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Argumentation and Discretionary Power

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ABSTRACT: This essay addresses the reasonableness of discretionary power, such as exercised by police, immigration officials, and teachers. Discretion is the power to interpret rules, to accept reasons given by individuals subjected to these rules, and to make judgments concerning their treatment. The essay articulates three faces of discretion, frames discretion as noumenal power, explicates the second-personal speech act structure of discretionary power, and concludes with a proposal for assessing the reasonableness of those encounters.

KEYWORDS: asylum, discretion, discretionary power, noumenal power, reasonableness, second-personal speech acts

1. INTRODUCTION: WHY FOCUS ON DISCRETIONARY POWER

Let me begin with three reasons why argumentation scholars should focus on discretionary power.

First, it is a ubiquitous form of power shaping our public and professional lives: we see discretionary power in our encounters with police, with administrative agents deciding our eligibility for social benefits, with immigration agents deciding where we may live, with child psychologists formulating education plans for our children. And in our roles as professors, when granting or denying requests from students, when assessing colleagues' applications for tenure and promotion, and when saying yes or no to requests for university service. In each of these encounters, reasons are exchanged, evidence is presented and assessed, judgments are rendered and communicated, and appeals are made and heard. In some encounters we occupy the role of the discretionary agent entrusted with the authority to issue judgements and make decisions, while in others we are the target, the one assessed and evaluated.

Second, the present moment is ripe for examining the use and abuse of discretionary power: consider the demonstrations over the abuse of discretionary police powers by the Black Lives Movement; or the vociferous public protests over the management of COVID-19; or the public uproar in Israel over proposals to limit the discretionary power of the judiciary by weakening its "reasonableness doctrine" for reviewing executive and legislative decision-making (Kingsley, 2023); or the stripping of the discretionary power of the environmental protection agency in the US to regulate air and water pollution (Liptak, 2023). Discretion is the lifeblood of administrative law. It has grown in importance with the rise of the welfare state and the concomitant rise of bureaucrats charged with making determinations of entitlement, as well as the necessity of professional experts for

managing wicked collective action problems. The increase of discretionary power has always been met with popular resistance. Presently it seems to have reached a fever pitch as those on both the left and right make calls for limiting discretion, such as “defunding the police” and “deconstructing the administrative state.”

Finally, the analysis of discretionary power is fertile ground for reflecting on and, perhaps, revising three central precepts of argumentation theory. By investigating how argumentation animates discretion we can reflect on how *power* operates in and through argumentation. By examining the speech acts at play in discretionary encounters—in particular, those acts of demanding, requesting, and pleading that operate as “second person calls” to open disagreement space, to revise our normative standing vis-a vis one another, and to shape and modify the space of reasons—we can gain a clearer understanding of the inherent *relationality* of argumentation. And, finally, by taking a closer look at how *reasonableness* operates as both the method for exercising discretionary power and the standard of review by which it is assessed we can gain critical insights into its nature.

2. THE THREE FACES OF DISCRETION

Discretion is the capacity to make discriminating authoritative judgments. More specifically, it is the ability afforded to exercise choice between two or more courses of action, each of which is legally permissible, ethically appropriate, and epistemically sound, though not in equal degrees.

Discretion has both structural and epistemic dimensions. On the one hand, as Anders Molander (2016) notes, the *structural* dimension of discretion is the authority afforded to an agent to make autonomous judgments and decisions, with the degree of autonomy granted comprising the scope their discretionary power. On the other hand, this autonomy is granted on *epistemic* grounds—on the presumption that the agent makes those decisions based on sound reasoning in the face of indeterminacy and justifies them with good reasons (with “good” cashed out by the target being able to recognize the agent’s decision is justified by the fair application of generalizable warrants, while being sensitive to the character of their individual circumstances). These are descriptive and normative dimensions: describing the basic work of discretion but also setting normative expectations for which discretionary agents are held accountable. Discretionary agents can fail on either dimension. They can overstep their authority or fail to exercise their ascribed powers. And they can fail epistemically by substituting faulty heuristics for sound reasoning, over relying on categorical judgments when assessing situations, not using argument schemes appropriately, or insufficiently articulating the reasons underwriting their decisions.

