

# The Problem of Judicial Discretion

Anthony T. Kronman

Martin Golding has performed a useful service for us by describing in summary form many of the main themes that have been at the center of American legal theory over the course of the last century. From the range of topics that he describes, I would like to pick out one for special emphasis and to say a word or two about it. I pick this particular topic because its persistence in American legal philosophy as a subject of controversy and debate has itself been, in some ways, a distinctive feature of our jurisprudential tradition. The American obsession with the problem that I am about to describe is, I think, peculiar to our legal culture and an interesting question, though not one I shall try to answer, is why that should be so. Why should we have been so preoccupied—at times, it seems, almost obsessively—with this particular problem rather than with any of a number of other issues that might as reasonably have claimed our attention?

The problem that I have in mind is the problem of judicial discretion, a problem that is posed by Holmes's characterization of adjudication as a form of legislation. In "The Path of the Law," Holmes asserts that a judge deciding cases must, of necessity, act as a legislator since the applicable legal rules cannot conceivably constrain him in the way the Langdellian conception of law as a system of deductive propositions suggests it does. There is always some discretionary space (Holmes didn't say always, but his realist followers in the 1930s did) in which the judge enjoys freedom of movement, freedom to decide that the case before him calls for the application of one principle or policy—one legislative program—rather than another, a discretionary space in which the judge's decisional processes are not and cannot be mechanically predetermined by the applicable rules of law.

The idea that there is an irreducible element of free creativity, of interpretive freedom, in the adjudicative process which is left over, so to speak, after one has taken account of all the rules that might conceivably bear on the case at hand is today an idea so familiar, so patently obvious, that it has lost all of its original power to shock or disturb. Despite its prosaic obviousness, however, Holmes's characterization of adjudication as a species of legislation gave rise to a problem that is still very much at the center of our concerns—the problem of how to account for the legitimacy of adjudication when it is conceived in this new Holmesian light.

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If judges are legislators and not adjudicators who are merely applying the rules they have been authorized to apply in the cases that come before them, what is it that gives their decisions legitimacy or authority? This is a difficult question, and however obvious the Holmesian view may seem as a starting point of analysis, it is a question to which we do not yet have a single confident answer. It would be impossible, in the short time that I have, to describe even in a sketchy way the extraordinary range of responses that have been offered to the problem of judicial discretion. I would, however, like to say a few words about two of these responses; although they do not represent the only alternatives, each has at least proven sufficiently attractive to win the adherence of a large number of supporters and to hold their allegiance over the course of an entire century.

The first response might be put in the following way: The problem with the Langdellian conception of law is its overly narrow characterization of what the law is, of what must be included within our conception of the legal system itself. If one thinks that the law is made up of nothing but relatively hard-edged and unambiguous rules, then the problem of judicial discretion is bound to seem both unavoidable and unresolvable. But it is naive to think that that is all the law contains. The law includes more than just those crisply decisive normative standards that we have in mind when we refer to legal rules; it also includes, for example, what Ronald Dworkin has called policies and principles, criteria of decision that have a generality and breadth which distinguishes them from legal rules as they are traditionally conceived. By adding these policies and principles to our conception of what a legal order typically includes we advance a long way toward a view in which the problem of discretion no longer seems so difficult or terrifying. Principles and policies provide guidance in the interpretation of hard-edged rules in situations where different and conflicting interpretations of the rules themselves are possible, and they also fill in much of the discretionary space which is left over even after all the rules have been taken into account. So a judge who is bound to apply the law, where the law means not just rules but principles and policies too, has considerably less discretion than he might be said to have if the law that he were responsible for administering consisted of rules and rules alone.

If you think about it for a moment, however, it is obvious that the problem of discretion is bound to reappear with regard to the very principles and policies that have been introduced in order to dissolve the difficulty which the Langdellian conception of law creates. Rules, principles, and policies all work successfully in part because of their generality and opentexturedness; it is just this characteristic, however, which brings them into conflict with one another and makes them ultimately indecisive when applied to the questions presented by particular cases. To put it even more simply, if there is discretion to apply a particular legal rule one way rather than another, then there will also be discretion in the application of principles and policies.

By invoking them in aid it might seem, therefore, that we have done nothing more than jump out of the frying pan and into the fire. In response it has been suggested that instead of trying to solve the problem of discretion by adding to the inventory of items which the legal order includes we ought

to reconceive the process of adjudication itself. When a judge decides a case he does so not as a single individual standing in olympian isolation, but as a member of a professional community which is itself the bearer of a specific intellectual and moral tradition. Deeply embedded in that tradition, the judge views himself as being able to say only certain things and forbidden to say others. The tradition of thought within which the judge is situated, and within whose horizon he encounters his task, constrains him in the discretionary decisions that he makes. The way to put the boogey-man of discretion to rest, it has been suggested, is merely to take note of the obvious fact that when judges decide cases, they do so subject to the constraints arising from a set of common understandings which they share with the other members of the interpretive community to which they belong. This is the view that Karl Llewellyn developed very forcefully in his later writings, and which has recently been taken up and reinvigorated by Stanley Fish and by my colleague Owen Fiss.

A second approach to the problem of discretion, different from the one I have been describing, starts from another famous utterance of Holmes, also contained in "The Path of the Law." In that essay Holmes remarks that although for the moment the law belongs to the black letter man, the law of the future will be made, as he puts it, by the man of statistics and economics. Holmes's meaning, I believe, is this: whatever we choose to include in our conception of law, the legal order as a whole will continue to be so permeated by ambiguity and indecisiveness that the prospects of ever finding firm ground within it are remote. To discover (or rather to invent) a firm basis for legal decision we must leave the domain of law for the larger realm of politics. If one believes, however, (as Holmes himself may have) that it is possible to identify fundamental political principles capable of guiding the application of legal norms, and believes, in addition, that a procedure can be devised for applying these principles in a rigorous and disciplined way to the decision of specific cases, then the problem of judicial discretion is bound to lose much of its apparent sting. A judge who has given up on the law as hopelessly indeterminate can still find relief in a theory of politics that promises the objectivity and rigor which the law itself has proven unable to supply. I suppose one might say that this second approach to the problem of discretion—which Holmes hints at and which is developed systematically by later writers like Lasswell and McDougal and championed, most recently, by Bruce Ackerman—rests on the optimistic belief that a science of politics can ultimately be found to replace the science of law which Langdell had originally hoped to construct but which Holmes and his realist successors demonstrated to be impossible on the terms Langdell himself proposed. This way of dealing with the problem of discretion does not rely on the concepts of tradition and interpretive community, but on the vastly different notions of science and scientific method.

I suppose one might reject both of the alternatives I have considered by maintaining that the idea of a science of politics is as much a will-of-the-wisp as the idea of a science of law, and by attacking the notion of a community of interpretive understanding as either intellectually empty or ideologically suspect. But what are we left with if we abandon these two

strategies? If we take the further step of abandoning all the effort to find a satisfactory solution to the problem of judicial discretion, and simply resign ourselves, as some today suggest we should, to the groundlessness of decision, we are left, I think, with a conception of adjudication that is intellectually incoherent and morally bankrupt. And that would be a matter of more than merely academic concern, for it would strike at the heart of our conception of professional integrity and undermine the pride we take in the practice of our craft.