

Policy Connection



What role does discretion play in our criminal justice system?

DOMESTIC
POLICY

The Policy Challenge

It is easy to fall into the trap of believing that the policymaking process is complete once the votes take place in Congress, the president issues an order, or the courts hand down a decision. However, more detail is involved in enforcing and implementing policies, and many more decision makers are engaged in filling in the blanks as they put laws into effect. To the extent that they are doing so, people who implement and enforce policies are said to be exercising “policy discretion.” Our goal in this Policy Connection is to provide a general picture of the role policy discretion plays in filling out the judicial function of government.³⁴

Specifically, we focus our attention on the role that discretion plays in shaping the outcomes—the policy impacts—of our criminal justice system. When it comes to basic law enforcement, discretion is important because there are so many points in the legal process at which the application of laws and policies is left up to the people in the field—from the police to the prosecutors, to the judges, and to those who impose whatever punishment or sanctions the courts require.

The Four Stages of Discretion in Criminal Justice

Ask anyone who has become directly caught up in the American criminal justice system and that person will tell you that he or she came away knowing a good deal more about how government really operates—perhaps more than he or she wanted to know. This individual likely had to deal with a reality that most of us know only indirectly by watching

one of the many versions of television’s popular *Law & Order* series.³⁵

What those shows highlight in dramatic fashion is the work of the police and the prosecutors, but in doing so they typically cover only half the story of the criminal justice process—the work of the police and the government prosecution team. Because some of the action takes place in courtrooms, we do get a limited exposure to the trial itself and the work of judges and those who run the courts. However, only in a rare episode or two among the hundreds associated with that popular television franchise do we get a glimpse of the work that takes place after a trial has concluded with a conviction—the punishment or post-sentencing stage.

To make sense of the role that discretion plays in shaping our criminal justice system, we must consider all four stages in which it plays a role: policing, prosecution, the trial, and punishment (see Table 14PC.1). Decisions are being made at each stage by officials in positions that by their very nature require them to make choices—hard choices. These choices have impacts and implications not only for those subject to suspicion, arrest, prosecution, and possible incarceration but also for the victims of crimes and the community as a whole. For those who study criminal justice, those choices are public policy at the street level.

The Necessary Evil (?) of Discretion

The exercise of discretionary authority to make decisions can prove extremely controversial, and yet one cannot imagine how the criminal justice system

TABLE 14PC.1 The Four Stages of Discretion

Type of Discretion	Who Is Involved?	Functions Performed
Police discretion (policing stage)	Police and others involved in investigations—for example, forensic experts and crime lab personnel	Crime-related functions (investigation, apprehension, interrogation, and incarceration), order maintenance, and provision of community services (emergency services, educational services, and crime prevention)
Prosecutorial discretion (prosecution stage)	Prosecutors and others involved in pretrial activities	Administrative (processing), quasi-judicial (ensuring due process and proper police behavior), and adversarial (advocating for state cases) functions
Judicial discretion (trial stage)	Judges and court administrators	Administrative (court management), procedural (upholding legal requirements and standards), instructional (managing juries), and judgmental (deciding cases and assessing jury verdicts) functions
Postsentencing discretion (punishment stage)	Agencies in charge of corrections, prison managers and personnel, and parole managers	Administrative (processing prisoners and handling fines), incarceration (managing prisons), parole-related functions, and rehabilitative and social service functions and law enforcement

could operate without empowering officials to make decisions at each stage of the process. Given the fact that no two crimes (or the individuals accused of committing them) are alike, there is no way to develop a system of uniform procedures to deal with all arrests, prosecutions, trials, and incarcerations. Discretion—and the potential abuse of discretionary authority—may be the necessary evil we must accept for a functional criminal justice system.

Although we rely on law enforcement to prevent crime or arrest those suspected of criminal acts, we all too often hear complaints about abusive police practices or the excessive use of force.³⁶ Professor Lawrence Lessig has called this “prosecutorial bullying,”³⁷ and in recent years there has been increasing evidence that past convictions may have been the result of questionable police and prosecutorial practices.³⁸ Critics have questioned the fairness of some court proceedings, and many focus on either the leniency or the harshness of decisions by judges in various cases.³⁹ As for the work of prisons and parole systems, both the news media and the popular culture outlets are filled with negative reports and narratives related to the way government officials conduct the post-sentencing functions of the criminal justice system.⁴⁰

Less widely known or reported are those instances when discretionary authority has been applied wisely or as a corrective to possible injustices. Problems associated with the misuse of police discretion have been addressed in a variety of ways, ranging from court decisions related to constitutional protections (see Chapter 4) to changes in the operating procedures of law enforcement agencies and the professionalization of policing and related fields. Most important have been efforts to rein in the possibility of discriminatory behavior, especially those practices based on racial and ethnic profiling.⁴¹

Prosecutorial discretion has also been subjected to reform efforts. The major push has been to change the prosecutorial norms to emphasize the need for justice and to check the tendency to engage in the overzealous pursuit of convictions by any means possible.⁴² In 1940, justice Robert H. Jackson had set the standard by arguing that “the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”⁴³ Altering the operational norms of prosecutors has its limitations in a world in which performance and winning cases is the measure of success for prosecutors.

