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 recog-
nized. 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 arbitra-
tor 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,
2 Lon L. Fuller, 'The Forms and Limits of Adjudication,' Harvard Law
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

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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.