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Foreword
The Nature of Discretion

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On October 30, 1978, Daniel Barth, then a sixth grader in Chicago, was playing kickball on his elementary school playground. He collided head-on with another child and was immediately taken to the principal's office complaining of a headache and vomiting. Daniel's mother was called and she directed the school officials to take him to Holy Cross Hospital, which is located across the street from the elementary school. An ambulance was called, but it did not arrive for over an hour. Notwithstanding the closeness of the hospital and the instructions of Daniel's mother to take him there, the school officials waited for the ambulance to arrive. By the time Daniel was seen by medical personnel, irreversible brain damage had occurred that could have been avoided if Daniel had been treated within half an hour of his accident.

How, is one's immediate response, could the school officials have been so stupid as to delay taking to a nearby hospital a child with a possible head injury simply because an ambulance had not arrived? Why was not the child taken there immediately or at least shortly after the incident, during the time everyone was waiting for the missing ambulance? Well, it turns out that the school officials may have been less stupid than law-abiding. There was, and still is, a Board of Education rule that mandates that school children be sent to the hospital in ambulances. Although the origins of that rule are not completely clear, it probably resulted at least in part from unfortunate results accompanying other incidents when children were transported to hospitals by people untrained in the medical arts.

Notwithstanding the existence of the rule, which undoubtedly is not a rule that is self-evidently silly or perverse, a verdict for more than $2.5 million was

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returned by a jury and signed by the trial judge against the Board of Education for negligence in its employees' actions and against the city for negligence in failing to dispatch an ambulance promptly.[1] The jury must have concluded, and the judge must have concurred, that the school officials had discretion to send Daniel to the hospital without waiting for the ambulance to arrive, at least under the circumstances as they were on October 30, 1978, and, further, that the failure to exercise that discretion was actionable.

Now, one wonders, why is that? Indeed, why is it that most of us probably intuitively agree with the conclusion reached by the jury, although I suspect we also are at least a little troubled by the implications of the rule's existence. After all, here the school officials abided by a clear rule that by its terms unmistakably applied to the situation. But, did it really "apply" or did it only apply *initially* to the situation, in what lawyers might call a prima facie manner? Were there conditions of defeasance in either the situation or in the terms of the rule that indicated that the initial assumption of the rule's applicability was in error? Obviously so, in both the jury's view and that of those who agree with it. The question to be answered, though, is what are those conditions of defeasance or, alternatively, where are they to be found, for they most certainly are not in the rule itself.

My guess is that this last question cannot be answered very often with a particularity that goes much beyond referring to such matters as "common sense." To be sure, there might be an answer on occasion. There might be, for example, some other rule, a prior decision on similar facts, or a "principle" that appears applicable, but here there was neither a qualifying rule nor a prior decision, and we know there was some relevant principle only because of the now authoritative jury verdict. That verdict, though, does not rest on a previously specified principle, at least not on one more specific than a general admonition not to engage in thoughtless acts. An analysis of "thoughtlessness," of course, takes us back to the idea of common sense, and the circle closes.

What this case demonstrates is the unresolvable conflict in our culture between the desire to give authoritative guidelines in the form of clear, specific, coherent, and rational "rules" and the impossibility of doing so. We desire clear guidelines because we think it unfair to impose obligations where the lack of clear rules makes it difficult to conform conduct to the law's demands. Yet, clear and specific rules are simplistic of necessity; otherwise, they would quickly lose comprehensibility. Moreover, it defies human intelligence to anticipate all, or even a large share of the appealing circumstances, that a rule might encounter. The universe of social interaction is incredibly, indeed unknowably, complex. Each person operates in a web of relationships with enormous numbers of objects, people, and institutions in ever-changing combinations and permutations. And each of those relationships is made

1. Chicago Tribune, Nov. 9, 1984, at 1, col. 5.

more complex still by their interaction with the myriad manifestations of the self that each individual personality possesses.

What occurs when we write rules to govern social interactions is that the necessary simplicity of the rule clashes with the complexity of human experience, and out of that tension emerges, in large measure, our legal system. Think for a moment of the relationship between human experience and a rule that in many respects is completely unproblematic—the rule that drivers of vehicles must stop those vehicles at red lights. Any particular red light at an intersection in a large city must affect thousands of people a day, and each of those persons is completely different from all the others in disposition, in background, in personality, and in needs. Yet, we cut across that amazing diversity with a simple rule—stop at red lights.

