among possible legal rules without authoritative guidance. To procedural reformers and the practicing bar, however, these are just “issues of law,” and have very different status from “truly” discretionary decisions like sentencing, granting injunctive relief, or sanctioning attorney misbehavior. The jurisprudential debate seems to have missed this distinction altogether. At the level of abstraction at which they deal, a choice between two statutory interpretations and a choice between two criminal sentences, each clearly justifiable under the prevailing rule structure, seem to be instances of the same judicial “discretion.” The fact that
The second jurisprudential assumption I will question is whether an appropriate theoretical account of discretion can disconnect the individual decisionmaker from any social or institutional structure. Ever since H.L.A. Hart distinguished the “internal” from the “external” perspective, and thereby distinguished law from coercion, the jurispruders have sought to provide an “internal” account of discretion. They have done so by divorcing the thought processes of the internal decisionmaker from institutional constraints and power relationships.97

But is the internal perspective of the individual decisionmaker really divorced from such institutional constraints? Can one act as a judge and not be aware of oneself as a person whose power is both created and defined by an institutional structure? Can one read legal authorities and not be aware of them as the record of potential exercises of institutional constraints on legal decisionmakers? Can a judge, in short, separate the question “What should I do in this case?” from the question “What can and should a judge do in this case?”98

If these questions cannot be separated, the project of providing a purely internal account of discretion must fail. If institutional power constraints limit a judge’s perception of what she should do, as well as what she can do, any account of discretion must include consideration of the way external constraints shape the judge’s perception of the correct

97. This divorce of the institutional and personal perspectives, while true of Hart’s description of judicial decisionmaking, does not characterize his work generally. On the whole, Hart is quite aware of the reciprocal relation between the shared societal understandings of the nature of legal obligations and the institutions that create positive law. See, e.g., H.L.A. Hart, supra note 8, at 77-120. What he has missed, however, is how the legal language functions as a specialized discourse with complicated relationships to general language, and the ways that language itself is used in certain institutional activities, such as in the justificatory arguments of judges.

98. Duncan Kennedy, in a recent attempt to describe the experience of formulating judicial decisions, speaks of the “work” of legal reasoning as reconciling his preference for a result (his “how-I-want-to-come-out”) with the prevailing rules (which he treats as “autonomous entities” within his consciousness). That reconciliation takes the form of a legal argument, and the obligation to create not just an argument, but a persuasive legal argument, derives, Kennedy tells us, from a set of partially internalized institutional constraints created by his self-perception as a judge. Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518, 527-32 (1986). Justice Brennan describes what appears to be a similar tension between his personal vision of the just result and the force or constraint generated by the rule structure as a conflict between “passion” and “reason.” Brennan, Reason, Passion and “The Progress of the Law,” 10 CARDOZO L. REV. 3, 3 (1988). In both pieces, the legal rule structure is experienced simultaneously as an “internal” source of obligation and an “external” institutional constraint.
or appropriate decision. Once again, one must look to the actual practices of judges and lawyers to resolve such questions.

To summarize, the jurisprudential debate rests on two unproven and highly questionable assumptions: (1) "discretionary" decisionmaking has a single set of distinguishing characteristics that can be analyzed and described, and (2) this analysis can be done solely from the internal perspective of the decisionmaker. Once those assumptions are challenged, they cannot be defended by reference to the jurisprudential literature itself, but involve empirical claims about the language and actions of legal decisionmakers that can be answered only by resort to the proceduralist perspective.

The proceduralist perspective is similarly incomplete. While the jurisprudences are short of empirical grounding, the proceduralists are short of normative theory. The key question of the proceduralists is: How much discretion should various decisionmakers have? The question by its term is a normative one, and cannot be answered simply by a description of current judicial practice. It presupposes that certain instances of discretion, though they occur within our legal system, are invalid, inappropriate, or at least undesirable, while others are not. To support such claims, however, one needs criteria for determining when the exercise of judicial discretion is valid, appropriate, or desirable. The procedural literature generally eschews attempts to answer such questions, but they are central to the jurisprudential debate.

If the above analysis is correct, then each of these discourses is doomed to fail. Neither can provide the answers to the questions it seeks using the perspectives and methodologies it has adopted. Even if those perspectives were expanded and the methodologies of each discourse adopted by the other, it is doubtful that merely putting the two discourses together would solve the problems of either. The proceduralists need an account of what constitutes a right answer in law, or at least a correct method of reaching such an answer. The jurisprudences need a descriptive account of what the legal community recognizes, or at least generally refers to, as valid discretionary decisions.

Stated in this way, neither discourse can provide what the other seeks. After at least seventy years of trying, the jurisprudences have yet to provide any usable criteria for determining when a legal decision is correct. Proceduralist debates over whether institutional decisionmakers

99. Indeed, the most promising and influential theories that posit the existence of right answers in law do so by defining them in terms of processes like "interpretation" or practical reason. The processes are, by their nature, not reducible to criteria of validity. See, e.g., R. DWORKIN, supra note 10; J. FINNIS, supra note 93.
have too much or too little discretion demonstrate that little consensus exists among practicing lawyers as to when discretion is exercised appropriately. Accordingly, this lack of consensus cannot serve as a basis for theoretical generalizations concerning the problems the jurisprudences seek to answer.

Nonetheless, the two discourses are related to each other in important and interesting ways. Each provides perspectives and insights that the other lacks. The question, therefore, is whether the study of discretion can integrate the perspectives of the two discourses to provide a more complete account of discretionary decisionmaking.

B. The “Old” and “New” Problems of Discretion

Any theoretical account of discretion must answer two questions. The first, the “old problem of discretion,” asks how a judge may act appropriately within the legal system even though the judge is free (in that she will not be reversed) to give differing, even contradictory answers. She may, for example, either grant or deny the injunction. At a doctrinal level, this is a problem the courts have recognized for generations. It is the problem of determining when a judicial decision is “within the bounds of discretion” and hence allowed, and when it is “arbitrary” or “an abuse of discretion” and thereby subject to reversal. At a theoretical level, it is the same problem the Realists, Hart, and Dworkin all faced, namely, how can one justify as valid the results of a decision-making process that does not yield determinate results through application of formal rules?100

The Realist claims about the indeterminacy of law and legal reasoning, however, raise a second question that virtually has been ignored in the jurisprudential debate, the “new problem of discretion.” This question asks: What distinguishes instances of doctrinally recognized discretion, like sentencing decisions, from other judicial activities, like statutory or constitutional interpretation in which judges may also decide in contradictory ways? An adequate theory of discretionary decision-making must distinguish discretion not only from arbitrary or random decisions, but from other decisions that may be just as indeterminate, in the sense that many judicial responses may be justified under the prevailing rule structure, but are nevertheless not “discretionary” in the sense that judges and practicing lawyers understand the term.