Discretion is a multidimensional concept, referring to three analytically distinct but often overlapping powers. I refer to these distinct powers as the three faces of discretion. Each face refers to not only form of power but is also exercised through distinct forms of argumentation and is assessed with distinct standards of reasonableness.

The first face of discretion is *the power to decide and distribute*. We most commonly understand discretion as the authority to decide between competing options, each with distinct advantages and disadvantages. This authority often entails the power to render those decisions into policies for governing behavior and distributing goods. Examples include leaders choosing between competing policy options, financial agents

making investment decisions, police officers detaining and using force against suspects, bosses commanding workers' behavior, parents making decisions for their children, and individuals choosing and justifying how they spend their time and money. The argumentation accompanying this face of discretion often takes form as practical reasons and arguments (Lewinski, 2021), with agents justifying their decisions in terms of the potential benefits of the decision and those opposing the decision arguing that the costs are too high for the decision to be acceptable. Those opposing the decision may also contest the authority of the decision-maker and argue that the decision is illegitimate (Lewinski, 2022). Assessments of this form of discretionary power often operationalize reasonableness in terms of *prudence*, making wise judgments in the face of contingency and *duty*, carrying out the obligations and fulfilling the responsibilities of an office (Hicks, 2008).

The second face of discretion is *the power to interpret and enforce*. Discretion also refers to the power to interpret, apply, and enforce laws, rules, guidelines, and standards. Examples include judges adjudicating legal claims, bureaucratic agents, such as immigration officers, reviewing asylum petitions, social workers determining eligibility for public benefits, or EEOC and Title IX officers overseeing investigations and making rulings on allegations of harassment and discrimination, as well as the examples of our work as professors described above. The argumentation accompanying this face of discretion is interpretive in nature (Langsdorf, 2007), with agents assessing the correspondence, or lack thereof, between a stated norm and actual behavior or, more broadly, from a general rule to a specific case. The work of statutory interpretation and the concomitant arguments justifying a particular interpretation serves as an exemplar of this form of argumentation (Walton, Sartor, and Macagno, 2018). Assessments of this face of discretionary power, which occur when rulings are appealed, often operationalize reasonableness in terms of the agent's *fidelity* to the law, rule or guideline and *fairness* to involved parties.

The third face of discretion is *the power to disclose and expose*. Discretion, finally, refers to the power to share private information about oneself or others. This is what we mean when we ask someone to be discreet. Examples include disclosing personal details about one's life in public settings, people gossiping about a friend, family member, or colleague, the collection and sale of a person's internet browsing history to data brokers, media outlets publishing sensitive information about public figures or national security, and the limits placed on officeholders to classify and declassify state secrets. This face of discretion concerns revealing information as a means of pressuring a person or an institution to account for their beliefs and actions. And one important type of information that may be revealed is the presence of disagreement itself; the decision to publicize a difference of opinion and initiate argumentation as means of pursuing accountability may have profound consequences for the relationship between the parties, be that an interpersonal relationship or a political-institutional relationship, say between a whistleblower and a corporation. Mark Aakhus (2010) refers to this kind of argumentation as "transparency work." Given that this face of discretion involves why, when, and where to surface disagreement and initiate argument, assessments of this form of discretionary power often operationalize reasonableness as *appropriateness*, especially in terms *propriety* and *respect*.

While these three faces of discretion often operate in tandem, it is important to retain their analytic distinctiveness because they invoke different standards of reasonableness. Some of the most unfortunate abuses of discretion, such as police misconduct and the failure of private equity managers to perform their fiduciary duties, has been the result of the (sometime intentional) misapplication of the standards of reasonableness pertaining to one of the faces for the other (Hicks, 2002; Hicks and Dunn, 2010).

3. DISCRETIONARY POWER AS NOUMENAL POWER

Discretionary power is not unlimited but bound by professional and communal norms formulated in statements of mission, policy, and protocol. Which are rarely airtight; rather, agents must interpret them considering contingent circumstances and apply them to unfolding situations. Moreover, they must do so in relation to stated purposes, goals and ever evolving strategic priorities. These interpretations become the basis for decisions, expressed as justifications and articulated in terms of the distribution of benefits to, or the issuing of sanctions for, the target of discretionary power. Discretion, then, is interpretive power coupled with the authority to enforce that interpretation on the behavior and bodies of others.

