



## A Brief Introduction of the Puzzle of Discretion

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Discretion arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances. At root, discretion is about power and judgment. Not surprisingly, discretion is the focus of countless law and policy initiatives designed to preserve, enhance, check, limit, shape, or eliminate discretion in a host of different settings. The articles in this special issue of *CJLS/RCDS* canvass settings as diverse as prosecutors, border guards, universities, and immigration decision makers. It generates heated political debate, excited social commentary, and intensive scholarly explorations. The question of discretion is both compelling and confounding. As early as 1935, John Willis famously urged scholars to attend to “what actually happens” in the context of administrative decision making. However, studying “what actually happens” is often harder than it sounds, and theorizing discretion in ways that move beyond a binary understanding of law/discretion is a daunting challenge. We believe this challenge can and should be addressed through interdisciplinary insights and dialogue.

“Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”<sup>1</sup> Ronald Dworkin’s oft-cited “doughnut analogy” neatly encapsulates the conventional view of discretion. Three main assumptions are embedded in this view: that law is the primary instrument of social regulation, that discretion is a residual category of law, and that this discretion is exercised by individuals who, though influenced in a wide variety of ways, are essentially autonomous. While recent scholarly analyses of discretion have begun to revisit and challenge this conventional view, its core assumptions nonetheless continue to underpin political discussions, policy debates, and judicial case law to such an extent that the conventional view of discretion sets the parameters of imagined policy and legislative reforms related to its use. To introduce this *CJLS/RCDS* special issue on discretion, we begin with a brief, critical review of the academic literature on discretion.<sup>2</sup> Discretion has long been the focus of scholarly and policy-related discussion and analysis in the field of criminal justice, and some of the conventional concern for discretion as a “problem” is rooted in the

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<sup>1</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 77.

<sup>2</sup> Portions of this introduction are drawn from Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005).

literature on police, prosecutorial, and judicial discretion over criminal law enforcement.

What we have termed the conventional paradigm of discretion is captured by the observation that where the law ends, discretion begins: whereas the rule of law is seen as intimately connected to notions of justice, discretion is more open-ended. As Philip Anisman observed in the first significant attempt to catalogue discretionary power in Canada, the exercise of discretion does not in and of itself suggest any particular value; depending on the context and the actions of a discretionary decision maker, discretion may mean beneficence or tyranny, justice or injustice, reasonableness or unreasonableness.<sup>3</sup>

A standard dictionary defines discretion as “the power or right to decide or act, according to one’s own judgement or choice.”<sup>4</sup> In the context of the administration of public law and policy, the “freedom to choose” of autonomous decision makers is defined in natural opposition to the constraints imposed by legal rules. Indeed, the same dictionary defines “arbitrary” (arbitrariness being the most prevalent concern associated with discretionary decision making) as “subject only to individual will or judgement, without restriction; contingent only on one’s discretion: an arbitrary decision . . . having unlimited power; uncontrolled or unrestricted by law; despotic; tyrannical.”<sup>5</sup> The idea of discretion is thus heavily inflected with liberal assumptions and ideals relating to the power of law, autonomy, and freedom of choice. Whether discretion is regarded benevolently or critically, its essential and inextricable binary relationship to law is largely taken for granted.

This legal construct assumes, in its most extreme form, that law and discretion are discrete and distinct entities that are negatively correlated: more law means less discretion, and less discretion means more law. The policy implications of this view of discretion are significant. The view that the only meaningful constraint on discretion is law leads to a primary analytical focus on the “surrounding belt of restrictions” rather than on the “hole” of discretion. Where discretion is constructed as a problem (usually expressed in terms of “arbitrariness”), solutions are most frequently sought through the development and application of even more legal rules to constrain, shape, and guide the use of discretion. This view also reflects the conceit that discretion can be eliminated and that legal rules, when not framed in discretionary terms, are somehow self-executing.

Until the advent of the welfare state, the dominant scholarly view was that which received its classic articulation in 1915 by A.V. Dicey,<sup>6</sup> that discretionary decision making by public servants was the antithesis of law and was associated with arbitrary might and coercion. With the rise of the welfare

<sup>3</sup> Philip Anisman, ed., *A Catalogue of Discretionary Powers in the Revised Statutes of Canada, 1970* (Ottawa: Law Reform Commission of Canada, 1975), Preface.