100. It is also the question that, if satisfactorily answered, would give the proceduralists the basis for determining when discretion was appropriately available within an institutional framework.
This "new problem of discretion" calls for a new approach to studying the problem. This approach recognizes that discretion, as used by practicing lawyers, has little to do with judicial freedom, at least in terms of expected outcomes. A motion for an extension of time to file a brief is "discretionary" in this sense even though every participant in the process knows it will be granted. The interpretation of an ambiguous contract term, however, is not "discretionary" even though none of the participants may have the slightest idea how the judge is likely to rule. Even from the internal perspective of the judge, it is unlikely that she feels "freer" or less constrained in ruling on the motion for an extension than she does in interpreting the ambiguous term.

The jurisprudences, with their emphasis on the internal decisions of the individual judge, cannot account for this phenomenon. The proceduralists would answer quickly that the difference is not in the decisionmaking process, but in the manner in which the decision is reviewed. That answer may come a little too quickly because it simply substitutes one verbal formulation for another. Instead of distinguishing discretionary decisions from legal ones, we are now called upon to distinguish review for legal error from review for abuse of discretion. This may still be a step forward, however, because once we start considering the review of discretionary decisions, we have abandoned the individual decisionmaker of the jurisprudential literature and have begun to approach the decision-making process from an institutional perspective.

Yet from the objective external view of the institution of appellate review all these decisions still look alike. All are made initially by the trial court. All are appealable (sooner or later) to the appellate court, which has the power to reverse but does so in relatively few instances.\textsuperscript{101} It seems then, that this perspective is too external. We need a methodology that provides greater insight into what the decisionmakers perceive themselves to be doing.

The source of such insight is found not in the way such decisions are made, but in the way they are justified under the prevailing rule structure. A trial judge deciding a question of statutory interpretation must write an opinion that is, among others things, a brief to the appellate court. She must seek to persuade the higher court to adopt her view of

\textsuperscript{101} Neither appealability nor frequency of reversal are promising distinctions. In the federal system, for example, some discretionary decisions, e.g., the granting of a preliminary injunction, are immediately appealable, 28 U.S.C. § 1292(a)(1) (1982); while others that seem quite rule bound, e.g., holding that subject matter jurisdiction exists, are not. 28 U.S.C. § 1291 (1982). Similarly, even though discretionary decisions are reviewed under the presumably looser "abuse of discretion" standard, it seems doubtful that they are, in fact, reversed less frequently than many types of cases involving legal issues.
the statute at issue as their own. A judge deciding a discretionary mat­
ter, however, does not necessarily have to bring the views of the appellate
judges on the issue into conformity with her own. Rather, she can justify
her decision by demonstrating that she is best suited to make such a deci­sion. Judicial recognition of this strategy is evidenced by the numerous
appellate decisions that affirm discretionary decisions while noting that
the appellate judges disagree or take no position as to the correctness of
the substantive decision reached. 102 Such decisions are justified within
the institutional structure of the courts, not by demonstrating that they
are correct, but by demonstrating that the decisionmaker is the person
most institutionally competent to make such decisions.

The study of judicial discretion, therefore, requires an examination
of the argumentative strategies by which discretion is justified within an
institutional system. 103 These arguments, while empirically grounded,
.presuppose various theories of institutional competence. These theories,
though not as general and abstract as those of the jurisprudes, invoke a
normative theory of judging and begin to explain how judges can justify
their decisions despite the absence of knowable right answers.

This Article will not set forth a single account of discretion that
demonstrates how discretionary decisions may be justified with an insti­tutional structure of appellate review. I doubt that any single account of
discretion can accommodate all the varying uses of that term within legal
discourse. Instead, the next Part will provide three different accounts of
discretion and three different answers to the question of how discretion­
ary decisions can be justified. The accounts occupy a middle ground be­
tween a purely descriptive factual account of discretion and a general
theoretical one.

Starting from consideration of the kinds of arguments trial judges
actually use in justifying specific instances of discretion, these models
seek to make explicit the hidden assumptions in such arguments. Do the
arguments assume the existence of right answers in law? Do they assume
that the trial and appellate court will agree on the facts, the applicable
legal rule, or the relative institutional competence of the trial and appel­
late judge? Out of such assumptions, it will be possible to abstract cer­
tain theoretical models concerning how discretion can be justified within

102. See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 634 (1953) (to obtain a
reversal, appellant must demonstrate that there was no reasonable basis for the district court's
decision to deny injunctive relief, regardless of the appellate court's view of the facts).

103. The idea of law as socially embedded normative expectations can be found in the
work of Niklas Luhman. See N. LUHMAN, A SOCIOLOGICAL THEORY OF THE LAW 73-102
(1974).
the institutional framework of present day American courts. Thus, they are intended to be coherent theoretical models, but ones that are grounded in actual legal practice.

III. Three Analyses of Discretionary Decisionmaking

Justifying a decision always takes place against a background of assumptions about what statements constitute adequate justifications within the relationship of the individuals providing and receiving the justification. For example, if a nervous friend sitting in your car questions why you are exceeding the speed limit, the answer, “The road is clear and dry and there’s nobody else on it,” may constitute an adequate justification of the action. It is unlikely, however, that the same justification would satisfy a state trooper who has stopped you for speeding. The point is that justificatory language tells us something about the assumed expectations of the person doing the justifying and the person to whom the justification is given. Whether you say to the state trooper, “I thought I was keeping up with the flow of traffic,” or, “There was an emergency,” tells us something about the norms that govern institutional response to such behavior irrespective of whether or not those statements are an accurate account of the reasons actually motivating that behavior.

Trial court opinions concerning discretionary decisions can be viewed similarly—as statements by a trial judge justifying a decision to a higher court. Accordingly, we can examine them to learn about the normative assumptions inherent in such justifications. Though the opinions may not provide an accurate account of how the discretionary decision actually was reached, the language of justification may still reveal information about the normative assumptions that underlie the institutional relationship.

A matter of particular concern with discretionary decisions is whether the justifying language assumes the existence of “right answers” to such questions. Both affirmative and negative responses are problematic in connection with discretionary decisions. If one assumes there is a single “right” or “best” answer, and the judge justifies her decision by demonstrating that the right answer has been reached, then it is hard to

104. Of course, this is not the only thing trial court opinions do or the only audience to which they are addressed. The opinion is also a communication to the litigants and the public. But the role assumed by the opinion in each of these communications may be quite different. It is unlikely, for example, that the trial court expects to persuade the losing party that its decision was correct, but rather that the loser’s arguments received full and respectful consideration. With respect to the reviewing court, however, the trial judge’s goal is, in almost all instances, quite clear and direct: to persuade the appellate judges that her ruling should be left undisturbed.
see how the decision is discretionary. If, however, one assumes there is no "right" answer, or, alternatively, that there are many equally "right" answers to the issue posed, then it is hard to see how any particular answer to the question can be justified at all. This section considers what kinds of justification models might avoid the two horns of this dilemma and examines the way discretionary decisions are justified to see if, and to what extent, they conform to these models.