The rule does not survive long in its simplicity, however, for "exceptional" cases soon come along that call for special treatment: a policeman chasing a criminal or responding to a call for help; firemen rushing to the scene of a fire; ambulances on missions of mercy. Moreover, the exceptions are not limited to official actors: a parent (or in the future perhaps a school official) rushing a child to a hospital; a pregnant woman on her way to give birth or an anxious relative on the way to join her; bride and groom, best man, or whoever, trying to get to the church on time. As these cases come up we make modifications of our rule, but human experience is too complex to allow us to anticipate in advance all the necessary exceptions, and if we tried to do so the resultant rules would be too complex to be usable. Thus, there is an ongoing process of rule and rule modification (of various kinds) that allows for amelioration of the simplistic rigor of rules in the context of fact situations as they develop. That amelioration will also, we hope, provide at least some rough guidance for the decision of similar cases in the future, although "rough" does seem to be the key term here.

This conflict between the simplicity of rules and the complexity of human experience lies at the heart of many of our legal institutions. It captures in large measure the nature of the common law; it describes, and perhaps explains, much of the legislative process; and, it also is the wellspring of the administrative process. Its operation goes by different labels, of course. In the common law process we refer to a system of precedent; in the legislative process we refer to legislative refinement or amendment; in the administrative process, and, interestingly enough, often in the judicial process, we speak of discretion.

In each of these dynamics, there is an ongoing reconsideration of the relationship between rules and human experience. In February of 1984, I was privileged to moderate a conference at Duke University School of Law where a number of distinguished scholars brought their considerable talents to bear on one aspect of the relationship between rules and human experience—the nature of discretion in law enforcement, in particular (but not limited to) the exercise of discretion by the police. This symposium contains the papers presented at that conference, and together they constitute a remarkable effort

at exposing and exploring the nature of "discretion" in law enforcement. They are more than that, though, for "discretion in law enforcement" is but a microcosm of that wellspring of our legal system—the conflict between the desire to provide clear guidance for action and the impossibility of doing so. I will briefly discuss each of the papers presented in the order they were delivered at the conference.

The conference opened with the presentation of Richard Uviller's paper,[2] which relates his observations gathered while spending a large part of six months on patrol with a group of police officers in the Ninth Precinct in New York City. Professor Uviller's paper is the perfect place to begin a consideration of the nature of discretion in law enforcement. His carefully related observations of the streets he patrolled, the people he encountered, and the men with whom he rode help vividly to recreate the real-life world within which choices by the police are made. The analysts of concepts like discretion must never be tightly constrained by such worlds, but they ought not to lose touch with them entirely, either. Professor Uviller's account goes a considerable distance towards opening for the analysts the doors to reality. Professor Uviller is himself one of those analysts, and his conclusions concerning rules and discretion are striking:

> Rigid rules tend to ossify individual responsibility and discourage individualistic thinking. Those who would shrink discretion obey the precept: "Treat likes alike." However, the overriding lesson of experience in our criminal justice operation is that every case is different. The major worry is that the people out there dealing with the problems will lose their appreciation of the differences between the cases and begin reacting to them as repetitive. There is nothing quite like a good set of rules *cum* guidelines to bring the common elements to the fore and obscure the differences. . . . The learned fact should be that crimes and criminals emerge from a rich variety of circumstances. Separately and in combination, the variants can never be fully anticipated or assessed; yet they are often critical to forming the just response.
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> So, to the widest extent practicable, I favor discretion.[3]

Perhaps Professor Uviller is correct; perhaps we should inhibit the impulse to constrain police officers by the proliferation of rules. Still, directly commensurate with the strength of the desire to reduce the strictures on policing ought to be the strength of the desire to increase the training of the police. The more we let them exercise their "judgment," the more we should be concerned about the factors that will inform that judgment and about how the skills of policing will be employed. Here, though, we run into the conventional view that the craft of policing cannot be taught—it can only be learned by experience. Whether wisely or not, that conventional view will dampen significantly any enthusiasm for reducing the scope of rules designed to regulate police behavior. If we cannot train them in a manner that gives us confidence that judgment will be exercised wisely, we will not increase further their freedom from formal constraints.