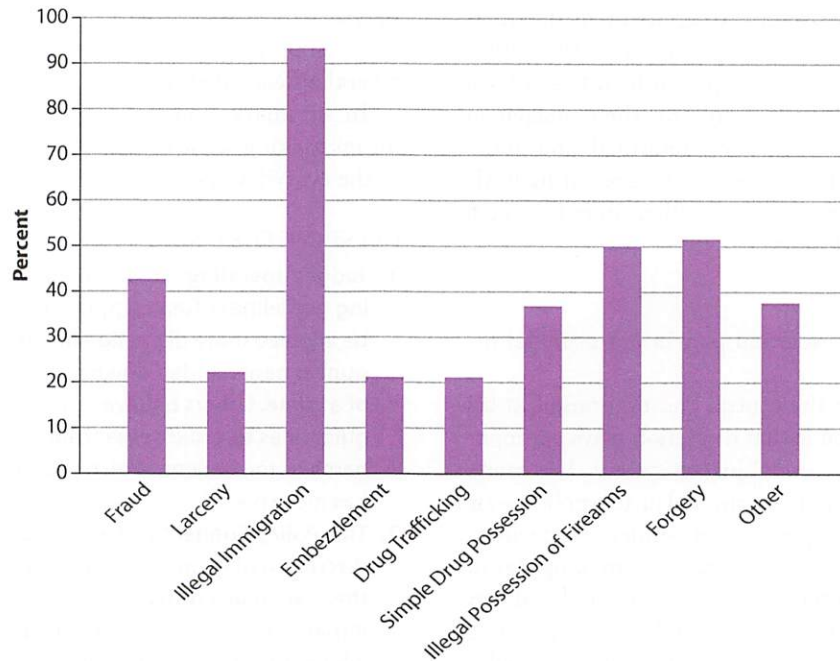


FIGURE 14PC.1 Percentage of Individuals Eligible for Nonprison Sentences Sent to Prison by U.S. Federal Judges, Fiscal Year 2012

More than 13,300 individuals convicted of a range of legal violations in fiscal year 2012 were eligible for “nonprison” sentences under federal sentencing guidelines. Given the discretion to determine whether an individual would face incarceration, federal judges were more likely to order imprisonment for some crimes than for others.

Source: U.S. Sentencing Commission, Interactive Sourcebook of Federal Sentencing Statistics, Fiscal Year 2012, Figure F; compiled at <http://isb.uscc.gov> using the Commission’s fiscal year 2012 Datafile.

The disparities in sentencing among judges as well as the perception that many judges were too lenient in their sentences led to the passage of federal and state laws in the 1970s and 1980s that were designed to limit judicial discretion in that specific area. The U.S. Sentencing Reform Act of 1984 has been particularly controversial,⁴⁴ although studies have indicated that it had some impact on increasing jail terms for federal crimes (see Figure 14PC.1). Nevertheless, over time, the provisions of the act have been loosened through Supreme Court decisions and efforts by judges to have the guidelines themselves loosened to allow for greater discretion. Those who carry out judicial functions in administrative agencies have also

taken discretionary initiatives to ensure that the work of others adheres to basic due process guarantees. This has been especially true in recent years, as immigration policy enforcement has become increasingly important.

The exercise of post-sentencing discretion has also undergone a number of reforms. Public policies related to the management of American prisons have been the subject of study and change since the early 1800s,⁴⁵ and over the decades a range of approaches have been developed to deal with the treatment of prisoners, most of them relying on giving prison administrators considerable authority to manage their facilities.⁴⁶ In recent years, the emphasis on rights and rehabilitation has been offset by

budget cuts and overcrowding in many facilities, and these trends have had an impact on the options available to those who run prison facilities at local, state, and federal levels. Similarly, the management of parole services has been reformed and transformed over the decades, sometimes resulting in the expansion of discretion and at other times leading to the imposition of limits.

Conclusion

What role does discretion play in our criminal justice system?

The answer to the central question posed in this Policy Connection is that discretion plays an important role in our criminal justice system. We cannot make sense of America's criminal justice policy—and the system that implements it—unless we focus attention on those who are engaged in making significant decisions at each of the four stages outlined here.

As important is a more general observation about the role of discretionary authority in other public policy arenas. As we have seen in earlier chapters and Policy Connections, antitrust policies and the efforts to regulate key sectors of the economy (e.g., banking) depend on how those who work in the relevant agencies use their authority to monitor, investigate, and pursue legal remedies against those who may cross the legal line.⁴⁷ For example, in recent years, the amount of discretion given to those in command positions to deal with charges of sexual abuse in the military has been brought into question.⁴⁸ In 2013, a managerial decision within one Internal Revenue

Service office about how to handle applications for tax-exempt status led to a major scandal that cost several officials their jobs.⁴⁹

In summary, making sense of American policy means making sense of discretion and how it is used in the everyday operations of our government.

QUESTIONS FOR DISCUSSION

1. Judges operating under federal and state sentencing guidelines often complain that they ought to be allowed more discretion in determining the punishment handed down for someone convicted of a crime. Others believe in strict adherence to the guidelines to avoid sentencing that is either too harsh or too lenient. Which position do you think has more merit?
2. This Policy Connection focused on the role policy discretion plays in the criminal justice system, but there are many other areas of our lives that are impacted by decisions made by public officials who administer government programs. School officials, for example, decide whether to hold classes when warned of an approaching snowstorm. Social workers in a state agency must determine whether a family is eligible for some government benefit or service. Someone at the Internal Revenue Service makes a decision about whose tax return will be subject to an audit. What has been your experience with the exercise of policy discretion? Do you believe the exercise of discretion in your case was handled well or poorly?