A. Discretion as Skill

One possible response to the problem of "right" answers is to assume the existence of right or best responses to discretionary decisions, but to deny that any rule or algorithm can be formulated that would enable one to determine what is the right or best response. This is not as paradoxical as it may first appear. Many of the things we know how to do, like swimming, playing an instrument, or fixing a car, are things that cannot properly be done simply by learning a verbal rule and trying to follow it. Such knowledge of practices is not confined to physical skills, but may include intellectual abilities we generally classify as "knowledge." Wittgenstein provided a fine example of this when he pointed out that one may know what a Hayden symphony sounds like and yet be unable to communicate that information to others, or provide a rule or algorithm that would enable another to recognize it.105

Such practices106 can be taught, but only by attempting to engage in the practice itself, not by setting forth a set of rules by which the appropriate version of the practice can be defined. Yet there is nothing particularly mysterious or mystical about knowledge of practices, even though such knowledge cannot be obtained by rules. They can be taught by persons familiar with the practice. It is often possible to judge whether someone has acquired knowledge of the practice in the same way we judge knowledge of other, more rule bound behaviors, by seeing if their actions are similar to those of others recognized as competent in the practice.107

105. L. WITTGENSTEIN, supra note 94, at ¶ 527.
106. I will use the term "practice" to denote activities that can be neither learned nor evaluated by following a preexisting rule. The position that all propositions are appropriately understood in terms of practices (or to use the Wittgensteinian term "language games") is an issue that need not concern us here. See generally Morawetz, Wittgenstein & Knowledge (1978).
107. See S. Kripke, Wittgenstein on Rules and Private Language (1982) (arguing that all rule-following behavior can be evaluated only by comparing it with the responses of other members of the community); see also Yablon, supra note 13 (reviewing Kripke's book and relating it to current debates in legal theory).
One possible justification of discretionary decisionmaking, therefore, asserts that some forms of judicial decisionmaking, which I call “discretion as skill,” involve the exercise of a practice that is neither reducible nor justifiable in terms of a rule. Such an analysis seems particularly appropriate for decisions, like sentencing, in which the decisionmaker has a large, but not an exhaustive set of options. She can, for example, sentence the defendant from one to ten years, but no more or less. Yet, while such a rule leaves the judge “free” to grant either a one or nine year sentence, in that either decision largely is insulated from appellate review, the justification for that freedom assumes not that the judge is acting without constraint, but that she is exercising skillful, practical judgment to “tailor” the most appropriate sentence for that particular case.

The justification of discretion in such cases, the deference to trial court decisions, rests on a claim that the trial judge has special knowledge that enables her to achieve an answer better than any that could be obtained by simply following rules laid down by a higher court or legislature. Trial court opinions involving the appropriateness of criminal sentences differ strikingly from other judicial opinions in their lack of any attempt to apply rules to the sentencing determination. Other than the statutory minima and maxima, traditionally there have been no “rules” for sentencing, so justification based on rules is not possible.109

108. Most of the decisions are the result of motions to modify or reduce sentences in federal criminal cases, rather than the sentencing decisions themselves. Sentencing decisions themselves are rarely published; nor is it even obligatory, in most cases, that a federal judge state reasons for her sentence (although, under current practice, it is strongly recommended). United States v. Vasquez, 638 F.2d 507, 534 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981); United States v. Harris, 558 F.2d 366, 374 (7th Cir. 1977).

109. See, e.g., United States v. McCoy, 517 F.2d 41, 44 (7th Cir.), cert. denied, 423 U.S. 895 (1975); United States v. Lowery, 335 F. Supp. 519, 521 (D.D.C. 1971). Indeed, it is sometimes used as a ground for attacking sentencing decisions on appeal that they were made “mechanistically.” United States v. Saade, 652 F.2d 1126, 1138 (1st Cir. 1981); see also United States v. Elliott, 674 F.2d 754, 756 (8th Cir. 1982) (sentencing approach challenged as “mechanical”); Woosley v. United States, 478 F.2d 139, 143-45 (8th Cir. 1973) (rule against mechanical sentencing accords a defendant the judicial discretion to which she is entitled). Moreover, the resistance to the use of sentencing guidelines is based largely on the same underlying assertion, that the act of imposing the correct sentence is not a matter that can be reduced to rules. See, e.g., United States v. Reich, 661 F. Supp. 371, 378 (S.D.N.Y. 1987) (“[T]he idea of restraining discretion through grids ... belittles the gravity of the social statement that attends the imposition of a criminal sentence.”). Similar considerations seem to have been involved in the initial development of sentencing discretion in this country. See Samaha, Fixed Sentences and Judicial Discretion in Historical Perspective, 15 WM. MITCHELL L. REV. 217 (1989).
Yet judicial opinions do seek to justify sentences, and they do so for the most part by discussing facts: facts about the crime committed, about other crimes the defendant may have committed, his attitude towards the crimes, his actions prior to arrest, and a panoply of other facts. A sentencing opinion, however, contains more than just facts. It often contains subjective judgments by the trial judge on such matters as the degree of remorse defendant now feels or the heinousness of the crime committed. These are presented as individualized judgments, specifically tailored to the facts of the case. In making them, it is common to find judges speaking in the personal subjective voice, “I believe,” or “We feel,” as they opine on the defendant’s blameworthiness or remorse.

Thus, the “message” of the sentencing opinion is that the trial judge, in determining a sentence, is tailoring the “right” result to the specific facts of the case. It also implies that this is not a rule bound determination but a matter of individual skill involving subjective, often intuitive


111. See, e.g., United States v. Mason, 510 F. Supp. 87, 90-91 (N.D. Cal 1981) (judge’s inference of additional criminal activity was used to enhance sentence).


115. Consider, for example, the following quotations:

The inquiry into this defendant’s character compels the conclusion that he did not “come clean” with those whose assistance and cooperation he sought for his personal advance in life. . . . It is not surprising therefore that his inability to speak the full truth, which evidently has become an ingrained habit, recurred in his interview with his probation officer whose report to the Court defendant well knew would eventually be studied by us before sentence was imposed.