Since these professional and communal norms are themselves conditioned by a series of indeterminate normative standards, expressed by terms such as ‘adequate’, ‘appropriate’, and most commonly, ‘reasonable’, discretionary power is, ultimately, the power to decide what is reasonable and what is unreasonable. That is, discretionary power is the authority afforded to define the situation in such a way as to give life to these norms, to determine when and how to apply them, and, crucially, to assess an actor’s attempts to reason within these norms as either immaterial or dispositive.

Discretionary power is, therefore, the capacity of an agent to “influence, use, determine, occupy, and even seal off the space of reasons for others” (Forst, 2015, p. 116). What Rainer Forst (2015) refers to as noumenal power: the ability of an agent to intentionally shape the space of reasons of the target in a way they would not have done without the interference of the agent—with the space of reasons conceptualized as the normative space of freedom and constraint in which the reasons motivating how one feels, believes, and acts are formulated and justified. In the context of discretionary power encounters, noumenal power is exercised by the agent determining what counts as reasons and how those reasons can be expressed—including how they must be formulated to be considered relevant, when they can be uttered in the encounter to warrant consideration, the criteria for determining if they are sound or fallacious, and what sorts of response the target’s reasons deserve from the agent.

4. DISCRETIONARY POWER ENCOUNTERS: THE POLITICAL ASYLUM PROCESS

While discretion is an important concept itself, by reconstructing the argumentative character of concrete discretionary power encounters we see some its key features more clearly. Features that show us that discretionary power encounters are a unique context of argumentation deserving of further study. To illustrate, let's take the United States Citizenship and Immigration Service's (USCIS) description of the process for requesting political asylum in the US, describing the process as it unfolds across successive stages (USCIS, ND).

In the US migrants have one year to request political asylum, providing that they can demonstrate a "reasonable fear" of facing persecution or torture upon returning to their home country. Let's call this "request" made by the target the initial stage of the discretionary encounter.

If the UCIS gives uptake to the request—meaning that they elect to review it, which is in no way certain, and may take a long time—then, a "credible fear interview" with an asylum officer is scheduled. The purpose is to determine if migrant's "fear" is indeed "reasonable"—operationalized as the migrant providing sufficient evidence to establish a "significant possibility" that they will face persecution or torture. Let's call the agency's decision to give the target's request uptake the second stage of the discretionary encounter, and the "credible fear interview" the third.

What is most striking about the interview is its explicit adversarial framing. The UCIS does not stipulate what evidence migrants need to present to demonstrate their fear as reasonable. Rather, the asylum officer makes this determination during the interview. Asylum officers are directed to test the credibility of the migrant's claims—which are advanced by their testimony and the supporting witnesses and documents they can muster to back up their testimony—through the speech acts common to interrogations: asking the same questions over and over, demanding migrants repeat their narratives multiple times to look for inconsistencies, and throughout the interview casting doubt on the migrant's standpoint by telling them that they don't believe them. The form and force of the speech acts comprising the interview make it clear that the officer's determination of reasonable fear is not taken only from the migrant's verbal claims but by reading the migrant's affective displays and bodily reactions as "evidence" of those claims; that is, the officer exercises their epistemic discretion in their analysis of the migrant's interview performance.

The officer conducting the "credible fear interview" does not, however, have the discretion to grant the request for asylum. If the asylum officer finds that migrant's fear is indeed reasonable, they write a report documenting the case and this report becomes the official "application" for asylum that is submitted for agency review. Let's call this transformation of the migrant's "request" into an "application" the fourth stage of the encounter. And the fifth stage is the subsequent "asylum merits interview" with a senior officer.

