Prosecutorial discretion in international criminal justice

Davis, C.J.

Chapter 2
Understanding Discretion

> I think probably, to be scientific and precise about this, it might be better if you indicated what you mean by 'prosecutorial discretion'.
>
> Interview with P15

1 Introduction

This chapter establishes the conceptual framework through which this thesis approaches the study of discretion contained in the following chapters. To do so, it zooms out from the topic of prosecutorial discretion and engages with the preliminary theoretical question of what is meant by 'discretion'. In a break from the legal paradigm of conceptualising discretion as an imagined space for free choice bounded by various restrictions, the novel argument advanced here is that discretion should be principally understood as the *act of reaching a reasoned decision about the appropriate course of action to pursue*. The legal paradigm's conception of discretion draws an arbitrary distinction between forces that do constrain discretion and those that do not. This runs contrary to how decision-making is understood in other scientific fields and offers a distorted image of how decision-making works in practice. As such, any analysis of decision-making that takes as its starting point a constraint-based conception of discretion promoted by the legal paradigm (such as one defining discretion by reference to rules or as a grant of power or authority) will invariably fail to capture the gamut of forces that affect how discretion is exercised. The concept of discretion advanced here, however, invites a nuanced understanding of the forces that

operate on decision-makers in practice, while staying true to the notions of choice, judgement, and discernment that emerge from the word's etymological origins. This chapter therefore provides the theoretical foundations that enable the zooming-in on international prosecutorial discretion in the rest of this study. This conceptual framework invites a critical look at the well-worn topic of prosecutorial discretion, promising to provide new insights into how choices are made by the gatekeepers to the international criminal justice system and what role identities shape the decisions that they make.

2 Conceptualising Discretion

What does it mean for someone to have 'discretion'?[1] Understanding discretion's core features requires tracing the word's etymological roots back to the late 2nd and early 3rd century. In his defence of Christians against the Carthaginian magistracy's accusations of infanticide, baby-eating, incest, and 'illegal existence', the religious scholar Tertullian retorted against the unfairness of the Christian God in persecuting his followers. God, he argued, did not hasten to distinguish between those who accepted him and those who did not, nor hesitate to perhaps treat non-believers with "all the plagues of the world".[2] Tertullian's use of the word *discretionem* in this context concerned God's capacity to distinguish—a connotation which, today,

1 This is the same question that was posed by Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 32.

2 Tertullian, 'Apologeticum', chapter 41, section 2, contained in and translated by T R Glover, *Tertullian, Minucius Felix* (Harvard University Press, 1st ed, 1931), 188-189:

> *Hoc, inquitis, et in deum vestrum repercutere est, si quod et ipse patiatur, propter profanos etiam suos cultores laedi. Admittite prius dispositiones eius, et non retorquebitis. Qui enim semel aeternum iudicium destinavit post saeculi finem, non praecipitat discretionem, quae est condicio iudicii, ante saeculi finem. Aequalis est interim super omne hominum genus et indulgens et increpans.*
>
> "But this", you say, "can be retorted upon your God too, since He Himself because of the profane suffers His own worshippers to be injured". First admit His disposition of events, and then you will not turn this against Him. For He who has ordained eternal judgement once for all after the end of the world does not hasten to make that separation (which is the essence of the judgement) before the end of the world. Meantime He treats all mankind equally, both in concession and in warning.

discretion still carries. A later use of *discretio* in the Vulgate Bible introduced the notion of discernment, in the context of God granting people various skills (in this case, the "prophetic ability to evaluate prophecies").[3] Early uses of *discrétion* (in French) concern the ideas of wisdom and sound judgement.[4] When 'discretion' entered the English language some time before 1235, it was used to refer to judicial determinations. The Statutes of King Henry III, Edward I, and Edward III, for example, make numerous references to the discretion of judges to make decisions, award compensation, and impose penalties.[5]

In modern parlance, discretion is used principally in senses concerning sound judgement. Two of the three senses listed in the *Oxford English Dictionary*, the authoritative record of the *history* of the English language, still maintain this connection: those senses relating to "judgement or decision", and those relating to the faculty of being discreet; the third sense, concerning separation and distinction, still maintains a connection with Tertullian's use of *discretionem* in 197.[6] Discretion, therefore, needs to be understood principally as an action in which people reason and make what they believe to be appropriate decisions. However, the relationship between this faculty of reasoning and the context in which it is deployed has caused writers within different research paradigms to refine their understanding of discretion. The result is that discretion is understood differently both

---

See also D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 8, and *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), 'discretion'.

3 *Vulgate Bible*, 1 Corinthians, chapter 12, verse 10, available at *Perseus Digital Library* <https://www.perseus.tufts.edu/hopper/>, with the translation from *Vulgate Bible (Douay-Rheims Translation)* <http://www.gutenberg.org/files/8300/8300-h/8300-h.htm#Book53>:

> *Alii operatio virtutum alii prophetatio alii discretio spirituum alii genera linguarum alii interpretatio sermonum.*
>
> To another the working of miracles: to another, prophecy: to another, the discerning of spirits: to another, diverse kinds of tongues: to another, interpretation of speeches.

See also Craig Keener, *1-2 Corinthians* (Cambridge University Press, 1st ed, 2005), 101.

4 *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), 'discretion'.

5 See, for example, *The Provisions of Merton* (1235), s 4, *The Statutes of Gloucester* (1278), and *Statute the Second* (1350), s 3, all contained in *The Statutes of the Realm* (Dawsons, 1st ed, 1810) vol 1.

6 *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), 'discretion'.

within and between different scholarly fields.

The following subsections explore how discretion is understood in different fields. Subsection 2.1 describes how discretion is understood within the legal paradigm. It argues that the prevailing understanding that pits discretion and rules as two alternative decision-making models and treats discretion as an imagined space is flawed. If it is accepted that the presence of rules removes discretion by directing an outcome or procedure, then *any* force which directs an outcome or procedure must *also* be seen as removing discretion regardless of the form that force takes. Subsection 2.2 describes what these other forces are and how discretion is inevitably affected by forces that exist outside the norms-focussed legal paradigm. This chapter advances an action-oriented conception of discretion in section 3, that allows a nuanced analysis of decision-making practices by accounting for the roles of these normative and social forces and lays the foundation for the exploration of power and role identities contained in the rest of this thesis.