United States v. Beasley, 490 F. Supp. 1228, 1232 (S.D.N.Y. 1980). “The Court is most impressed with the deep, genuine remorse that the defendant has shown for what he did. In this Court’s view, this is the first and best indication of an individual’s rehabilitation.” McIlwain, 427 F. Supp. at 359.

During the days which preceded your sentencing, for the reasons here set out, and because, as I said a moment ago, I considered that I had before me not a criminal but a man who, only technically, was a violator of the law, I studied every possibility of avoiding your imprisonment.

Feliciano-Grafals, 309 F. Supp. at 1298.

116. Compare the statements in note 115 supra with judicial opinions involving issues of law. Not only do the latter employ syllogistic reasoning to make the result appear the deductive outcome of the application of a preexisting rule, but the process of decisionmaking itself is portrayed as formal and objective, with no reference to personal feelings or views of the judge.
judgments, and thus one that the appellate court is rarely competent to evaluate.

Indeed, the language of appellate opinions regarding sentencing determinations indicate that they share the same normative assumptions about the nature of sentencing and the respective competence of trial and appellate courts. Appellate courts are equally averse to applying rules to sentencing determinations. The only rule generally cited by appellate courts is that trial courts have broad discretion\textsuperscript{117} absent "illegality" (for example, sentencing outside the statutory parameters),\textsuperscript{118} or "gross abuse of discretion" (which rarely occurs).\textsuperscript{119} Virtually the only "error" that provides a basis for upsetting the trial court’s sentencing judgment is that the factual record before the trial court was incorrect.\textsuperscript{120} This is viewed, however, as a defect in the process, not the judgment, and the remedy is resentencing by the trial judge based on the correct facts.\textsuperscript{121} Thus, the institutional framework assumes the superior skill of the trial judge in making the sentencing decision. Appellate review consists only of ensuring that the circumstances for appropriate exercise of that skill have been provided.

The language of trial and appellate court opinions regarding sentencing thus embody a set of normative assumptions about the relative institutional competence of trial and appellate judges in making these decisions. One underlying assumption is that there are right answers to sentencing decisions and that trial courts are more likely to make them than appellate courts. The superior institutional competence of trial courts is derived from the assumption that sentencing is not a rule-determined activity but a practice, a skill acquired through experience involving a finely tuned set of subjective judgments based on facts. This assumption of right answers in practice, which cannot be generalized or stated in rules, leads to a theory of institutional competence that legitimizes trial court discretion.

While this may seem a fairly familiar justification for discretion, it provides an interesting way of understanding one of the Supreme Court’s

\textsuperscript{117} United States v. Hooton, 693 F.2d 857 (9th Cir. 1982); United States v. Bedrosian, 631 F.2d 582 (8th Cir. 1980).

\textsuperscript{118} United States v. Dean, 752 F.2d 535, 539-40 (11th Cir. 1985), cert. denied, 479 U.S. 824 (1986); United States v. Huss, 520 F.2d 598, 602-03 (2d Cir. 1975).

\textsuperscript{119} United States v. Lacey, 661 F.2d 1021, 1022 (5th Cir. 1981), cert. denied, 456 U.S. 961 (1982); United States v. Nerren, 613 F.2d 572, 573 (5th Cir. 1980).

\textsuperscript{120} See, e.g., United States v. Fatico, 579 F.2d 707, 712 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1979) ("[M]aterially false information used in sentencing may invalidate the sentence imposed."); United States v. Brice, 565 F.2d 336 (5th Cir. 1977) (same).

recent pronouncements on the most important and disturbing of all sentencing decisions: imposition of the death penalty. In McCleskey v. Kemp, the Court refused to reverse a death sentence on the basis of statistical evidence that tended to demonstrate that death penalties were administered in a racially unequal manner by the Georgia courts. Earlier Supreme Court rulings had held that the death penalty could not automatically be imposed based on a mechanical rule, but had to be the result of a discretionary decision, either by a judge or jury, where that discretion was "suitably directed."

In McCleskey, a study of over 2000 Georgia murder cases indicated that, even after taking various nonracial variables into account, black people accused of killing white people were far more likely to receive the death penalty than other murder defendants. Yet the Court held that such evidence did not demonstrate the kind of arbitrariness or abuse of discretion that violates the eighth amendment, not because such evidence was invalid, or because death penalties influenced by racial factors were not improper exercises of discretion, but because it was the wrong kind of evidence to demonstrate such an abuse of discretion.

To understand the implications of this ruling it is necessary to consider practices and the various ways practices can be critiqued. Since there are no preexisting rules governing them, the only way to critique a particular instance of a practice is to use one's own knowledge of what constitutes a skillful exercise of the practice, or to rely on the judgment of someone believed to have such knowledge. In either event, the criteria utilized are standards internal to the practice itself. For example, if one seeks to evaluate the way a particular dish is prepared or a particular musical piece is played, one cannot do so unless one knows what a good performance would be like and this requires one to adopt the criteria of those skilled in the practice.

123. Id. at 317-19.
125. Gregg. 428 U.S. at 189.
126. 481 U.S. at 286-87.
127. Id. at 317-19.
128. For example, assume that a friend takes you to a restaurant that serves an exotic cuisine you have never tasted before. You are certain, after a few bites, that you do not like the food, but the implications of that response will depend on what your friend tells you about the practice. If she states that the food is badly prepared according to the standards of the practice, you are likely to conclude that the chef is no good. If, on the other hand, she states that the food is quite well prepared, you are likely to conclude that you do not like the cuisine. It is only knowledge internal to the practice that enables you to distinguish the two judgments.
By contrast, when one seeks to critique the practice itself, one must utilize criteria that in some way differ from the criteria used in judging instances of the practice. Sometimes these criteria involve using completely different values from those recognized as important by those skilled in the practice. For example, one can criticize classic French cuisine as being too heavy and cholesterol laden, or rock music for being too loud. It is unlikely that those skilled in such practices will be perturbed by such criticism. They will assume that the critic does not share the values inherent in French cuisine or rock music, and they will probably be correct.129

It is also possible, however, for there to be certain values or goals which do not form part of the criteria for judging individual instances of the practice, but which are nonetheless recognized as relevant to judging the practice as a whole. For example, it is assumed that professional baseball games should be exciting and entertaining, yet players are judged by their batting averages, not their entertainment value. Similarly, it is assumed that law school education will enable law students to pass the bar exam, yet most law professors are not evaluated on the basis of their students' bar passage rate. The problem is that even though these goals are recognized as relevant to evaluating the practice as a whole, they cannot be made criteria for judging specific instances of the practice without profoundly changing it. A baseball league in which managers were encouraged to use their most colorful or popular players, rather than their most proficient ones, would change drastically the nature of the game. Similarly, most law professors would resist altering their courses to increase bar passage rates. Thus, criticisms like these are profoundly disturbing to the practice in the way that the other critiques are not. They undermine the fundamental assumption that the practice is accomplishing its recognized goals. Seeking to achieve those goals directly, however, would destroy the practice itself. If baseball becomes too boring, or bar failure rates too high, such drastic changes may eventually come, but both practices are willing to stand quite a lot of criticism along these lines in order to keep the practices intact.