The purpose of the merit interview is to determine if the migrant is legally eligible for asylum, which is largely a matter of reviewing their past actions and known associates for evidence that were not complicit with acts of persecution in their home country, they have not engaged in criminal activities, and that they are not associated with a terrorist

group. While this interview is officially farmed as “non-adversarial” it is not necessarily less harrowing for the migrant, as it will likely focus on the most intimate acts and relationships of the migrant’s life, as the officer looks for possible reasons for ineligibility. If the “merits” interviewer finds the migrant is legally eligible, the case is advanced for review by an immigration judge, the sixth stage of the encounter. The judge may either review the case file on its own, or demand that the migrant come in for an additional interview, if they feel additional evidence is needed (a possible seventh stage).

The immigration judge’s review is final and cannot be appealed. If the judge finds the migrant’s fear to be reasonable, the request is granted (and the migrant tries find a home and get the official paperwork that will allow them to work, which entails a host of ongoing discretionary encounters); if the judge finds the migrant’s fear to be unreasonable, the migrant is scheduled for deportation.

Granting that this is an all too abstract account of the asylum process, I believe that briefly reflecting on the unfolding of this encounter affords two potential insights.

5. CONTEXTUAL FEATURES OF ARGUMENTATION IN DISCRETIONARY POWER ENCOUNTERS

Even this cursory description of the asylum process gives us, first, insight into some salient and, I believe, general features of the argumentation occurring in the context of discretionary power encounters. And by extension insight into some of the general features of the argumentative relationships enacted during those encounters.

There is marked *asymmetry* in knowledge and power performed in the encounter, with the agent able to demand extensive knowledge of the target’s life. While the target knows nothing of the agent’s life and is prohibited from seeking such knowledge.

These encounters are *intimate*. Targets must provide intimate details about their lives, such as sexual practices, psychiatric records, and detailed descriptions of familial relationships. Agents observe the target in their homes, at school, and at work and depend on those observations to make inferences about the target.

They are *affectively charged*. Not simply because the encounter may have severe consequences for the target. Affects themselves are often assessed in the encounter, with the target’s bodies and emotional displays constituting the evidentiary basis for the agent’s decision.

They are marked by *dispersed authority*. Often no single agent can make the decision. Thus, it may be hard to locate who is accountable.

Finally, the application of discretionary power is typically not a single isolated event but is *ongoing*. Targets may be required to have repeated, often stressful, encounters with agents.

While each of these features are easily identifiable in the asylum process, I think these are contextual features of most discretionary power encounters, be that the process of requesting welfare benefits, seeking reproductive health services, undergoing annual performance reviews, or pleading for an extension on an assignment. What differentiates the structure of discretionary power encounter is whether it is a matter of the target initiating the process by issuing a request or plea, such as the cases of requesting political asylum and pleading for an extended deadline, or is it a matter of the agent initiating the

encounter by issuing a demand, say in the case of a police officer directing movement, pulling over a car, or hailing a potential suspect to search them for contraband.

6. THE RELATIONALITY OF DISCRETIONARY POWER: SECOND PERSONAL SPEECH ACTS

A second potential insight can be gleaned from this account of discretionary power encounters: when examining the moment-to-moment unfolding of the discretionary power encounter—within the asylum process, and more generally—we see that its argumentative texture is organized less around the use and distribution of assertive speech acts than second personal speech acts. And, further, I take this to mean that both the structural and epistemic dimensions of discretionary power are enacted in and through the use and distribution of second-personal speech acts in the encounter.

There is a difference between assertive and second-personal speech acts. A difference that matters for understanding relational performances of discretionary power.

Assertives, as van Eemeren and Grootendorst (2004) explain, are speech acts in which the speaker asserts a proposition and commits themselves more or less strongly to its acceptability. Although the prototype of an assertive is the speaker guaranteeing the truth of a proposition, they more commonly express opinions on events or situations. Assertives include claims, statements, reports, explanations, suggestions, assurances, suppositions, and denials. And they rightfully occupy a central place in our conception of argumentation.