2.1 Discretion in the legal paradigm

The legal paradigm recognises two senses of the word 'discretion'. In the first sense, discretion is a grant of power or authority to make a decision. H L A Hart, for example, identified that 'discretion' can mean "the authority to choose".[7] In the second sense, discretion refers not to the power to make a decision, but to the way in which decisions are made. This leads to the confusing situation where someone can have discretion (in the first sense) to exercise discretion (in the second sense) in making a decision. Thus, there is a distinction between a prosecutor *having* the discretion to select charges and the prosecutor *exercising* discretion to select charges. The problem is that both of these senses are very closely related in that a power to make a decision (discretion the first sense) will necessarily relate to how the decision is made (discretion in the second sense) because the grant of authority will often limit the decisions that an individual can take. A prosecutor might have the authority to select charges, for example, so long as those charges are permitted under a relevant statute. In such a case, the grant of decision-

7 H L A Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652, 657. Hart was not alone in recognising this connotation. See also Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 32; and Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 1.

making authority is inseparable from the issue of how those decisions are made. There is thus little difference between the two senses.

To understand why the understanding of discretion within the legal paradigm is problematic, it is useful to reflect on the relationship between law and decision-making. The legal paradigm has strong parallels with Max Weber's bureaucracy.[8] Weberian bureaucracy distributes decision-making power in "a stable way [that] is strictly delimited by rules concerning the coercive means, physical, sacerdotal, or otherwise which may be placed at the disposal of officials".[9] The demands of efficiency dictate that the bureaucratic machine must continue to function "precisely, unambiguously, continuously, and with as much speed as possible", necessitating the development of "calculable rules" to ensure decisions are made "without regard for persons".[10] All human emotions are expelled from an official's decision-making thought processes, dehumanising the application of official power, leaving a system of governance that is predictable, efficient, and equitable.

If law is understood in this way as a system of rules (formal or otherwise), legal analyses tend to exclude from their scope any matter that is not governed by those rules.[11] Therefore, under the legal paradigm, discretion and rules present two alternative decision-making models.[12] On the one hand, there is the system of decision-making that is regulated by rules, statutes, and legislation; and on the other, there is that which requires personal judgement.

In this light, prosecutorial discretion within the context of international criminal law typically looks something like this. Prosecutors have the authority to make decisions. Some of these decisions are subjected to rules that demand prosecutors consider various factors. Article 53 of the *Rome Statute* is perhaps the best example, which requires prosecutors to consider

8 Martha Feldman, 'Social Limits to Discretion: An organisational perspective' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 164.

9 Max Weber, 'Bureaucracy' in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 196.

10 Max Weber, 'Bureaucracy' in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 215-216.

11 Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 124; D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 2.

12 Michael Adler and Stewart Asquith, 'Discretion and Power' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 9, 15.

jurisdiction, admissibility, the gravity of the crime, the interests of the victims, and the interests of justice in opening an investigation or commencing a prosecution. Statutory rules may be supplemented by judicial interpretations. ICC judges have, for example, understood that the 'gravity' of a situation requires an assessment of the scale, nature, manner of commission, and impact of the alleged crimes.[13]

Beyond these rules, prosecutors can exercise free choice and are protected by guarantees of institutional and functional independence. Institutional independence "is concerned both with the status of the prosecutorial institution acknowledged in the statute as well as the formal independence from others actors—states, international organisations, NGOs—including other organs of the court".[14] Kevin Heller observed that "[s]tatus as a separate organ of the tribunal is critical to prosecutorial independence, because it means that the other organs—the Registry and the judiciary—do not have the formal authority to issue binding directives to the OTP concerning prosecutorial strategy".[15] The *Rome Statute*, for example, establishes that the Prosecutor is a separate organ of the Court (under article 34); has full control over the management and administration of their office (under article 42(2)); and is prohibited from seeking or acting on instructions from any other source (under article 42(1)). Functional independence, on the other hand, concerns a prosecutorial actor's ability to exercise their role free from the pressures of other actors, be they states, other organs of the court, or otherwise. The statutes of the ICTY and the ICTR established that the Prosecutor "shall act independently" (in article 16(2) of their respective statutes). The *Rome Statute* contains a similar provision in article 42(1). At the ICC, for example, the Prosecutor has the sole capacity to open investigations and bring charges. Even the referral of a situation to the Prosecutor by a state or the United Nations Security Council creates no obligation on them to open an investigation into it. Judges have been hesitant to encroach upon this independent power. After Fatou Bensouda decided not

13 See *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the 'Application for judicial review by the government of the Comoros')* (ICC, Pre-Trial Chamber, ICC-01/13, 16 September 2020), [20].

14 Luc Côté, 'Independence and Impartiality' in Luc Reydams, Jan Wouters, and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press, 1st ed, 2012) 319, 324-325.

15 Kevin Heller, 'Role of the International Prosecutor' in Cesare Romano, Karen Alter, and Chrisanthi Avgerou (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 1st ed, 2013) 669, 673.

to open an investigation into the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, judges merely 'requested' her to reconsider this decision. After reconsidering her decision, and coming to the same conclusion, the judges found that her reconsideration was not 'genuine' but decided against requesting another reconsideration on the basis that the law "does not establish with sufficient clarity the exact distribution of prerogatives between the Prosecutor and the pre-trial chamber".[16] Functional independence is also protected by provisions such as article 70 of the *Rome Statute*, which criminalise attempts to impede, intimidate, or corruptly influence court officials. It may also be protected through the operation of a court's 'inherent jurisdiction' enabling the prosecution of contempt.[17]

The legal paradigm therefore encourages the simplistic view of discretion. It exists when the decision-maker has no rules upon which they can rely to determine the procedure that needs to be followed or the conclusions that needs to be reached. It is a negative concept, capable of definition only by reference to the existence of law.

Discretion, then, is often conceptualised through the use of a space metaphor, which sees it as an imagined space in which the decision-maker can exercise free-choice. Keith Hawkins, for example, expressly referred to it as "the space… between legal rules in which legal actors may exercise choice".[18] Kenneth Davis, the famous American scholar whose work ushered in a proliferation of rules in the context of sentencing and parole reform in the 1970s,[19] argued that discretion existed when the "effective limits" on an official's power left them "free to make a choice among possible courses of action or inaction".[20] J L Jowell called it "the room for decisional manoeu-

16 *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the 'Application for judicial review by the government of the Comoros')* (ICC, Pre-Trial Chamber, ICC-01/13, 16 September 2020), [111].

17 See, for example, *Prosecutor v Duško Tadić (Judgment on allegations of contempt against prior counsel, Milan Vujin)* (ICTY, Appeals Chamber, IT-94-1-A-R77, 31 January 2001), [13].