But, is the conventional view accurate? Professors David H. Bayley and

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2. Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, LAW & CONTEMP. PROBS., Autumn 1984, at 15.

3. *Id.* at 32.

Egon Bittner challenge that view in their paper.[4] They make a convincing argument that "the antinomy between policing as a craft and policing as a science is false."[5] They then proceed to make concrete suggestions for modifying police training in order to maximize the development of mature judgment by line officers.[6] To be sure, these suggestions may seem inadequate to prepare rookies for their first patrol, a feeling ironically fed by Bayley and Bittner's own discussion of the incredible complexity of the choices police officers face;[7] but one cannot also escape the impression that rookies would be much better prepared if this advice were operationalized, and indeed veterans would also be advantaged by the opportunity to share experiences in a somewhat orderly fashion along the lines suggested in this paper.

There is another factor that most of us intuitively would agree is relevant to the societal determination of the role and training of the police, and that is knowledge about them, their environment, and the nature and effectiveness of their interactions with the public. Notwithstanding the intuitive attractiveness of more knowledge about policing, resistance to rigorous studies of policing is a commonplace phenomenon, and more striking still, police forces often seem slow to respond to new knowledge about the police function. Both phenomena call for explanation. Why, in this society of ever-increasing technocracy, would not increased knowledge and awareness of the nuances of the police function be desired, indeed demanded, and then acted upon forthwith?

Professor Lawrence Sherman may provide at least a partial answer in his paper, *Experiments in Police Discretion: Scientific Boon or Dangerous Knowledge?*[8] The effect of knowledge, Professor Sherman argues, is a function of the theoretical matrix that knowledge confronts. To give an example of my own, if a country does not wish to have a navy in large part because of expense, the decision may also be justified by the belief that, since the world is flat, ships will simply sail off the edge of the world. Proving that the world is not flat will not change the decision, however, inasmuch as the real ground for the decision is an economic one. Furthermore, proof of the configuration of the world might be viewed as truly dangerous by those who oppose the navy on other grounds because it would remove part of their justification for not building it.

Professor Sherman develops this dynamic in the context of policing. He first explores three general models of policing—ministerial justice, police justice, and professional crime control—and then proceeds to demonstrate how the significance of knowledge of various kinds of matters may be viewed differently depending upon one's view of the appropriate role of the police.[9]

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4. Bayley & Bittner, *Learning the Skills of Policing*, LAW & CONTEMP. PROBS., Autumn 1984, at 35.
5. *Id.* at 36.
6. *Id.* at 53-55.
7. *Id.* at 46-48.
8. LAW & CONTEMP. PROBS., Autumn 1984, at 61.
9. The Note included at the end of this issue discusses one element of this role—namely, how arrest records, and the information contained therein, influence the exercise of police authority. Note, *The Impact of Arrest Records on the Exercise of Police Discretion*, LAW & CONTEMP. PROBS., Autumn

Indirectly, he also develops an even more troublesome point. His argument gives insight as to why some segments of the police community may positively resist rigorous study of certain aspects of the police function. If a segment of the police community knows or intuits that some authority will bring a different set of assumptions to bear on an analysis of data that is generated, that segment will understandably fear that the reviewing authority will not "understand" the aspect of the police function examined. Thus, the data will mean something different to the reviewing authority than to the police. When that happens, the reviewing authority might get the itch to meddle which, of course, is to be avoided if possible. If the data are never generated, the problem is avoided.

Professor Sherman also points out that another source of resistance to developing knowledge about the police function is that it may generate conclusions with which no one wants to deal. What if, for example, we conclude that arresting black males, or white females, or any other category of individuals, has a significantly greater impact than arresting members of some other group, or that warnings to members of that second group are as effective as arresting the members of the first group? Should we then begin to make decisions on that basis, or is that the essence of discrimination? When, in short, does rational categoric thinking become stereotypic thinking? As long as no data indicate that groups may be distinguished based on the efficacy of differential interventions, the problem need not be faced directly. Thus, one can appreciate why police forces may resist the generation of data that can only, from their perspective, cause problems. Without such data, the police can more or less handle things as they like; with the data, they are subject to the criticism of acting irrationally or discriminatorily.