Second personal speech acts, and for our purposes think of demands, requests, and pleas, have a different normative pragmatic structure and function than assertives, however. Following Lance and Kukla (2013), second personal speech acts are forms of address in which ‘I’ address ‘you’ specifically, seeking that ‘you’ respond in a way consistent with our relationship, thereby affirming that relationship by performing it. For instance, if I invite you, who I consider my friend, to come to my house to hang out, then I am seeking that you accept my invitation on the basis of our friendship; if I later discover that you accepted out of a sense of obligation or that you felt sorry for me, then I would be justly hurt and may question our friendship. And if you must reject my invitation, I expect you to do so in a way consistent with our friendship. Or if I am a police officer demanding you show me identification, I expect you to obey me and, moreover, to perform your obedience in a way that clearly signals your recognition of my authority (by doing so immediately, without any furtive movements, and without the direct eye contact that may indicate defiance).

The most salient difference between assertives and second personal speech acts is that assertives are judgments about the world, its inhabitants, and their actions made by an arguer who stands apart—expressing a point of view on that world (quite literally a standpoint), with this viewpoint being either from her individual outlook (first-personal) or as representative of a generalizable outlook (third-personal). Second personal speech acts, on the other hand, call into being a specific relationship and do the work of assigning the normative statuses of the relational partners from within the relationship itself. Hence, each time “we” successfully perform a second-personal transaction our relationship is reenacted and the norms that underwrite it are reinscribed. The friendship deepens, police authority

is reaffirmed. Conversely, when these speech acts fail or are challenged—when your friend ghosts you or you turn your cell phone on to film the police officer—disagreement space is opened and the relationship with all the normative statuses it entails are open to revision. Which is why Lance and Kukla argue that second person speech acts “both depend on and make use of existing normative contexts and roles for their production, and call into being new relations and statuses that revise the normative structure of social space and action” (2013, p. 457).

Discretionary power encounters are organized in terms of second personal transactions. They have a call-and-response structure that underwrites the authority of the parties, and for which we must account to see the encounter from the target’s point of view. While doubtlessly there are an abundance of assertives issued in asylum decisions—most notably in the post-interview reports and the letters accounting for the final ruling authored by the agents—the unfolding of the argumentative process in the transaction between the agent and target occurs primarily in the interviews, which are, like all interviews, constituted by questions and answers, and the myriad of communicative functions accomplished via those questions and answers. For the target it is surely the experience of being interrogated and waiting for the agent’s response to their request that circumscribes what discretionary power feels like, something we may miss if we reconstruct the event in primarily as a series of assertions and defenses of standpoints. But even more generally the process is structured in terms of a request-response sequence, from the initial request for asylum all the way through the discretionary act of judge who grants or denies that request. The same sort of call-response sequence is common to most, if not all, discretionary power encounters. The operative difference being whether the sequence begins with a request by the target or a demand by the agent. The normative statuses and relations of power of the participants derive from the respective ability each is afforded to make requests and demands. Meaning that the structural dimension of discretion—the respective authority, or lack thereof, afforded to the agent and the target—is constituted through the distribution of these second-personal speech acts in the encounter.

We can see three types of second personal speech acts present in the asylum process, which I believe are common to discretionary power encounters: demands, requests, and entreaties. And while all three are types of directives—involving attempts by the speaker to bring it about that recipient do something—they are not interchangeable. Each presents different types of reasons which, in turn, license different forms of inference. Each imputes different responsibilities the parties have to one another as they consider those reasons. And, thereby, each affords parties differing degrees of freedom and constraint in choosing how to feel, think and act. That is, these second-personal speech acts give shape to the space of reasons the parties share. And navigating in and justifying from this space of reasons constitutes the epistemic work of discretion.

A successful demand imputes an obligation to the target to obey the speaker and to do so in a way that makes clear the reason they are obeying is a recognition of the speaker’s authority. That is, the target obey because they take themselves as relationally owing it to the speaker to perform the action. Demands, of course, fail when the target does not perform the proscribed action. But they can fail in other ways. For instance, if the target performs the act but in a way that makes it apparent that they are doing so not out of respect for the speaker’s authority but because it will shut them up and let the target get on with

their day. Demands perform a relationship of inequality, succeeding or failing to the extent that this inequality is made manifest.