18 Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 11.

19 Robert Baldwin and Keith Hawkins, 'Discretionary Justice: Davis reconsidered' (1984) *Public Law* 570, 570; National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (National Advisory Commission on Criminal Justice Standards and Goals, 1st ed, 1973), for example 3, 26, 243.

20 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State

vre", and Robert Goodin saw discretion as a "lacuna in a system of rules".[21] Perhaps the most famous invocation of the space metaphor, however, was Ronald Dworkin's claim that discretion is like a "hole in a doughnut" as "an area left open by a surrounding belt of restriction"—a metaphor that is as deceptive as it is easy to visualise.[22] All of these definitions posit that discretion is a "residual notion, defined in terms of its opposite"—to understand the scope of discretion, the analyst must first understand the scope of the law.[23] Discretion is what is left over when rules have dictated the mandatory procedures, considerations, or outcomes.

The apparent trend in the legal paradigm is to treat the legal system as a body that needs to be inoculated from the virus that is discretion. Just as Weberian bureaucracy strives for predictability, efficiency, and equality, the law must abolish (to the extent possible) the threat that discretion poses to the achievement of these values. "The attitude so often encountered"', wrote D J Galligan, "that while [discretion's] presence may be inevitable, it is at the same time slightly deviant".[24] Davis's assessment of discretion, for example, reflects his belief that discretion is "a corrupting force, a nasty growth, that constantly erodes the basis of 'justice' ".[25] There are three lines of argument that explain the desire to curtail discretion.

The first is that the mistrust of discretion is symptomatic of an underlying mistrust in power and authority. Zenon Bankowski and David Nelken argued that concerns about discretion should not be seen as problems concerning law, economics, organisations, or otherwise, but rather viewed as an "index to anxiety" over society's concerns about "unregulated decision-making".[26] Concerns about discretion, they wrote, form part of the broader problem of "distrust of power endemic in western capitalist so-

University Press, 1st ed, 1969), eBook.

21 J L Jowell, 'The Legal Control of Administrative Discretion' (1973) *Public Law* 178, 179; Robert Goodin, 'Welfare, Rights, and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232, 234.

22 Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 32.

23 Robert Goodin, 'Welfare, Rights, and Discretion' (1986) 6(2) *Oxford Journal of Legal Studies* 232, 233.

24 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1.

25 Robert Baldwin and Keith Hawkins, 'Discretionary Justice: Davis reconsidered' (1984) *Public Law* 570, 571.

26 Zenon Bankowski and David Nelken, 'Discretion as a Social Problem' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 247.

cieties because of their relatively partial, open, but ultimately unjustifiable hierarchies".[27] Kenny Yang observed, for example, that "[d]iscretion can be dangerously synonymous with unchecked power".[28] Charles Breitel, who at the time was sitting on the Appellate Division of the New York Supreme Court, cautioned that arbitrariness, discrimination, oppression, inequality, corruption, and the emergence of a "police state" were some of the 'great hazards' that discretion exposes society to.[29]

Second is the concern that discretion leads to arbitrariness and 'injustice'; a risk to the integrity of the law by unsealing a pandora's box of politicisation and caprice. Davis argued that discretion was the cause of "the greatest and most frequent" injustices, where "emotions of deciding officers", "favouritism", and the "imperfections of human nature" lay waste to any hope of fairness and equality in decision-making.[30] Peter Mascini highlighted the 'unpredictability' of discretion and the risk that it posed to the "consistency and legitimacy" of official decisions.[31] Discretion opens the door to officials deciding matters on the basis of personal, context-specific, and idiosyncratic considerations resulting in the fate of a matter resting on "largely unknowable factors".[32] This is the sort of justice Richard Schmidt referred to as *kadijustiz* (a concept later popularised by Weber)[33] to describe decisions meted out by a judge "without any reference to rules or norms but in what appears to be a completely free evaluation of the particular merits of every single case".[34] Anni Pues further observed that discretion is often seen

27 Zenon Bankowski and David Nelken, 'Discretion as a Social Problem' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 247.

28 Kenny Yang, 'Public Accountability of Public Prosecutions' (2013) 20(1) *Murdoch University Law Review* 28, 57.

29 Charles Breitel, 'Controls in Criminal Law Enforcement' (1960) 27(3) *The University of Chicago Law Review* 427.

30 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook.

31 Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 124.

32 M P Baumgartner, 'The Myth of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 129, 157.

33 Richard Schmidt, 'Die deutsche Zivilprozeßreform und ihr Verhältnis zu den ausländischen Gesetzgebungen' (1908) 1 *Zeitschrift für Politik* 245, 266; Max Weber, 'Bureaucracy' in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 216.

34 Max Rheinstein, 'Introduction' in Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Cambridge University Press, 1st ed, 1954) xxv, xlviii, quoted

as a threat to the integrity of the law because it risks opening the door to a decision-maker (specifically an international prosecutor) becoming 'politicised'.[35] The alternative and more-desirable vision of governance implicit in this line of criticism is of rule-based processes that would be more ridged and mechanical—"perhaps even oppressively so"—but also more standardised, consistent, and orderly.[36]

Third is a belief that by basing decisions on rules, as opposed to discretion, this will afford more 'legitimacy' to the process or to the outcome.[37] Pierre Bourdieu observed that when decision-makers purportedly base their decisions on reasoned interpretations of texts—thereby denying the existence of their creative capacity—they pay homage to the "cult of the text" and disguise what are otherwise "naked exercises of power".[38] Decisions are legitimised by the existence of purportedly objective standards to which decision-makers can use to support their actions. In the context of prosecutorial discretion specifically, the belief that an international prosecutor's legitimacy will be assisted through the 'padding out' of discretion with more rules, better-defining existing rules, or more strictly detailing the decision-making framework in other ways has been widely adopted.[39]

These three arguments have given rise to the popular and often-heard

---

in David Matza, *Delinquency and Drift* (Transaction, 2nd ed, 1990), 118. See also Intisar Rabb, 'Against Kadijustiz: On the negative citation of foreign law' (2015) 48(2) *Suffolk University Law Review* 343, 348-349.

35 Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), 3.

36 M P Baumgartner, 'The Myth of Discretion' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 129, 129.

37 See, for example, Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 121.

38 Pierre Bourdieu, 'The Force of Law: Toward a sociology of the judicial field' (1987) 38(5) *Hastings Law Journal* 814, 851, 818.