Professor Albert Reiss's work[10] is an enlightening complement to Professor Sherman's. Professor Reiss takes the mix of issues, factors, and variables that together provide the context for the police and their function and organizes them into two competing models—compliance and deterrence—both of which are different in significant respects from the models employed by Professor Sherman. Professor Reiss's main theme is that the police have adopted a deterrence model of law enforcement, whereas most of the work they do is compliance oriented. This has a number of important consequences that Professor Reiss explores, including such matters as the police engaging in a substantial amount of activity the formal justification of which is not clear, and the fact that much of police training is unresponsive to the police role on the streets.

Professor Reiss also adds to our understanding of the nature of the discretionary choices the police face by exploring that issue from a perspective different from that of the earlier writers. In particular, he adds the problem

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1984, at 287. The particular view of the appropriate role of the police will, of course, affect decisions on how this knowledge should be used.

10. Reiss, *Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion,* LAW & CONTEMP. PROBS., Autumn 1984, at 83.

posed by the fact that different levels of the police hierarchy face different kinds of choices and are subjected to different kinds of pressures and interests.[11]

The lesson that Professor Reiss draws from his effort is that we must consider what ought to be the appropriate mix of compliance and deterrence elements in our model of the police function.[12] That is an important lesson, but I think another important lesson emerges from the juxtaposition of Reiss's and Sherman's work. For me, one of the enlightening aspects of these two analyses is the remarkably complicated ways in which we can conceptualize the police function. The richness of the analyses is impressive in itself, but it is also significant for unearthing the factors relevant to the police function and for beginning to suggest the various ways that those factors can be organized. Such understanding is a crucial step toward rationally organizing and directing the police.

No matter what model of the police function is eventually adopted, however, it surely will not purport to eliminate "discretionary" choices of all kinds. A model of a police agency that does not contain some room for choice on some issues is difficult to imagine. The range of choice and the range of issues are variables—whether, for example, choice centers on less controversial matters such as uniform regulations or extends to more controversial matters such as enforcement policy—but discretion in one or more of its manifestations will persist. In deciding how the police should be structured and what powers they should possess, an appraisal of what powers they currently hold will be of some interest. There is, though, less than full agreement on that issue, as an exchange I had with Kenneth Culp Davis indicates.[13] Professor Gregory Williams has now added his views on this intractable problem and he has done so in a very impressive manner.[14]

Professor Davis and I argued over the extent to which the police could be analogized to a typical administrative agency, and thus be subject to analogous rules and regulations. One aspect of this inquiry is the authority the police have over the substantive content of the "problem" they are charged to "administer." That issue requires that the relationship of the police to a series of doctrines such as delegation theory, separation of powers, due process, and the full enforcement statutes be worked out. Davis and I entered that thicket and now Professor Williams has joined our safari and, I must say, advanced the mission considerably on several fronts.[15]

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11. *See id.* at 88-89.

12. *See id.* at 122.

13. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62 (1976); Davis, *Dialogue on Police Rulemaking. Police Rulemaking on Selective Enforcement: A Reply*, 125 U. PA. L. REV. 1167 (1977); Allen, *The Police and Substantive Rulemaking: A Brief Rejoinder*, 125 U. PA. L. REV. 1172 (1977).

14. Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, LAW & CONTEMP. PROBS., Autumn 1984, at 123.

15. In fact, Professor Williams's work, which is a part of his Ph.D. dissertation in political science, was in large measure the impetus for this symposium.

What is immediately obvious about Williams's effort is its remarkable erudition. His prodigious scholarship makes my efforts, at least, pale by comparison. More important, he has turned up and pointed out some interesting matters. He has injected into the debate the implications of the history of law enforcement agencies, in particular the history of sheriffs, a point not considered by Davis or myself. He has examined the full enforcement statutes and their etiologies more carefully than anyone. He has collected all the relevant cases more thoroughly than ever before. He has even convinced me that I was too hasty, if not in error, in a position I articulated in my earlier work, which unfortunately is no mean feat. He has persuaded me that much of the low visibility activity of the police may be highly analogous to the subject matter of typical state delegation theory,[16] and that my conclusion that state theories of delegation would not readily permit delegation of any substantive rulemaking authority should therefore be rethought in light of his discussion.