The attack on racially disproportionate sentencing in McCleskey may be seen as a critique of precisely this type. Racially unbiased sentencing is an assumed goal of the practice of discretionary sentencing. Instances of sentencing in which procedures or statements of the judge indicate racially motivated decisionmaking are undoubtedly subject to

129. The critic’s values may come, in time, to be shared by those skilled in the practice. They may seek to change the practice to incorporate these new values into it. Witness such developments as “nouvelle cuisine” and “soft rock.”
reversal. These, however, represent critiques of specific instances of the practice of discretionary sentencing based on criteria internal to that practice.

The defendant's challenge in *McCleskey*, by contrast, was an attack on the practice itself. It undermined the basic assumption that discretionary sentencing yields racially fair results. Yet one could not directly alter the racially disproportionate results documented in *McCleskey* without profoundly changing the nature of capital sentencing from a discretionary practice to one mandating rules of racial proportionality. It is not surprising, therefore, that the Court rejected the *McCleskey* evidence as not "constitutionally significant." The Court's refusal to accept this evidence demonstrates the depth of the assumption of institutional competence of trial judges (or juries) that underlies discretionary sentencing. It implies that such an assumption can only be overcome, at the adjudicative level, by a level of unfairness that discredits the entire system.

The model of discretion as skill provides one answer to the question of how discretionary decisions can be justified within an institutional structure. It is based on the shared assumption of trial and appellate judges that there are certain legal decisions that can be made correctly at the level of practice, but cannot be reduced to rules and, accordingly, cannot be reviewed based on correct compliance with the rules. These decisions are justified by reversing the normal assumptions of institutional competence. The decisions of the trial judge are presumed superior to those of the appellate judge. Trial court opinions embody these

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131. *McCleskey*, 481 U.S. at 313. The majority expressly recognizes petitioner's argument in *McCleskey* as a threat to the entire system of discretionary sentencing. As it states: "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *Id.* at 314-15.

132. Although the death penalty in *McCleskey* was imposed by the discretionary decision of a jury rather than a judge, the majority decision indicates that juries, because of their presumed knowledge of community values, are assumed to possess the unique sentencing skill normally assumed to reside in trial judges. "In the individual case, a jury sentence reflects the conscience of the community as applied to the circumstances of a particular offender and offense." *Id.* at 311 n.32.

133. These assumptions are manifested in the majority opinion when it states: "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." *Id.* at 313. The majority also notes that the statistical study indicates a "reasonable level of proportionality among the class of murderers eligible for the death penalty." *Id.* at 313 n.36.
presumptions as they seek to demonstrate that the decision was made skillfully, carefully, and with attention to all the facts. An appellate court judge, if convinced that the decision was made with the requisite skill, will not reverse it, even if she would reach a contrary decision. Thus, the trial court judge justifies her decision not by showing that it is correct, but by demonstrating her superior institutional competence to the appellate court.

B. Discretion as Expediency

The model of discretion as skill seems satisfactory for decisions when the judge is authorized to choose among a large but not exhaustive set of possible outcomes, such as sentencing, setting bail and bonds, and determining what kind of injunction to issue after trial. This model is problematic, however, in other types of decisions considered by most judges and lawyers to be discretionary. These involve situations such as granting or denying motions for a preliminary injunction, the admission of potentially prejudicial evidence, or a change in venue. In such cases, the number of possible outcomes is small (grant or deny), but includes all possible dispositions of the issue. Moreover, they are often made under circumstances in which the judge has only a limited record before her and is operating under substantial time constraints. In such cases, it seems doubtful the decision can be justified as an exercise of unique skill by the trial court judge.

Many of the trial court decisions normally called discretionary have only two possible outcomes, which together constitute not merely the permissible zone of discretion but exhaust the possible outcomes. A judge can either grant a preliminary injunction motion or deny it, either permit the contested evidence to be heard or not, either grant the change of venue or deny it. It is difficult to justify such decisions as a skillful selection of the best among many possible alternatives. Rather, they seem to be bipolar, yes or no determinations, no different from most others made by courts.

Many of these otherwise ordinary legal decisions, however, involve situations when the decision must be made under substantial time constraints. Foremost among these are applications for temporary or preliminary relief prior to the development of a full factual record. Evidentiary rulings, often made as part of an ongoing trial, and change of venue motions, which must be made at the earliest stage of a case, both

134. See, e.g., Marshall Durbin Farms, Inc. v. National Farmers Org., Inc., 446 F.2d 353, 356-58 (5th Cir. 1971) (grant of preliminary injunction reversed, in part because neither defendants nor the court had an adequate opportunity to read plaintiff's "flood of . . . affidavits").
involve limited factual records at the time the judge makes the discretionary decision. It is difficult to justify the trial judge’s discretion to make such decisions as an exercise of skill resulting in the right answer. The decisions themselves often contain indications of tentativeness or uncertainty.\textsuperscript{135}

Rather, it is the tentativeness of such decisions, the fact that they are made under conditions of uncertainty, that provides the underlying institutional justification for trial court discretion. The decisions are justified, not on the grounds that they represent the correct answer, but because they are the best approximation possible under the circumstances. If, indeed, no better answer is possible, then deference to the trial court is justified, not so much on the basis of its presumed superior skill, but on institutional considerations like the need for speed, finality, and predictability. Thus, I refer to this model as “discretion as expediency.”

The assumptions underlying this justification are the reverse of those in the first model. It assumes the existence of a presumptively controlling doctrinal rule to which the decision should conform, a “right answer” in theory. It also assumes that at the level of practice, the judge can do no more than approximate the theoretical right answer. The legal rules may give judges a clear and precise theoretical answer as to when to grant a preliminary injunction\textsuperscript{136} or exclude certain types of evidence\textsuperscript{137} but these rules, though theoretically precise, provide only a rough guide as to how to act in practice.\textsuperscript{138} Discretionary decisions of this kind are justified not because they are correct, but because they are close enough,


\textsuperscript{136} See, e.g., Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 556-65 (1978) (examples of how courts can simplify a preliminary injunction analysis).

\textsuperscript{137} See, e.g., Fed. R. Evid. 403 (judge may exclude evidence when the prejudicial effect outweighs the probative value).