39 See, for example, Allison Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 541; James Goldston, 'More Candour About Criteria: The exercise of discretion by the Prosecutor of the International Criminal Court' (2010) 8(2) *Journal of International Criminal Justice* 383, 402; Luc Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3(1) *Journal of International Criminal Justice* 162, 168; Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), generally; and Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010), generally.

belief that "the proper legal strategy is to keep [discretion] to a minimum" through the growth of regulation.[40] This is what Davis believed was necessary to curtail the "greatest and most frequent injustices" he believed were caused by unnecessary discretionary power. Through "earlier and more elaborate… rule-making and in better structuring and checking [the exercise] of discretionary power", he hoped, the destructive potential of discretion could be progressively mitigated.[41] Jan Klabbers even went so far as to label the desire to regulate discretionary conduct a "kneejerk deontological reflex" stemming from a concern that discretionary conduct will not be free from political influence.[42] The space for free choice that discretion apparently affords decision-makers needs to be lessened. Around the field in which the decision-makers can roam free, fences need to be built to keep them under progressively stricter control.

Yet while it has often been recognised that it is simply impossible to regulate for all factual circumstances decision-makers may encounter,[43] the belief persists that more regulation is better. In 1976, Charles Thomas and W Anthony Fitch observed that many prosecutors *themselves* thought that it was feasible and desirable to develop comprehensive prosecutorial guide-

40 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1.

41 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook, quoted in Robert Baldwin and Keith Hawkins, 'Discretionary Justice: Davis reconsidered' (1984) *Public Law* 570, 571.

42 Jan Klabbers, 'The Virtues of Expertise' in Monika Ambrus et al, *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, decision makers, or irrelevant actors?* (Cambridge University Press, 1st ed, 2014) 82, 90.

43 See, for example, Roscoe Pound, 'Discretion, Dispensation, and Migration: The problem of the individual special case' (1960) 35(4) *New York University Law Review* 925, 926-927; Dan Kahan, 'Reallocating Interpretive Criminal-Lawmaking Power within the Executive Branch' (1998) 61(1) *Law and Contemporary Problems* 47, 49; Norman Abrams, 'Internal Policy: Guiding the exercise of prosecutorial discretion' (1971) 19(1) *UCLA Law Review* 1, 2; Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 61; Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1173; Andrew Ashworth, 'The "Public Interest" Element in Prosecutions' (1987) *Criminal Law Review* 595, 606; Zenon Bankowski and David Nelken, 'Discretion as a Social Problem' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 261. Even Davis conceded that "[r]ules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice", though he also believed it was responsible for "nine-tenths of injustice in our legal system": Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook.

lines.[44] In the context of international criminal law, significant effort has been expended on identifying the 'limits' of prosecutorial discretion, with many concluding that the adoption of prosecutorial guidelines or policies would be a welcome development.[45] Staff within the ICC OTP have themselves been prolific in producing a veritable number of policy documents that purport to structure decision-making. One senior prosecutor within the Office even remarked in the context of being interviewed for this research that "you want to make sure that you limit your own discretion" and that "any good Chief Prosecutor will want to have his or her hands tied".[46]

Arguably the most broad-ranging and vague rule that purports to constrain discretionary conduct is the principle that public officials should exercise their powers 'in the public interest'. This general rule is manifested in various forms. The principle that public officials hold their power on trust and for the benefit of the society that granted them that office is not a new one and has long formed a central tenet of public administrative theory, at least in common-law jurisdictions. As early as 1690, John Locke argued in his *Second Treatise of Civil Government* that executive discretionary power is vested in officials "for the public good".[47] Edmund Burke, in 1835, expressed this obligation in terms of a trust relationship under which public officials acted as 'trustees' of power for the public beneficiary.[48] By the end of the 18th century, in fact,"a large and well developed body of primarily common law doctrine" had developed in England and Wales that placed public officials in a legally-actionable fiduciary relationship with the pub-

44 Charles Thomas and W Anthony Fitch, 'Prosecutorial Decision Making' (1976) 13(3) *American Criminal Law Review* 507, 517.

45 See, for example, Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020); Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010); Allison Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510; Philippa Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice" ' (2005) 50 *Criminal Law Quarterly* 305; Luc Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3(1) *Journal of International Criminal Justice* 162.

46 Interview with P26.

47 John Locke, *Second Treatise of Government* (1690) s 160. See also Floyd Mechem, *A Treatise on the Law of Public Offices and Officers* (Callaghan, 1st ed, 1890), 1-2.

48 Edmund Burke, *The Works of Edmund Burke, with a Memoir* (George Dearborn, 1st ed, 1835) vol 1, 496. See also Bruce MacFarlane, 'Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency' (2001) 45 *Criminal Law Quarterly* 272, 297.

lic.[49] In the 1783 case of *R v Bembridge*, judges of the Court of the King's Bench in England and Wales established so much by holding that the defendant—an accountant within the office of the Receiver and Paymaster-General who knowingly concealed from auditors various amounts owing to the office—was a "trustee for the public" and liable for prosecution by the King. Such a rule, they held, "is essential to the existence of the country".[50] More recently, on the other side of the Atlantic, judges at the Supreme Court of New Jersey held that public officials, "as fiduciaries and trustees of the public… are under an inescapable obligation to serve the public with the highest fidelity", and must "exercise their discretion not arbitrarily but reasonably".[51] Like in *Bembridge*, the judges held that this principle was necessary for the functioning of the state, arguing that its existence was "essential to the soundness and efficiency" of the government.[52] While the same principle has not found footing in civil law jurisdictions, the underlying idea that government should serve the public has. In Germany, for instance, sovereign powers are granted to officials who are loyal to, and serve, the public.[53] Internationally, the *United Nations Convention against Corruption*[54]—which currently has 187 parties—illustrates the general applicability of this principle by being based on the premise that powers attached to a public office must be exercised for the benefit of the public.[55]

Galligan argued that the relationship between public officials and the public obligated office holders to adopt the "most rudimentary requirements of political morality" when exercising discretionary authority, namely "rationality, purposiveness, and morality".[56] He saw that these principles

49 Paul Finn, 'Public Trusts, Public Fiduciaries' (2010) 38(3) *Federal Law Review* 335, 336-337.

50 *R v Charles Bembridge* (1783) 3 Doug 327, 331-332.

51 *Driscoll v Burlington-Bristol Bridge Co* 8 NJ 433 (1952), 474-475.

52 *Driscoll v Burlington-Bristol Bridge Co* 8 NJ 433 (1952), 476.