Not all aspects of Professor Williams's paper are as convincing, however. Much of what he has uncovered and collected needs to be developed, as I am sure it will be. For example, he asserts that the history of the office of sheriff must be considered in an analysis of the role of the police.[17] He does not explain why that is so, even though he admits that their origins "may be somewhat different."[18] In fact, later on in his article, he points out that "police scholars have found that sheriffs in the United States [in the early 1900's] generally considered the law enforcements aspects of their jobs to be very unimportant and that few sheriffs took their law enforcement tasks seriously."[19] If that is so, it is difficult to see what relevance the history of the office of sheriff possesses for an analysis of the police, and Professor Williams does not supply the answer.

His discussion of some of the case law is similarly incomplete. For example, he cites *Gowan v. Smith*[20] as support for the proposition that full enforcement statutes need not be taken seriously because the police obviously may engage in discretionary decisionmaking.[21] Unfortunately, the case cannot be read to stand for that proposition. In the first place, the quoted material Williams relies upon is from a plurality, not a majority, decision. Second, the issue before the court was whether mandamus should issue, not whether the police had unbounded discretion not to enforce the law. In fact, the problem was not that the police were not enforcing the law; the problem was just the opposite. In the court's words:

> The averments of the petition clearly indicate that the police commissioner of the city of Detroit does not refuse to enforce the law in the only manner in which he can legally enforce it, . . . but, on the contrary, that he has made so many complaints . . . that the same have been pending in the recorder's court without trial.[22]

16. *See* Williams, *supra* note 14, at 159-61.
17. *Id.* at 130.
18. *Id.*
19. *Id.* at 143-44.
20. 157 Mich. 443, 122 N.W. 286 (1909).
21. Williams, *supra* note 14, at 137-39.
22. 157 Mich. at 470, 122 N.W. at 295.

That is not rousing support for the right of the police not to enforce the law unless, of course, there is more to be said about the matter.

In part, these and similar difficulties exist because Professor Williams is attacking a strawman. He has set up my work as an example of those who would deny the police any discretion in law enforcement, and he then proceeds to destroy, very effectively, that position. The problem is that I never took that position, nor has anyone else to my knowledge. My position was that substantive rulemaking was inappropriate—rulemaking that affects the substantive scope of the criminal law—which in some measure explains the title of my article, *The Police and Substantive Rulemaking.* Curiously, Professor Williams for all his criticism of my position, accepts it. In his discussion of another case, he states that it "is a case involving a type of rulemaking which is not at issue in developing law enforcement rules."[23]

Perhaps my criticisms are misdirected. If so, I am sure that Professor Williams soon will set me straight. This manuscript is one of his first works, and its publication quite clearly heralds the arrival of another significant theorist who is interested in the police. The merits of his effort are substantial and whet the appetite for the things that surely are to come.

Appetites for things to come were whetted by another relative newcomer to the ranks of those who think and write about the nature of discretion in law enforcement, David Linnan. Mr. Linnan has spent a considerable period of time in West Germany studying various aspects of the police of the federal state of Baden-Wuerttemberg, and his contribution to the conference was a thorough presentation of both the theoretical role of the police in German law as well as a discussion of the studies that have been done of the exercise of discretion by the police in West Germany.[24]

Mr. Linnan's effort is significant in at least two respects. Notwithstanding the periodic fascination of American scholars with the German legal system, in particular the German system of criminal law, there has been very little in the way of careful and meticulous description of that system. Linnan's work fills that gap somewhat by, for the first time, making available to English speaking scholars a careful description of the formal institutional relationships of the police in one state of West Germany.

The second significant aspect of Linnan's work is that it provides some support for the intuitive notion that once serious studies of the police in West Germany were done, they would begin to look much more like their American counterparts than was suggested by the crude presentation of German theoretical relationships in earlier American work. For example, German law specifically recognizes certain forms of discretionary choices that appear similar to those exercised by police in the United States.[25] Moreover, despite the theory of prosecutorial control of criminal investigations, "the police are in

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23. Williams, *supra* note 14, at 156.

24. Linnan, *Police Discretion in a Continental European Administrative State: The Police of Baden-Württemberg in the Federal Republic of Germany,* LAW & CONTEMP. PROBS., Autumn 1984, at 185.