\textsuperscript{138} For example, Judge Posner’s opinion in American Hosp. Supply Corp. v. Hospital Prod. Ltd., 780 F.2d 589 (7th Cir. 1986), notes that, in giving “substantial deference” to trial court decisions in preliminary injunction cases, appellate courts bear in mind:

that the district judge had to act in haste, that he had to balance the factors which, though they can be related in a neat formula, usually cannot be quantified, and that in dealing with the parties and their witnesses and counsel in the hectic atmosphere of a preliminary-injunction proceeding the judge may have developed a feel for the facts and the equities that remote appellate judges cannot obtain from a transcript.\textit{Id.} at 594-95.
and making a finer determination is either not possible or not worth the time and effort.

An analogy can be made to the way students think about the results of experiments in physics labs. My own observations, based on an admittedly small exposure, is that such experiments never work. That is, the result one obtains in physics lab never agrees with the result one theoretically should get under the precise mathematical formula. If the result is way off, the professor tells the student to do it again, but if the result is reasonably close, either the student or the professor may decide it is "good enough," and that further work is unlikely to yield an appreciably better result.

In preliminary injunction motions, unlike physics experiments, the rules do not enable one to specify in advance the result one "should" get. Nonetheless, a trial judge may be able to invoke in the reviewing court the same belief that her decision is "good enough," that is, that no additional consideration is likely to give an answer that is closer to the theoretically correct result. When an appellate court says that it need not consider the "merits" of the case in reviewing a preliminary injunction motion, but merely whether discretion has been abused, the appellate court is recognizing that its own view of the merits has no greater claim to validity at this stage in the proceedings than that of the trial judge. Once it acknowledges that its own view is no better than the trial court's, there are strong systemic reasons for deference to the trial court's decision, such as the need for a quick response, for conservation of judicial resources, and for predictability in both the instant and future cases.

Trial court opinions that justify the exercise of discretion on this basis may speak quite differently than those providing justification under the first model. Rather than a discursive, fact-based opinion eschewing discussion of rules, decisions of the second type are justified by showing that they were "good enough," that is, reasonable applications of the substantive legal rule under circumstances involving limited time and information.

Trial court opinions involving these kinds of discretionary decisions are more concerned with rules than those involving the first model. They not only cite the formal legal standard, often discussing its nuances and variations in some detail, but also tend to follow the structure of the formal paradigm that they recognize as doctrinally controlling. Thus, a preliminary injunction opinion will usually marshall, sometimes in con-

139. See, e.g., Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 392 (8th Cir. 1976); Morgan v. Fletcher, 518 F.2d 236, 238 (5th Cir. 1975).
secutive order, the evidence tending to show probability of success, irrepar­arable harm, balance of hardships favoring equitable relief, and public interest.\textsuperscript{140} An evidentiary opinion will consider the probative value, then the prejudicial effect.\textsuperscript{141} The effect of such a structure is to justify the decision by showing that the trial court is making a sincere and reasonable effort to follow the rule.

Since the legal standards applied often involve "balancing" various factors that impel the court in different directions, the opinions that follow such standards tend to have an "on the one hand, on the other hand" quality. A judge will consider first the probative weight, then the prejudicial effect. The actual choice, the determination that one set of factors outweighs the other, tends to be made tentatively\textsuperscript{142} and often negatively (that is, as a failure of one side to meet its burden under the rule).\textsuperscript{143} Judges often will acknowledge those arguments or facts that they think provide the strongest grounds for opposing their conclusions.\textsuperscript{144} This tends, of course, to reinforce the impression that the decision is a considered and reasonable response to the uncertainties confronting the court. Moreover, even though these are basically bipolar, yes or no kinds of motions, judges often will seek ways to portray their decisions as somehow placed between the extreme requests of both sides, thereby further demonstrating their openness and consideration of both sides.\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{142} For example, in Paschall, 441 F. Supp. at 349, the district court sought to justify its grant of a preliminary injunction in an antitrust case by reviewing the relevant antitrust case law and listing five issues that "were irrelevant to a determination of the vast majority of the cases cited to the Court," but that "must be confronted" in the case before it. Id. at 363. The district court was trying to establish the reasonableness of its view that the issues before it were serious and difficult, a prerequisite for injunctive relief. Id. at 364.
\item \textsuperscript{143} In Farkas, 554 F. Supp. at 24, preliminary injunctive relief was justified, in part, by a finding that "defendants have offered no reason, nondiscriminatory or otherwise, why plaintiff was not promoted to one of the new directorships and the two younger applicants were." Id. at 28. See also British Printing & Communication Corp., 664 F. Supp. at 1529 (plaintiffs failed to show that they were likely to succeed on the merits).
\item \textsuperscript{144} See, e.g., Medtronic, 527 F. Supp. at 1095 (acknowledging that public interest favored losing party on motion, but only "slightly").
\item \textsuperscript{145} For example, in Farkas, 554 F. Supp. at 24, Judge Miner stated: In determining that plaintiff is entitled to preliminary relief, this Court is mindful of the potentially disruptive effect injunctive relief might have upon the state in its
\end{itemize}
short, district court decisions of this type tend to emphasize both the tentativeness and the reasonableness of the court's decision. The implicit justification is that the lower court decision is the best application of the doctrinally applicable rules that can be made under the circumstances.

Appellate opinions reviewing such discretionary decisions reveal similar normative assumptions. Such opinions generally do not seek to determine if the decision below was correct, but ask only whether the lower court's view was a reasonable or permissible view of the facts and arguments presented to it. Appellate courts also may look for other indicia of reasonableness, such as the willingness of the lower court to take an intermediate position in fashioning relief, or its consideration of both sides of the issue.

capacity as employer. Accordingly, Mr. Farkas shall receive a salary commensurate with the position to which he seeks appointment during the pendency of this action. However, Mr. Farkas shall continue to serve in his present capacity as Associate Radiological Health Engineer.

Id. at 28-29.

146. See, e.g., California ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1322 (9th Cir. 1985) (court looked to circumstances of the case to determine whether the trial court abused its discretion in granting preliminary injunction); St. Jude Medical, Inc. v. Carbomedics, Inc., 764 F.2d 500, 501 (8th Cir. 1985) ("The Court's view of the facts, though certainly not the only permissible view, was not implausible, and we may therefore not disturb it."); Punnett v. Carter, 621 F.2d. 578, 582 (3d Cir. 1980) (finding record support for the lower court's conclusions); Friends of the Earth, Inc. v. Coleman, 518 F. 2d 323, 327 (9th Cir. 1975) (factors to be considered in determining the validity of a preliminary injunction are: the probability of success on the merits, the relative importance of the rights claimed; the nature of the act enjoined, and the hardship resulting to each party from a grant or denial).