53 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art 33(4).

54 *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

55 Rose, Kubiciel, and Landwehr observe that "the improper combination of private interests with a position or power to be exercised for the general public interest constitutes the essence of corruption": Cecily Rose, Michael Kubiciel, and Oliver Landwehr, 'Introduction' in Cecily Rose, Michael Kubiciel, and Oliver Landwehr (eds), *The United Nations Convention against Corruption: A commentary* (Oxford University Press, 1st ed, 2019) 1, 3.

56 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 4-5.

demanded that decision-makers base their choices on consistent, fair, and impartial reasons; that these reasons could be related to the standards that applied to the discretionary authority (namely that there was an intelligible connection to the policies, principles, and rules by which the power was constrained and the purposes for which the authority was granted); and that the decision-maker abide by the "critical conceptions of morality".[57] While he conceded that these concepts may be criticised as "hopelessly imprecise", their value was in their role both as a basis of political morality and the touchstone by which any decision can be scrutinised, as well as the foundations upon which authorities could develop more specific guiding criteria to constrain the exercise of discretionary authority.[58]

Yet the conceptualisation of discretion within the legal paradigm and the solutions to its perceived problems are flawed. The space metaphor, which invites discretion to be seen as a space, room, lacuna, or 'hole in a doughnut', invites discretion to be seen as a physical area capable of definition. This metaphor shapes how writers in the legal paradigm perceive discretion and apparently affects their belief that the space is capable of definition.[59] Dworkin's doughnut, for instance, instils this misconception by offering a mental image of a physical object in which the space for free choice is clearly distinguishable from the 'doughnut' of standards and authorities and positing that rule-based decision-making can be distinguished from discretion (if even only by a Herculean figure capable of discerning all rules and all principles that lead them to the 'right' answer).[60] But con-

57 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 6.

58 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 5 (see, specifically, footnote 3. Here, Galligan recalls that J M Keynes "is said to have remarked that ideas and concepts are like balls of wool with no sharp edges and that rigorous attempts at conceptual precision are likely to inhibit original thought").

59 For more on how individuals' conceptions of the world are shaped through metaphor, see George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003) and Bernard Hibbitts, 'Making Sense of Metaphors: Visuality, aurality, and the reconfiguration of American legal discourse' (1994) 16 *Cardozo Law Review* 229.

60 It is worth recalling that Dworkin did not believe discretion to exist in those circumstances where a party to a decision by an official is "entitled" to a particular outcome. The reason, he argued, was that even when the "rules" failed to determine the result, "principles" would, and the decision-maker was obliged to take these principles into account (just as if they were rules): see, generally, Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14.

trary to what the space metaphor suggests, there is no clear divide between rules and not-rules. Both Galligan and Hawkins have pointed out that standards are typically "vague, abstract, or in conflict".[61] It is only in fringe cases where rules will leave only one interpretation. Bankowski and Nelken, in criticising the hope that rules are the panacea to anxieties about discretion, argued that there is simply "no escape from the problem of discretion" because the distinction between rules and discretion is often "untenable".[62] According to Carl Schneider, because "discretion and rules rarely appear in unadulterated form in any large area of legal significance", the choice is not one between rule-based and discretion-based decision-making, but instead "between different mixes of discretion and rules".[63] Moreover, some people may regard something as a rule, and others might not. The ICC OTP's various policy papers serve as a good example. The comment referred to earlier from the senior OTP official regarding the desirability of limiting discretion through the policies demonstrate that the policies can be interpreted as binding; but it is also difficult to argue—without reference to other powers such as social pressures—that the hand can tie itself. While internally these policies may be viewed as binding, they nevertheless stem from a pre-existing vagueness in the original grant of discretionary authority that officials have used discretion to fill.[64]

Further, the proliferation of rules only serves to shift discretion towards other issues. Decision-makers must then grapple with the interpretation of the rules. Doris Liebwald reminds us that the "elasticity of legal interpretation can lead to astonishing meanings or changes of meaning of legal terms, concepts and rules", and that "even the best efforts to reach maximal precision will not result in absolute precise legal texts, because language itself is imprecise and requires interpretation".[65] There is no correct way of

61 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 32; Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 14.

62 Zenon Bankowski and David Nelken, 'Discretion as a Social Problem' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 248.

63 Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 49.

64 See the discussion contained in D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 12-13.

65 Doris Liebwald, 'Law's Capacity for Vagueness' (2013) 26(2) *International Journal for the Semiotics of Law* 391, 392.

resolving problems caused by the inherent vagueness of language because there is no higher-order normative system to provide answers, meaning that interpretative discretion is here to stay and that eliminating it is an "impossible dream".[66] Facts, too, require interpretation. As Hawkins observed, "[e]ven where the meaning of a rule seems clear, the facts upon which the application of a rule may depend have always to be interpreted".[67] For example, the *Criminal Code Act 1983* (NT) establishes that 'serious harm' is that which "endangers, or is likely to endanger, a person's life; or that is or is likely to be significant and longstanding".[68] Whether harm would be 'likely' to cause any of these effects will normally depend upon a lawyer's personal assessment of the injury or that of a medical expert. Discretion may also be required to interpret vague policy or public opinion.

Perhaps the biggest and most fundamental flaw in the legal paradigm's conceptualisation of discretion is that it contains a critical failure point that, once triggered, destroys the very prospect of discretion *ever* existing. This same failure point is the one that the legal paradigm's conception of discretion pins as discretion's defining feature. The failure point is this: the belief that discretion is defined by an absence of rules (as evidenced by the pervasiveness of the space metaphor). The legal paradigm does not rely on the form of rules to define discretion, but rather their function: they direct the decision-maker on the procedure that must be followed, the considerations that must be made, or the outcome that needs to be reached. Therefore, there should be no distinction made between rules and any *other* force that directs the decision-maker on the same matters. Any distinction would be purely theoretical and ignore the reality that these forces operate to achieve the same practical outcome as rules. The lessons from fields outside the law—such as economics, organisational studies, psychology, and sociology—reveal that these forces are so numerous, so permanent, and so overwhelming that the very notion of discretion simply does not exist if the legal paradigm's conception of discretion is maintained. Discretion is a vacuum that "invites its own destruction", to be filled by any number of forces that gush in to fill the void characterised by an absence of rules.[69] It

66 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1, 17.

67 Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 35.

68 *Criminal Code Act 1983* (NT), s 1.

69 Richard Lempert, 'Discretion in a Behavioural Perspective: The case of a public

is to these other forces this chapter now turns.