<sup>4</sup> *Random House Dictionary of the English Language*, 2nd ed. (unabridged) (New York: Random House, 1987), s.v. “discretion.”

<sup>5</sup> *Ibid.*, s.v. “arbitrary.”

<sup>6</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1915; reprint, London: Macmillan, 1975).

state, many students of jurisprudence came to a more progressive view of discretionary decision making, seeing it instead as a “humanizing” device to permit the general rules of law to be adapted to the separate circumstances of individual cases.<sup>7</sup> As more and more people’s rights came to be determined by front-line discretionary decision makers, the pendulum swung back once again. Beginning in the 1960s, many scholars, including most notably Kenneth Culp Davis,<sup>8</sup> returned to earlier preoccupations, again seeing the widening use of administrative discretionary powers as a serious threat, both real and potential, to individual justice. Davis’s notion of “discretionary justice,” understood at its simplest in the negative—as minimizing injustice from the exercise of discretionary authority<sup>9</sup>—requires that forms of public administration be subject, at a minimum, to standards of fairness and reasonableness. Most of the jurisprudence on discretion since the 1960s has involved the application of legal standards to constrain the exercise of discretion. This preoccupation with legal constraint of discretion has generated further critique, and an emerging focus in legal scholarship in the 1990s on discretion as a mechanism for dialogue, democratization, and the enhancement of human dignity.<sup>10</sup> Drawing from a slightly different conceptual tool kit, recent social-scientific scholarship has begun to explore discretion as a specific mode of governance in its own right.

Despite these shifts, discretion as a binary contrast to law remains the dominant paradigm, and discretion continues to be understood primarily as a threat to rule of law values such as certainty, objectivity, and fairness. Indeed, the *grundnorm* of Canada’s legal system remains the oft-cited words of Justice Ivan Rand in *Roncarelli v. Duplessis*, that no discretion is “untrammelled.”<sup>12</sup> An important contribution was made in 1986 by D.J. Galligan in his substantial study of legal discretion. Galligan advanced a framework for approaching discretion as a distinct sphere of legal action and criticized Davis for, among other things, his failure to include any consideration of policy making in his study of discretion, arguing that policy

<sup>7</sup> See, e.g., the work of John Willis, and especially John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values,” *University of Toronto Law Journal* 17 (1968), 357. See also John Willis, “Administrative Decision and the Law: The Canadian Implications of the Franks Report,” *University of Toronto Law Journal* 13 (1959), 45–55.

<sup>8</sup> See in particular Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

<sup>9</sup> *Ibid.* Davis wrote, “Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.” *Ibid.*, 3.

<sup>10</sup> See, e.g., Lorne Sossin, “The Politics of Discretion: Towards a Critical Theory of Public Administration,” *Canadian Public Administration* 36 (1993), 364–91.

<sup>11</sup> See, e.g., Anna Pratt, “Reframing Discretion,” in *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005); Willem DeLint, “Regulating Autonomy: Police Discretion as a Problem for Training,” *Canadian Journal of Criminology* 40 (1998), 277–304.

<sup>12</sup> [1959] S.C.R. 121. The reality, however, is that many settings of discretion are not subject to meaningful oversight. For discussion see Lorne Sossin, “The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law” (paper prepared for *The Legacy of Roncarelli v. Duplessis, 1959–2009*, Université de Sherbrooke, September 18, 2009).

making is “the very heart of the discretionary process.”<sup>13</sup> Galligan, among others, challenged the idea that law and discretion are related in a zero-sum dichotomy.<sup>14</sup> Discretion, by contrast, was seen as embedded in and overlapping with legal rules. As Chief Justice Beverley McLachlin of the Supreme Court of Canada has noted, “things are not as simple as Dicey perceived them. The law is not as certain as he would have it, nor are administrators as arbitrary.”<sup>15</sup>

Nicola Lacey points out that the tendency of traditional legal approaches to treat discretion as a residual category of law has meant relatively little attention to how decisions are actually made and excessive attention to judicial discretion and judicial review. Studies of “how decisions are actually made” in settings other than the judicial have tended to come from the social sciences.<sup>16</sup> Where legal scholarship has tended to privilege the law side of the dichotomy, social scientists have tended to focus on the discretion side, in the process privileging social forces. In recent years there has been a growing interest in “discretion-centred” (as opposed to “law/rule-centred”) studies. In this arena, social-science studies have contributed to the gradual “de-centring” of law by denying its essential primacy and by focusing analytical attention on “extra-legal” or “non-legal” influences on discretionary decision making.