147. See, e.g., Tahoe Regional Planning Agency, 766 F.2d at 1324 ("The district court attempted to mitigate the harsh effect of the injunction by creating exceptions which allow limited repairs and construction in the shorezone.").

148. Machlett Indus., Inc. v. Techny Indus., 665 F.2d 795 (7th Cir. 1981), provides a good illustration of the way different descriptions of the lower courts' decisionmaking processes can be used to justify different styles of appellate review. The majority in Machlett noted that the trial judge in the case had adopted the prevailing party's findings of fact after he had decided to grant the preliminary injunction and had entered those findings as his own without reading them. Id. at 797. It held that this fact warranted a more critical examination of those findings and went on to reverse in a decision that considers the preliminary injunction issues virtually de novo. Id. at 798.

The dissent, in contrast, stressed that the facts were found after a six day hearing before the trial court, and that "it is not the province of this court to determine whether we as an initial matter would or would not have granted a preliminary injunction." Id. at 799 (Pell, J., dissenting). The dissent demonstrated, based on facts in the record, that the lower court's decision constituted a reasonable exercise of discretion. Id. at 799-803. Irrespective of which side had the better of the argument, the case nicely illustrates the basic thesis of this section—that discretionary cases are, in part, about the institutional competence of the discretionary decisionmaker. When the trial judge is portrayed as blindly accepting the position of one side, the assumption of institutional competence, and the appellate deference that goes with it, is destroyed. When, on the other hand, the trial judge is portrayed as conscientiously seeking to
A further implication of this model is that if the decision fails to conform to the theoretically applicable rule, it loses its claim to deference from the appellate court. This can happen either if the appellate court believes the trial judge used the wrong doctrinal rule\textsuperscript{149} or if the appellate court believes the trial court's decision was not as good an application of the controlling rule as that which could be made by the appellate court.\textsuperscript{150} Despite the discretionary character of preliminary injunction determinations, for example, I think most lawyers would agree they are more often reversed on appeal than are discretionary decisions under the first model, like sentencing.\textsuperscript{151}

Because under this model, trial court decisions are justified by showing that they are a reasonable application of a doctrinally controlling rule, the appellate court, which, by virtue of institutional structure is presumed to have superior knowledge of the doctrinally controlling rule, has more to review than in the first model. If the appellate judge believes the trial court has stated the rule incorrectly, or not given appropriate weight to the various factors, the basis for deference to the trial court's decision is lost, and reversal is likely to result.

For example, if the trial court makes it clear that it is applying the controlling legal standard, not by weighing the various considerations, but by a categorical determination that converts its decisions into a more rigid limiting case, it is likely to lose the justification for discretion as expediency. Suppose that a judge must decide a motion to enjoin construction of a dam that will endanger the habitat of a rare but economi-
call is not made. The judge drafts two opinions. The first carefully recounts all the harm (economic and otherwise) that will befall the region if the dam is not built relatively soon, then seeks to value the rare fish, and concludes that the balance of hardships requires denying the injunction. The second opinion states that, because the fish is economically unimportant, its extinction is to be given no weight in the theoretical calculus. Both drafts examine the same problem and resolve it the same way, yet most lawyers would agree that the latter is far more likely to be reversed than the former.

An appellate judge disagreeing with the first draft might feel that she would have weighed the relevant considerations differently, but has no basis, under the doctrinal rule, to believe her weighting is superior to that of the trial judge. In the second draft, by contrast, the trial court is stating a general rule of application (economically unimportant species do not count) that can be analyzed and disagreed with at the doctrinal level. Accordingly, it has a greater risk of reversal.

The assumption of the model of discretion as expediency then, is that there is a right answer in the sense that a potentially controlling doctrinal rule is applicable to the decision, but given the problems of time and uncertainty, any reasonable application of that rule should be given deference by the appellate court.

C. Discretion as Creativity

Neither of the preceding models captures a concept of judicial discretion that has had substantial influence in Anglo-American law generally and Legal Realism in particular. That concept is the notion of discretion as creativity, of the heroic judge who, through her intuitive grasp of the felt necessities of the time and her judicial craft in interpreting existing precedents, is a powerful force for creative social change. 152 Discretion, in this sense, is quite different from the institutional notion of discretion characterized by appellate deference to trial judge decisionmaking.

This form of judicial creativity usually is associated with the decisions of high court judges rather than trial judges. Moreover, the kinds of decisions referred to—those that create new rights of privacy or property, that promulgate rules redressing social wrongs, or facilitating economic progress—are not what practicing lawyers or judges would

consider “discretionary” at all. Rather, they are stated as interpretations of legal rules, often described in very high levels of applicability and generality, and promulgated by appellate or supreme courts.

It is not clear that such decisions should be considered “discretionary.” They are certainly not discretionary in the sense in which practicing lawyers use that term, or in the institutional sense we have been considering in this section. Indeed, some would argue that these are not discretionary decisions in any sense, but merely the exercise by judges of the same freedom generally exercised by legislators to make legal rules. Those who disagree are likely to emphasize the qualities of the judicial craft, the way in which new legal doctrines must fit and make sense within the broader legal language. It is this description of judges as neither totally free nor totally constrained when they make new law that might justify applying the term “discretion” to the process.

There is, however, a kind of trial court analogue to the idea of discretion as creativity, which constitutes a form of institutionally recognized discretion justifying appellate court deference. There are certain types of trial court decisions where the prevailing doctrine, in effect, authorizes trial judges to “break the rules.” For example, it is doctrinally recognized that a judge always has discretion to deny summary judgment, even if all the prerequisites for summary judgment have been met. Similarly, some of the doctrines traditionally associated with equity practice, particularly laches, and perhaps such doctrines as unclean hands and in pari delicto all permit, in a way, a trial judge to “break the rules” by refusing to treat the case as falling within the rules usually and generally applicable to such cases. Thus, a judge has discretion to invoke laches and permit claims that would usually be barred by the applicable statute of limitations, or to refuse to grant summary judgment even when a party has shown it is “entitled” to such a judgment as a matter of law.

153. See supra notes 23-32 and accompanying text.

154. See R. Dworkin, supra note 10; Brennan, supra note 98; Kennedy, supra note 98; Yablon, supra note 13, at 636.

155. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962); 6 J. Moore, W. Taggert & J. Wicker, Moore’s Federal Practice ¶ 56.17[66] (2d ed. 1988). The federal final judgment rule makes such denials of summary judgment difficult to review in any event. Nonetheless, given the methodology of this Article, the fact that the courts have created a separate doctrinal category to justify deference to lower court decisions refusing summary judgment is itself worthy of study.