2.2 Discretion beyond the legal paradigm

Discretion, observes Richard Lempert, "is not only a property of legal rules; it is also a property of behaviour".[70] Rules can be ignored; a rule can be believed to exist when it does not; and "if law is no guide, other social forces may be, and they give rise to patterns of behaviour that look, and in a sociological sense are, more rule-bound than behaviour that is in theory rigorously structured by law".[71] As discretion is fundamentally concerned with the notion of choice—a concept to which law has no special claim of expertise—advancements in other fields concerning decision-making have influenced how discretion is understood.[72] It has long been understood that free choice simply does not exist, and that "[a] thousand limitations… encompass and hedge us even when we think of ourselves as ranging freely and at large".[73] Discretion needs to be understood in this light. *Any* decision, be it derived from the conscious application of rules or the purported enjoyment of discretion, will be affected by any number forces. Therefore, it is important to recognise that discretion will be "shaped by a variety of constraints, human, organisational, or economic, operating beyond rules".[74] This subsection draws attention to just some of these other forces, to further the argument that discretion should not be defined by reference to the constraints upon a decision-maker's capacity to choose.

---

housing eviction board' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

70 Richard Lempert, 'Discretion in a Behavioural Perspective: The case of a public housing eviction board' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

71 Richard Lempert, 'Discretion in a Behavioural Perspective: The case of a public housing eviction board' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

72 Martha Feldman, 'Social Limits to Discretion: An organisational perspective' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 167.

73 Benjamin Cardozo, *The Growth of the Law* (Yale University Press, 1st ed, 1924), 61, quoted in Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 49.

74 Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1173. See also Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 38 and D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 124.

Turning to sociology, the first force that acts as a constraint on a decision-maker's capacity to exercise free choice is their *habitus*. The *habitus*, as conceived by Pierre Bourdieu, is a "system of durable, transposable dispositions, which integrates past experiences and functions at every moment as a matrix of perception, appreciation, and action, making possible the accomplishment of infinitely differentiated tasks".[75] An individual's *habitus* conditions them to be disposed towards particular conduct and outcomes while at the same time presenting the course of action to be followed as obvious and natural. These dispositions "can be objectively 'regulated' and 'regular' without in any way being the produce of obedience to rules, objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and, being all this, collectively orchestrated without being the product of the orchestrating action of a conductor".[76] Therefore, while an individual's *habitus* is the product of their history, it does not present itself as such. As Émile Durkheim observed in one of his lectures on the reform of secondary French education:

> "[F]or in each one of us, in differing degrees, is contained the person we were yesterday, and indeed in the nature of things it is even true that our past *personae* predominate, since the present is necessarily insignificant when compared with the long period of the past because of which we have emerged in the form we have today. It is just that we don't directly feel the influence of these past selves precisely because they are so deeply rooted within us. They constitute the unconscious part of ourselves".[77]

In the *habitus*, "the sediment of individual and collective trajectories" are

75 Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1977) [trans of: *Esquisse d'une théorie de la pratique, précédé de trois études d'ethnologie kabyle*], 82-83.

76 Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1977) [trans of: *Esquisse d'une théorie de la pratique, précédé de trois études d'ethnologie kabyle*], 72.

77 Émile Durkheim, *The Evolution of Educational Thought: Lectures on the formation and development of secondary education in France* (Peter Collins, Routledge, 2nd ed, 2006) vol 2 [trans of: *L'Evolution pédagogique en France*], 11, quoted in Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

transformed into second nature.[78] It is constituted by "the active presence of the whole past".[79] All an individual's past experiences, from what they have been formally taught to what they have seen, heard, felt, or otherwise witnessed creates the reality they occupy, the way they think, and the window through which they perceive the world. The *habitus* imbues its occupant with a "spontaneity without consciousness or will",[80] generating "inclinations, propensities, and tendencies" without revealing that these are not as natural as they appear.[81] The result is that an individual's *habitus* defines the horizon of possible conduct, allowing only for "bounded creativity" within the realm of that permitted by an actor's historical experiences.[82] It therefore instils a path-dependency on decision-makers.[83] The effect of the *habitus*, therefore, is to deny anyone the ability to truly exercise free choice.

A decision-maker's history has been accepted as a constraint on their capacity for free choice in other ways. Carl Schneider observed that "[d]ecision-makers, after all, do not live and work in a vacuum; they are inevitably products of their environment"—through their training, "lawyers and judges acquire habits of thought that limit the range of arguments that they will find acceptable and the kinds of decisions that they will be willing to advocate and reach".[84] Hawkins observed the power of what he termed the 'decision-frame', or the "structure of knowledge, experience, values, and meanings that the decision-maker shares with others and brings to a choice".[85] This frame, he argued, was of critical importance in informing how decision-makers identify relevant information, organise facts, and interpret them.[86]

78 Vincent Pouliot, 'The Logic of Practicality: A theory of practice of security communities' (2008) 62(2) *International Organisation* 257, 273.

79 Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

80 Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

81 Vincent Pouliot, 'The Logic of Practicality: A theory of practice of security communities' (2008) 62(2) *International Organisation* 257, 274.

82 Davide Nicolini, *Practice Theory, Work, and Organisation: An introduction* (Oxford University Press, 1st ed, 2012), 5, 225-226.

83 Vincent Pouliot, 'The Logic of Practicality: A theory of practice of security communities' (2008) 62(2) *International Organisation* 257, 273, citing Pierre Bourdieu, *Méditations pascaliennes* (Seuil, 1st ed, 2003), 231.

84 Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 80-81.

85 Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1191.

86 Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law*

Economics uses the concept of 'bounded rationality' to describe how decision-makers are unable to assess all alternatives and all information prior to making a decision. Their discretion is constrained by their own memory, attention-span, and mental capacity, among other things.[87] Decision-makers "cannot achieve perfect, purposive rationality" when making choices, but instead must instead accept that they have certain inherent constraints that limit their ability to exercise true free choice.[88] For example, the natural desire of people to make sense of the world around them demands that they categorise facts, problems, events, encounters, and so on in order for them to function. This process of categorisation, observes Schneider, "in effect become rules of decision which govern, or at least influence, how issues are resolved".[89]

Psychology provides yet more insights into how choices are constrained by forces beyond rules. For example, decision-makers are generally biased towards avoiding losses. This tendency has been called "one of the most robust human biases".[90] People are more likely to avoid risk than embrace potential. This gives rise to the *status quo* bias, which posits that "individuals have a strong tendency to remain at the *status quo*, because the disadvantages of leaving it loom larger than advantages".[91] William Samuelson and Richard Zeckhauser observed the pervasiveness of the *status quo* bias.[92] When presented with a series of options that do not specify the risk and opportunity attached to outcomes, decision-makers are more likely to stay with the choice they made before, rather than to adopt an alternative course of action.[93]

Review 1161, 1195.