While social scientists might be faulted for underestimating the influence of law/rules in discretionary decision making, their contributions with respect to the actual uses of discretion are illuminating. Further, where legal scholars have attended to actual uses of discretion, they have tended to focus on adjudication, and, as noted by Marc Galanter, this focus on adjudication is “vastly disproportionate to its prominence as a source of rules.”<sup>17</sup> Nevertheless, as Keith Hawkins observes, over the last 25 years sociologists, criminologists, and political scientists have been increasingly interested in discretion in legal decision making.<sup>18</sup> For example, an important contribution has been made by Doreen McBarnett, who observes that discretion is not only present in legal decision making but is, in fact, *functional* for the legal system, in that it allows for the management of the lack of fit between legal rhetoric and reality.<sup>19</sup> Lacey also observes that social scientists have shed

<sup>13</sup> D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), 110.

<sup>14</sup> See, e.g., Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: Oxford University Press, 1996).

<sup>15</sup> Beverley McLachlin, “Rules and Discretion in the Governance of Canada,” *Saskatchewan Law Review* 56 (1992), 168.

<sup>16</sup> A notable exception to this assessment is the work of John Willis. See especially Willis, “The McRuer Report,” 357. See also Willis, “Administrative Decision and the Law”; Lorne Sossin, “From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion,” *University of Toronto Law Journal* 55 (2005), 427–48.

<sup>17</sup> Marc Galanter, “Adjudication, Litigation and Related Phenomena,” in *Law and the Social Sciences*, ed. Leon Lipset and Stanton Wheeler (New York: Russell Sage, 1986), 153.

<sup>18</sup> Keith Hawkins, “The Use of Legal Discretion: Perspectives from Law and Social Science,” in *The Uses of Discretion*, ed. Keith Hawkins (Oxford: Clarendon Press, 1992), 19–20.

<sup>19</sup> Doreen McBarnett, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981).

light on other uses of discretion, such as obscuring a lack of consensus or ambiguity about official policy; pre-empting the use of formal legal controls; and bestowing political and administrative power,<sup>20</sup> such as that wielded by immigration decision makers.

Another dimension of discretionary justice that has been subject to criticism is the autonomy of the discretionary decision maker. In liberal regimes, law is the only legitimate formal limit on the assumed autonomy of decision makers. Decisions may be regarded as “guided,” “constrained,” “limited,” or “determined” by external factors, but it is still the fundamentally autonomous individual agent who is seen to *make* the decisions. In the uncritical functionalist view, discretionary decision making entails a rational calculation of what would be most congruent with the goals of the organization in question. In the critical but still functionalist view, discretion is regarded as an instrument of oppression, political interference, and/or discrimination. In the former, the decision maker is regarded in classical rationalist terms; in the latter, the individual decision maker is either disregarded altogether or explained away as a conscious agent or an unwitting pawn of the powerful.<sup>21</sup>

There is now as well a substantial social-science literature focusing specifically on police discretion. Most of these studies are preoccupied with identifying the factors that affect the uses made of the discretionary decision-making power of the police and with measuring their relative statistical importance. This literature subscribes, for the most part, to a “rule-based” conception of and framework for action,<sup>22</sup> dividing the world of decision making into “legal” and “extra-legal” criteria. As such, it leaves undisturbed the very notion of “freedom to make choices” and the underlying assumption of the inherent autonomy of individual subjectivity.

Interdisciplinary and pluralist approaches to the study of discretion have, however, begun to emerge. Joel Handler is a legal scholar who emphasizes the transformative and progressive potential of the discretionary decision maker in relation to the needs of powerless groups. He makes the obvious, but surprisingly rare, observation that solutions that call for more law are of limited application, “since procedural due process protections are such a problematic remedy for the vast majority of dependent persons.”<sup>23</sup> In a similar vein, Robert Goodin makes a persuasive case for abandoning the long-standing preoccupation with legal solutions to the problems of discretion.<sup>24</sup> Goodin observes that the law/discretion binary leads to the unjustified conclusion that

<sup>20</sup> Nicola Lacey, “The Jurisprudence of Discretion: Escaping the Legal Paradigm,” in *The Uses of Discretion*, ed. Keith Hawkins (Oxford: Clarendon Press, 1992), 364.