25. *Id.* at 204-06.

practical control of the pretrial investigation,"[26] as they are, of course, in the United States. As a result, the police in fact determine who will be brought to the attention of the prosecuting authorities.[27] Thus, as Linnan explains, police supervision in its peacekeeping function diverges from theory as does the relationship between police and public prosecutor.[28]

There are other apparent similarities between law enforcement in Germany and in the United States. For example, despite the theory of the police being closely supervised by, and subordinate to, civilian authorities, "in practice the police are established as an independent organization."[29] As in the United States, West German police will apparently "deemphasize fighting crime in favor of maintaining public order."[30] Even the most cherished of our myths about the German criminal justice system, that there is an absence of plea bargaining, is at least indirectly questioned by Linnan's work. Threatening harsher sanctions for those who do not plead guilty is the central theme of plea bargaining in the United States, but it is not supposed to occur in Germany. Nevertheless, one study of the police that Linnan reports found an inclination among the police to punish offenders, at least with fines, if they were not polite or did not acknowledge that they had violated the law.[31]

This brief description barely scratches the surface of Linnan's detailed, sophisticated, and interesting account of the West German police. He has promised us the results of an empirical study he conducted in Germany, and I for one will look for it with keen interest.[32]

The next presentation at the conference changed the focus of inquiry somewhat. Professor Abraham Goldstein presented some of the fruits of his work on the Federal Victim and Witness Protection Act of 1982.[33] The Act modifies the role of the victim in federal criminal prosecutions, and Professor Goldstein carefully relates the nature of that modification. The piece is valuable for that effort alone, but it does much more than that.

What the Act does, and what Goldstein analyzes, is to inject into an ongoing system a new agent who has, or may have, a certain amount of power and authority. What we see in Goldstein's piece, then, is an analysis of a system in change. This new agent—the victim—intrudes into the reasonably stable preexisting relationships within the system. That has the predictable result of stimulating a conservative reaction from those whose own positions of authority and power may be affected by this new development, a reaction further stimulated by the ambiguity of this new agent's role. Once more, further study of this phenomenon should prove quite interesting. The now

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26. *Id.* at 202.
27. *Id.* at 203-04.
28. *Id.* at 202-06.
29. *Id.* at 210; *see also id.* at 210-12.
30. *Id.* at 218.
31. *Id.* at 214-15.
32. *Id.* at 185 n.*.
33. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, LAW & CONTEMP. PROBS., Autumn 1984, at 225.

disturbed system, I would predict, will attempt to reestablish equilibrium either by eliminating or eviscerating the role of the intruder or by accommodating it in a fashion yet to be determined.

Professor Harold Pepinsky's contribution to the conference, *Better Living Through Police Discretion,*[34] introduces a number of new and interesting ideas. Perhaps centermost is the suggestion that there is a relationship between discretion and accountability. This proposition is "proved" by the observation that "[a]ccountability is . . . synonymous with responsibility. Having to answer for one's actions makes sense only if one could have chosen to do otherwise . . . . Discretion . . . means choice of action. Hence, accountability implies discretion."[35]

Maybe, but it strikes me that the matter is more complex than this argument allows. If, for example, one could have "chosen to do otherwise" in the sense of having an unreviewable authority to do so, then there is nothing to answer for when that choice is made. In that case, then, choice does not imply accountability even though it may imply responsibility. If, on the other hand, the phrase "could have chosen to do otherwise" means having the power, even if illegitimate, to do "otherwise," then "discretion" becomes so broad as to be meaningless. Without denying, then, that there might be much more to be said about the matter, it does strike me that this idea is not yet convincingly developed.

Two other aspects of Pepinsky's argument are more developed, though. First, he cogently argues that the conventional belief that rules curtail discretion may be in error. Rules, in fact, may create discretion in the sense of choice or ambiguity both by disrupting normal methods of interacting and by creating ambiguity as to what the appropriate standards are under the rules. Second, Professor Pepinsky makes an appealing plea to hold the police accountable to the residents of the districts they patrol for their exercise of "discretion."

The conference closed with a discussion of Professor George Fletcher's paper.[36] In most of the preceding papers, the word "discretion" or a synonym appeared relatively prominently. The lesson of Fletcher's work is that its prominence may be matched by its ambiguity. In the tradition of the analytical philosophers, Fletcher goes about the task of unpacking the concepts to which the word has been used to refer. He develops a taxonomy of meaning that is a very useful addition to our understanding of the set of ideas that proceed under that label and, further, he shows the great capacity for confusion that can result from failing to be clear about precisely how the word is being employed.

