ABSTRACT. The main aim of this paper is to clarify the dispute over judicial discretion by distinguishing the different senses in which claims about judicial discretion can be understood and by examining the arguments for these various interpretations. Three different levels of dispute need to be recognized. The first concerns whether judges actually do exercise discretion, the second involves whether judges are entitled to exercise discretion, and the third is about the proper institutional role of judges. In this context, the views of Dworkin, Raz, Perry, Greenawalt, and Sartorius are examined. Finally, it is suggested that a resolution of the judicial discretion controversy requires a satisfactory theory of the justification of judicial decisions.

The controversy over the existence of judicial discretion has all the hallmarks of being an interminable, "philosophical" dispute. Although the term "judicial discretion" is fairly recent, the fundamental issue, the proper role of a judge, has a long history. Lon Fuller, for example, comments, "Questions of the permissible forms and the proper limits of adjudication have probably been under discussion ever since something equivalent to a judicial power first emerged in primitive society." Formal discussions can be traced back at least as far as Aristotle. In distinguishing between written law and equity, Aristotle says that "...an arbitrator goes by the equity of a case, a judge by the strict law." For Aristotle a judge is not entitled to pursue the "individualization of justice," a goal that modern writers such as Roscoe Pound urge on judges.

1 The popularity of this term probably can be traced to Ronald Dworkin, "Judicial Discretion," Journal of Philosophy 60 (1963): 624–38.
3 Rhetoric, Book I, Chapter 13, 1374 b 20–21.
4 See, e.g., Roscoe Pound, An Introduction to the Philosophy of Law (New Haven: Yale Univ. Press, 1922), Chapter 3. Pound restricts the pursuit of
The concept of discretion thus is simply the most recent way of framing an old dispute about the proper role of a judge. Contemporary writers can be aligned in three camps. In one are those who believe that judges as a matter of fact make law, invent law, legislate, make policy, or exercise discretion, that therefore judges are entitled to exercise discretion, and that judges in exercising discretion should be activists or instrumentalists. In another camp are those who believe that judges as a matter of fact apply law, discover law, declare law, interpret law, do not legislate, adjudicate, or do not exercise discretion, that therefore judges are not entitled to exercise discretion, and that judges consequently should be formalists, conservatives, or strict constructionists.

"individualization of justice" to areas of the law such as criminal law and the law of torts and excludes areas such as property and commercial law.