This kind of discretion seems to be closely analogous to the “heroic” discretion of appellate court judges discussed previously.\(^{158}\) In both cases the judges break out of the preexisting rule structure to create a result that looks “wrong” in terms of prior precedent and expectation yet seems “right” in terms of broader societal concerns. When such a ruling is made by the highest court, it becomes a new rule and can have vast societal implications. When such a ruling is made by a trial court, it generally is treated as the exercise of equitable discretion in the individual case, and has little effect on the preexisting rule structure. Thus, considering such decisions discretionary in an institutional sense serves both to authorize trial judges to take such actions occasionally and to limit their impact on the preexisting rules. This is the modern version of the old function of equity courts, which were both outside of and unconstrained by the system of law, yet thereby helped to preserve it.\(^{159}\)

Decisions of this kind are not justified, as are the first two models, by reversing the appellate court’s assumptions about its institutional competence to review trial court determinations. Rather, they are justified like ordinary legal decisions, by persuading the appellate courts that they are “correct,” in that the appellate court would have decided the issue the same way. The difference is that the trial court, in attempting to persuade the appellate court, does not apply the preexisting legal rule, but rather appeals to factors outside the scope of that rule.

For example, in complex litigation arising out of the collapse of the Franklin National Bank,\(^{160}\) the United States, a defendant in the lawsuit, moved for summary judgment. The trial judge, while conceding the strength of the government’s legal position, refused to grant summary judgment, arguing that the government’s presence as a party would “ensure a more full and fair development of the evidence” with respect to the case as a whole.\(^{161}\) Surely such considerations are not part of the normal determination of the appropriateness of summary judgment under the Federal Rules,\(^{162}\) yet the trial judge sought to justify it as the “right” answer in light of the broader social and political situation in which he found himself.

Equitable claims often are granted or denied on the basis of considerations outside those enunciated in the formal legal rules. Generally

158. See supra note 152 and accompanying text.
161. Id. at 224.
162. See FED. R. CIV. P. 56(c).
phrased in terms of "fairness" or "equity," such opinions seek to invoke in appellate judges the view that the trial court's order was the right thing to do, even if not authorized by the statute.163

A judge or lawyer seeking to justify a particular decision can make use of a variety of overlapping statements that have some status as law. These may range from broad constitutional or equitable doctrines to statutes, and from vaguely phrased legal standards to highly technical regulations. The overlapping applicability and open texture of many of these rules make possible both the heroic reinterpretation described at the beginning of this section164 and the ability of trial judges to justify those decisions that seem to break the legal rules.

Conclusion

The preceding discussion was not meant to be either an exhaustive or an exclusive account of judicial discretion, but rather an attempt to apply institutional perspective to questions usually examined only by jurispruders at the highest level of generality. Studying these problems from the perspective of institutions and the assumptions implicit in the justificatory language of institutions has the capacity to open up the scope of consideration and possible answers to such questions.

From an institutional perspective, the question whether there are right answers to legal questions becomes a matter not so much of conformity to a preexisting normative truth, but of the degree and kinds of agreement that can exist among different participants in the legal system at different institutional levels. This in turn reveals the various ways in which agreement between trial and appellate courts can exist: agreement as to their relative institutional competence to decide various matters, agreement as to doctrinally applicable rules, and agreement as to the appropriateness of the result. Discretionary decisions can be justified by evoking agreement between trial and appellate courts on some, but not all, of these matters. Accordingly, rather than forcing one to simply answer yes or no to the question of whether there are right answers in law, an institutional perspective enables one to answer both "sometimes" and "it depends on where you look."

The perspective of this Article also sheds considerable light on what I have called the "old problem of discretion," that is, how to distinguish valid exercises of discretion from invalid or abusive ones. It suggests that because there is more than one type of discretionary decision, and more

164. See supra note 152 and accompanying text.
than one type of justification, the search for a single standard of validity is likely to be futile. Rather, each of the suggested models provides a different standard for abuse of discretion, when the assumptions underlying each model are not met.

For example, a sentencing judge who does not seek to tailor the sentence to the individual defendant, but rather flips a coin or sentences all those convicted of the same crime to the same sentence, is not exercising discretion under the normative assumptions of the first model. A judge who refuses to follow the applicable rule by not giving one or more of the relevant factors any weight is not exercising discretion under the normative assumptions of the second model.

These are not descriptive or predictive statements about when reversal for abuse of discretion will actually occur. That may hinge on practical considerations such as whether the appellate court has a basis for knowing, for example, that the sentencing judge has flipped a coin. By the same token, they are not broadly prescriptive in that they do not seek to distinguish appropriate exercises of discretion from abuses on the basis of some general theory of law. They are, however, normative, in that they provide a basis for thinking about and criticizing both particular decisions and institutional arrangements, with the norms applied being drawn from the institutional relationships themselves.

With respect to what I have called the "new" problem of discretion—the attempt to distinguish traditional discretion in the doctrinal sense from the Realist view of discretion as the freedom judges have to decide cases in contradictory ways—the preceding analysis raises as many questions as it answers. In a sense, looking at discretion as appellate deference to trial court decisionmaking merely defines away the new problem of discretion by assuming that appellate court attitudes toward nondiscretionary decisions are different. Yet this assumption may not be true, or at least the appellate attitudes toward discretionary and nondiscretionary decisions may have substantial similarities. First, the discussion in the third model of "discretion as creativity" pointed out the similarity of some of the structures used to justify legal decisions and discretionary ones. Second, the categories of "discretionary" and "nondiscretionary" may be more flexible and overlapping than they appear at the doctrinal level. If, as noted in the second model, a trial judge can write an opinion which, by treating the issue as a limiting case, converts a discretionary decision to a nondiscretionary one, can she not also write an opinion that decides what might have been a legal issue on discretionary grounds? If so, then the trial court's ability to characterize the na-
ture of the potentially dispositive issues may be an important aspect of judicial freedom.

Finally, it is not clear that the normative assumptions we have examined that justify appellate deference to trial court decisions are limited to the circumstances in which we have looked at them. For example, while the notion of non-rule bound judicial skill is very useful in explaining both appellate deference and lack of rules in sentencing decisions, there is no reason to believe that the same notion may not be operative in other circumstances. In that regard, Judge Hutcheson's quotation about the judicial hunch, which began this Article,\(^{165}\) was not a description of how he decided discretionary matters, but simply of how he decided cases.

This Article confirms the traditional notion that the judge who exercises discretion properly is doing something quite different from flipping a coin or exercising a prejudice. But, by pointing out the importance of non-rule based considerations in justifying the exercise of discretion, and the continuing difficulties of distinguishing discretionary from other forms of judicial decision, it also indicates that the Realists were right in emphasizing the importance of the judicial hunch.

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165. See text accompanying note 4 supra.