87 Martha Feldman, 'Social Limits to Discretion: An organisational perspective' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 168.

88 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 121.

89 Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 83.

90 M Ena Inesi, 'Power and Loss Aversion' (2010) 112(1) *Organisational Behaviour and Human Decision Processes* 58, 59.

91 Daniel Kahneman, Jack Knetsch, and Richard Thaler, 'Anomalies: The endowment effect, loss aversion, and status quo bias' (1991) 5(1) *Journal of Economic Perspectives* 193. 197-198.

92 William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1(1) *Journal of Risk and Uncertainty* 7, 41.

93 William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1(1) *Journal of Risk and Uncertainty* 7, 35-36, 41.

Organisational dynamics, too, affect the choices that decision-makers make. Discretion is often exercised within a complex network of overlapping organisational structures. Decisions are rarely the product of one individual, but rather the product of the actions of multiple people and their own previous decisions.[94] Power structures alter the behaviour of decision makers. Subordinates are expected to obey orders from and meet the expectations of their superiors.[95] Decision-makers may choose to repeat their previous decisions in factually similar situations rather than make different choices because of efficiency requirements, dodging responsibility, boredom, or laziness.[96] Ginevra Richardson, Anthony Ogus, and Paul Burrows have observed that decision-makers may feel the need to adopt a cooperative approach out of a "desire to win the approval of colleagues", leading to individuals concentrating disproportionately "on certain aspects of their job in order to receive the approval of their superiors".[97] In some cases, this desire for acceptance can be caused by the way in which a decision-maker is appointed. This is perhaps most obvious in the United States. The US has a practice of electing chief prosecutors: in 2005, 85% of chief prosecutors reported that they had been elected to the position.[98] Their status as elected officials, with their re-election contingent upon the ongoing support of the voting public, has been observed to pressure them towards increasing conviction rates.[99]

Finally, how individuals perceive their role and the purpose for which they were granted discretionary authority affects the decisions that they

94 Keith Hawkins, 'The Use of Legal Discretion: Perspectives from law and social science' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 27; Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1172.

95 Ginevra Richardson, Anthony Ogus, and Paul Burrows, *Policing Pollution: A study of regulation and enforcement* (Clarendon Press, 1st ed, 1982), 185.

96 Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 82.

97 Ginevra Richardson, Anthony Ogus, and Paul Burrows, *Policing Pollution: A study of regulation and enforcement* (Clarendon Press, 1st ed, 1982), 185.

98 Steven Perry, 'Prosecutors in State Courts, 2005' (National Survey of Prosecutors, NCJ 213799, Bureau of Justice Statistics, 1 July 2006) <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1124>, 3.

99 See, for example, Stephanos Bibas, 'Transparency and Participation in Criminal Procedure' (2006) 81(3) *New York University Law Review* 911, 935; Abbe Smith, 'Can You Be a Good Person and a Good Prosecutor?' (2001) 14(2) *Georgetown Journal of Legal Ethics* 355, 390.

make.[100] Galligan argued that the "basic duty" of any official with decision-making authority was to "realise and advance the objects and purposes for which his power has been granted".[101] The choices available to a decision-maker are therefore directed by their understanding of their role and the role of their institution more broadly.

These are just vignettes of some of the forces that constrain an official's decision-making capacity. There are countless others. This reality highlights the difficulty inherent in defining discretion by reference to constraints. Doing so inevitably requires an arbitrary distinction to be drawn between forces that apparently do constrain free choice and those that do not. Section 3 therefore proposes an action-oriented conception of discretion that allows it to be understood as a practice *independent* of specific constraints that embraces the complex reality that these constraints exist and shape individual action.

3 Discretion as a Practice

Two main arguments have so far been established to demonstrate the problems that come from conceptualising discretion by reference to constraints. First, any such understanding must draw an arbitrary line between those forces that apparently do constrain discretion, and those that do not. Discretion and rules are not two different models of decision-making. The lawyer's obsession with rules and regulation has merely created the misconception that rules provide a degree of constraint on free choice that is somehow more powerful than all of the social forces outside of the legal paradigm that were addressed in subsection 2.2. Second, the logic behind a constraint-based understanding of discretion means that discretion is self-destructive. Once constraints start being identified, they appear everywhere, eventually leading to the (correct) conclusion that decision-makers are never truly able to exercise free choice. While the conclusion is not problematic, conceptualising discretion so as to deny the conclusion is. Therefore, any effort to analyse discretion from the perspective of the constraints upon a decision-maker will take as its point of departure a distorted and restricted image of how decision-making actually works. Moreover, any policy recommen-

100 John Bell, 'Discretionary Decision-Making' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 89, 91; D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 12.

101 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 30.

dations flowing from such an analysis will inevitably fail to appreciate the complex web of forces that operate upon decision-makers.

In order to overcome these problems, discretion should be understood as the act of reaching a reasoned decision about the appropriate course of action to pursue. In this context, 'reasoned decision' refers to a decision that is reasoned. It does not refer to a decision, formal or otherwise, communicated to another in the form of a policy paper, press statement, preliminary examination report, or something similar. Whether a decision arising from discretion is *communicated* is irrelevant for the purposes of this definition. To be clear: 'reasoned decision', as used here, does not refer to any document, speech, or anything else that communicates a decision. There is an important distinction between the physical activity of *communicating* the reasoning for a decision and the mental activity of *reasoning* which produces the decision referred to in this definition. Discretion is about what takes place inside the mind of a decision-maker and not the form in which these mental processes manifest in something observable. Discretion, by its nature, is invisible to the outside world.

Further, *decisions* that arise as a *result* of discretion may manifest in observable action or invisible silences. Discretion can result in *both* action and inaction. A change of action is the clearest indication that discretion has been exercised. If the ICC Prosecutor opens an investigation into the *Situation in Afghanistan*, for example, it is obvious that they have exercised discretion. Many 'big' actions, such as opening an investigation, charging someone, or appealing, are clear indicators that discretion has been exercised. In normal practice, no professional of basic competence would do any of these things without putting some degree of thought into whether their decision is appropriate!