Requests, on the other hand, perform a relationship in which inequality is suspended: in assuming the authority to make the request, the speaker also recognizes the authority of the target to freely decide whether to grant it. Requests, *contra* Searle, are not weaker forms of demands. Rather, they give the recipient what Lance and Kukla (2013) call a “petitionary reason” to grant the request: to do it for the speaker, considering the relationship in which they stand, as a means for enacting and extending that relationship. In other words, whatever reason I may have had for doing the proscribed action your request gives me a new reason to do it: for you, for us. Requests succeed to the extent that the target acts because of these petitionary reasons. Requests can fail in several ways. When the recipient feels they can’t deny the request for fear of relational repercussions, which is to say the request is taken as a disguised demand. Or the speaker’s entitlement to make the request is challenged because the recipient does not believe the speaker has the requisite authority to make the request of them or that they do not have access to the resources to allow for the performance of the proscribed action. While it easy to see how requests operate in interpersonal contexts, they also operate in discretionary contexts as well, as parties transact as customer and business owner, landlord and resident, police officer and suspect, teacher and student, or elected official and citizen, by issuing and responding to requests. If discretionary agents could not make requests, or if all their requests were heard as disguised demands, their jobs would be infinitely harder and we would have to conclude that all discretionary power is coercive, which it is not, nor do we want it to be.

Finally, entreaties perform, at least potentially, a renegotiation of the power in a relationship: The speaker first calls upon the target to grant them entitlement to issue a request, then, if acknowledged, proceeds to make it. If successful the speaker possesses a power that they did not possess before: the power to forward requests, issue invitations or, perhaps, make demands.

Common to the second personal speech acts that constitute discretionary power is that they are irreducibly relational—they do their work by presenting reasons whose form and force institutes and modifies the normative social statuses and moral relationships of the interlocutors. Hence, we should, I conclude, describe these argumentative encounters and all the labor performed by the arguers within them in terms of their relational qualities and assess them with reference to a normative standard of reasonableness tailored to account for these relational qualities.

7. CONCLUSION: TOWARDS A CRITICAL-RELATIONAL STANDADRD OF REASONABLENESS

Reasonableness has a dual character. On the one hand, it is way characterizing the competence of reasoners and their arguments. On the other hand, it is a way of assessing the fairness of the argumentative exchange, with a particular focus on how arguers’ approach and treat one another (Hicks 2003; 2008). We can see this at work in the various standards of reasonableness used in the three faces of discretion: prudence, fidelity, and propriety are used to assess the competence of discretionary reasoning and argumentation,

while duty, fairness, and respect are used to assess the reasonableness of the arguer's orientations and behaviors in the application of discretionary power.

While there has been much work on reasonableness as competence, with the concomitant fleshing out of its normative standards, much less work in argumentation theory has focused on explicating normative standards of relational reasonableness. To that end I propose that assessing the reasonableness of discretionary power encounters begin with two critical questions:

First, how do the discretionary agent and affected party approach and treat one another? This is *the procedural starting point of the argumentation*. A reasonable application of discretionary power requires the agent to justify the decision with reasons that are alert, alive and sensitive to the affected party. Reasons that are cognitively and affectively alive to the needs and desires of the affected party, reasons that are attentive to with the affected party's experiences, and reasons which are given in terms that the affected party can understand and accept.

Second, what are the normative assumptions constituting the relationship between the discretionary agent and the affected party? This is *the material starting point of the argumentation*. To determine what is reasonable we must interrogate the nature of the relationship between interlocutors, asking just what each party owes to the other—the forms of care, respect and dignity required to maintain that relationship. The normative force of a particular reason, as the most reasonable, does not stem from logical or moral principles antecedent to the situation at hand, but from the reflexive authenticity of the relationships, and their concomitant relational contracts, in which we stand.

My hope is that foregoing analysis of discretionary power and these critical questions can aid us in forming a critical-relational conception of reasonableness to sit beside the critical-rational conception that has proven so useful for assessing the epistemic dimensions of argumentation. A critical-relational conception that can animate an account of the argumentation occurring within discretionary power encounters that individuals and movements can use to make vivid the challenges to their oppressive relations and their aspirations towards a transformed web of relationships, ranging from the most intimate to the most institutionalized.

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