Professor Fletcher furthers his argument concerning the ambiguity of the word "discretion" by introducing the idea of prerogative. Certain uses of

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34. LAW & CONTEMP. PROBS., Autumn 1984, at 249.
35. *Id.* at 250 (footnote omitted).
36. Fletcher, *Some Unwise Reflections About Discretion,* LAW & CONTEMP. PROBS., Autumn 1984, at 269.

"discretion" more comfortably fit with our common language conception of "prerogative," the argument goes. In particular, when Congress legislates, or the President either pardons someone or appoints someone to the Supreme Court, it would be difficult comfortably to call such acts "discretionary," even though all of them fit into one or another of the ways the word is employed, all too loosely, in legal discourse.

By invoking the idea of prerogative, Fletcher does demonstrate the ambiguity of the word that is the centerpiece of this symposium. Moreover, he argues that invoking the concept advances the making of important distinctions. "Discretion," he thinks, is best utilized to refer to a situation when "[t]here is in the background a sense of a higher authority's approving and tolerating the discretion . . . . This does not seem to be the case with matters of prerogative."[37] At this point, I am unconvinced. It strikes me that it is not true that "No one could lay down a set of rules to tell Congress how to legislate. No one could specify, conclusively, the standard for presidential mercy. No one could specify a determinative set of criteria for selecting Supreme Court nominees. These are matters that are intrinsically free of regulation."[38] These may be matters *relatively* free of regulation, but that is because of our political choices rather than anything "intrinsic" to these matters. Furthermore, we do construct a set of rules telling Congress how to legislate. Some are formal, like the equal protection clause; others are informal, on the order of political influence. Similarly, we construct an informal set of rules, enforced by the political process, on the presidential pardon power, and there are both formal and informal restraints, both with substantive meaning, on the appointment process.

Admittedly, these are not "conclusive" sets of rules, but neither is any other set that Professor Fletcher has addressed. Thus, it must not be the conclusive aspect that is of importance. With that idea removed, it becomes apparent that the word "prerogative" does not adequately distinguish such matters as the legislative process or certain executive functions either from each other or from other matters that Professor Fletcher apparently feels are more aptly characterized as discretionary, at least not along any line that Fletcher has developed. In all of these cases, there is in fact "in the background a sense of higher authority's approving and tolerating the discretion."

Ironically, though, it is not that Fletcher's argument is unconvincing; it is instead precisely the opposite—it is very convincing. So much so that the effort to introduce another word under which very different entities are grouped falls easily under the power of the earlier analysis. There are indeed similarities as well as differences among the concepts grouped under the label "prerogative," but those similarities and differences seem no greater than those that exist between the concepts labeled as "prerogative" and those labeled as "discretion." Thus, it is not that what he refers to as matters of

37. *Id.* at 282.
38. *Id.*

prerogative are not different from what he may refer to as matters of discretion. It is instead that all of these matters are different from each other.

What, though, is the significance of that? Is it simply to make the trivial point that language is not perfect? Perhaps, but I think there is more to it than that. Much of Fletcher's argument, and indeed much of what is contained in this symposium, proceeds as though "discretion" is an attribute or entity possessed by individuals. Fletcher has tried to show that what is possessed is not a singular entity but instead has varying manifestations. So far as it goes, that seems right, but it does not go far enough.

What is referred to as "discretion," supplemented by ideas such as "prerogative," is not so much an attribute or entity of a person as it is a description of a relationship. Moreover, every relationship differs from all others. That of prosecutor and cop is different from President and Congress or President and the body politic. The real lesson that underlies Fletcher's work, as well as that of the other authors here, is that the nature of those relationships must first be explored and then we must, to the extent possible, make choices concerning the scope of authority we wish specific actors to possess and the nature of accountability that we wish to impose upon them. We must, in short, face the bewildering complexity of human experience as forthrightly as possible, recognizing that it may be too complex to order rationally, but perhaps concomitantly recognizing that in the effort lies a large portion of the challenge of the human experience. Professor Fletcher is right; we must probe the nature of the endless variety of relationships that confront us, and not shield ourselves from that task by rationalizations, reductionist or otherwise.

That, at least, is the lesson I have derived from the privilege of studying and thinking about the essays in this volume. I suspect it is now time to let the reader begin his or her own process of discovery.