Silences or inaction are, in contrast, far more difficult to ascribe to an exercise of discretion. Moreover, it is possible that of all the exercises of discretion made by decision-makers around the world every day, decisions not to act are more numerous than those which result in action. This highlights a problem: when there is *no* change in action, it can be difficult (or impossible) to identify whether a decision has been made or discretion has been exercised. For example, if a particular charge is not included on an indictment, this may be caused by a prosecutor *deciding* not to include the charge (in which case discretion has been exercised) or simply not thinking about it (meaning that discretion was not exercised because no reasoned decision was made to exclude it). It may also be the case that a prosecutor decides *not* to decide something. Preliminary examinations at the ICC are

sometimes left open for many years without any indication that they are under active consideration. The preliminary examination into Colombia has been open since June 2004—over 17 years—without any decision having been made on whether an investigation should be formally opened or the preliminary examination closed. If, at a particular time, it was decided that no decision should be made on the future of a preliminary examination, this would be an exercise of discretion; however if it was simply the case that a preliminary examination was ignored without any decision being made on its future, this would not be. As such, it is very difficult to distinguish between silences or inaction arising as a result of discretion and silences or inaction arising simply because the decision-maker made no decision. The definition of discretion adopted in this thesis accepts that silences may be the product of decisions. Silences are no less important to the bureaucratic process than observable actions.

A second problem, related to both actions and inactions, is that without being able to peer into the mind of the decision-maker, people might incorrectly assume the reasons which inform a decision. Silences, in particular, leave the door open to speculation about the reasons for the inaction and invite them to be derived or inferred from the surrounding context. In reality, of course, there may be *no* reasons, or the reasons that people might ascribe to the silence might miss the ball completely. For this reason, first-hand, empirical, qualitative, research plays an important role in identifying what decisions have been made—regardless of whether they manifest in observable action or not—and why.

This definition of discretion advanced here has practical and theoretical benefits over the constraint-based model adopted within the legal paradigm. These advantages are demonstrated by reference to the elements of the definition. First, the approach adopted here establishes that discretion is an *act*. Exercising discretion is something that people do every day. The definition advanced here directs attention not to the way decision-making is theoretically curtailed, but to how it exists in practice. It invites a nuanced inquiry that respects the potential for both unity and diversity in the process of decision-making. It enables the capturing of the rich and complex nature of decision-making practices as they are found in the real world. In turn, it promises to provide an analytical foundation that is more grounded in reality and in-tune with day-to-day decision-making than a model which relies upon a limited and arbitrary conception of the factors that affect how choices are made.

Second, it emphasises that decisions need to be *reasoned*. The reference

to reason respects discretion's etymological roots. As H L A Hart observed, to exercise discretion is not to indulge "personal or momentary whim" or fancy; instead, discretion is "an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence".[102] Discretion demands that a decision-maker reflect on the various courses of action available to them and put a degree of thought into the choice they are making. This process of reasoning is what distinguishes decisions reached through discretion from decisions reached through arbitrary, intuitive, or impulsive means. Discretion therefore relies upon what Daniel Kahneman and Amos Tversky called 'System 2' cognition, or what Kahneman would later call 'slow thinking'.[103] The act of exercising discretion is not automatic or effortless; instead, it is controlled, effortful. This aspect of reasoning expressly sheds the presumption that decision-makers are affected by the same forces in the same ways and makes no reference to *how* a decision-maker can (or should) reason. This omission respects that decision-making is a highly context-dependent and individualised action. People reason in different ways. They relate to rules in different ways. They have different backgrounds, different experiences, different office dynamics, different desires, different financial concerns, and countless other attributes that define them as individuals. It would be wrong to presume a homogeneity of forces and arrogant to presume that discretionary conduct is constrained by some and not by others. Therefore, the definition offered here simply does away with reference to specific constraints.

Finally, the reasoning is conducted by reference to what the decision-maker believes is *appropriate*. Appropriateness introduces into the notion of discretion an attention to the role that social forces play in determining individual action. Inspired by James March and Johan Olsen's 'Logic of Appropriateness', Zachary Oberfield argued that "the heart of an individual's decision-making process" consists of socio-psychological outcomes such as "identities, attitudes, and motivations".[104] Decision-making, he claimed, "begins with the identities held by decision-makers" and that "if we want to understand how people act, we need to understand how they see them-

102 H L A Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652, 656-658.

103 Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for behavioural economics' (2003) 93(5) *The American Economic Review* 1449, 1450-1452.

104 Zachary Oberfield, 'Discretion from a Sociological Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 177, 177-178.

selves".[105] The role identities that people adopt therefore provide the starting points for how they determine whether conduct will be appropriate. These social roles provide reasons for individual behaviour.[106]

The definition of discretion advanced here therefore explicitly distinguishes between two ways that decisions can be made. Decisions can be made either through discretion; or they can be made through other means that do not involve the application of reason or reference to appropriateness. Thus, all acts of *discretion* involve making a *decision*; but not all *decisions* arise through an exercise of *discretion*.

4 Conclusion

This chapter has argued that discretion should be understood principally as the act of reaching a reasoned decision about the appropriate course of action to pursue. The prevailing understanding of discretion within the legal paradigm that relies upon the space metaphor to argue that discretion is a space in which a decision-maker can exercise free choice surrounded by a belt of restriction is problematic for two reasons. First, it draws an arbitrary distinction between those forces which apparently do constrain discretion (notably rules) and those that do not. However, the lessons from decision-making studies outside of the law reveal that a decision-maker is *never* free of constraints on their decision-making capacity. Therefore, any constraint-based conception of discretion takes as its starting point a distorted view on how decision-making operates in reality. Second, if the legal paradigm's constraint-based understanding of discretion is to be maintained, the notion of discretion self-destructs once it is realised that the forces that bind decision-makers are so numerous and so powerful that they can never truly exercise free choice. As such, the novel, practice-based understanding of discretion advanced here offers a more nuanced and accurate portrayal of how decisions are made. This understanding respects the notions of choice, judgement, and discernment embodied in the word's etymological roots, while shifting the spotlight onto the question of how decisions are reasoned without making any claim as to the power, or universal applicability, of specific constraints. Armed with this conceptual framework, it is now possible

105 Zachary Oberfield, 'Discretion from a Sociological Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 177, 180.

106 David Watson, 'Discretion, Moral Judgement, and Integration' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 229, 232.

to zoom in on international prosecutorial discretion and commence the inquiry into the tacit understandings that shape prosecutorial discretion in international criminal justice.