<sup>21</sup> For an excellent collection of the range of scholarly works on discretion see Keith Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992).

<sup>22</sup> The term “rule-based conception of action” is borrowed from Clifford Shearing and Richard V. Ericson, “Culture as Figurative Action,” *British Journal of Sociology* 42 (1991), 481.

<sup>23</sup> Joel Handler, “Discretion: Power, Quiescence and Trust,” in *The Uses of Discretion*, ed. Keith Hawkins (Oxford: Clarendon Press, 1992), 360. See also Joel Handler, “Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community,” *U.C.L.A. Law Review* 35 (1988), 999.

<sup>24</sup> Robert Goodin. “Welfare, Rights and Discretion,” *Oxford Journal of Legal Studies* 6 (1986), 250.

the problems of discretion can be resolved by the application of a rule, and he argues further that the problems that appear to arise in relation to discretion in the context of welfare decision making actually arise because of the underlying purpose of distinguishing between the needy and deserving claimant and the needy and undeserving: “imagine, in contrast,” he writes, “a world in which officials were guided only by the first half of that twin obsession: suppose officials are anxious to ensure that everyone who needs/deserves benefits gets them, but that they are utterly unconcerned to ensure that only they receive them.”<sup>25</sup>

Discretion is ultimately a political issue, not simply a legal one. Lorne Sossin’s work on discretion, administration, and the welfare state shares Handler’s concern with identifying ways of making the use of discretion in administrative contexts more responsive to the needs of the disadvantaged. Sossin, like Handler, is concerned to identify ways in which discretion can be employed to advance the interests of the disadvantaged. Dismayed with the “depoliticization” of the public sphere, he calls for the increased democratization of administration by engaging the public in its processes. The problem with public administration, in Sossin’s judgment, is that it is “closed off to [the public] as a conduit of political participation.”<sup>26</sup> He finds Dworkin’s “hole in the doughnut” analogy for discretion unsatisfactory; in its place he offers up a the analogy of a sponge, to capture discretion’s potential as a forum for politics.

Also unsatisfied with the rule based conception of discretion implied by the doughnut metaphor, but from quite a different perspective, Clifford Shearing and Richard Ericson make use of ethno-methodological insights and semiotics in their analysis of police action and culture. Shearing and Ericson challenge the “hegemony of the rule-based paradigm” by attending to the construction of subjectivities and the role of cultural narratives in relation to police discretion. In so doing, they avoid an explanation of action that resorts to individual choice, autonomous judgment, or (assumed) rules.<sup>27</sup> This effort is shared by scholars such as Peter Manning, Keith Hawkins, and Robert Emerson and Blair Paley, who examine structures of meaning and contexts of decision making in the “artful” and selective construction of realities.<sup>28</sup> These approaches complicate the generally taken-for-granted understanding of autonomy, subjectivity, and rationality. Moreover, they do not seek to identify new universals to explain decision making but, rather, see decision making as an activity constructed by a myriad of shifting

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<sup>25</sup> Ibid.

<sup>26</sup> Lorne Sossin, “Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State,” *Ottawa Law Review* 26 (1994), 9.

<sup>27</sup> Shearing and Ericson, “Culture as Figurative Action,” 483.

<sup>28</sup> Peter Manning, “‘Big Bang’ Decisions: Notes on a Naturalistic Approach,” in *The Uses of Discretion*, ed. Keith Hawkins (Oxford: Clarendon Press, 1992); Robert Emerson and Blair Paley, “Organizational Horizons and Complaint Filing,” in *The Uses of Discretion*, ed. Keith Hawkins (Oxford: Clarendon Press, 1992); Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulating Agency* (Oxford: Oxford University Press, 2003).



and dynamic influences—influences that do not merely shape decisions but actually constitute them. This approach has inspired several of the articles included in this special issue.

An alternative approach to thinking about the relations between law, administration and discretion is that developed by Peter Fitzpatrick. In contrast to treating the limited availability of the remedy of judicial review for administrative decision making as a residual problem stemming from the inherent opposition and conflict between law and administration, Fitzpatrick examines this tension as a productive and positive one, one that results in the “mythical mutuality” of law and administration.<sup>29</sup> He argues that it is precisely because of the particularistic and pervasive powers of administration “that the rule of law can be maintained in its aspects of universality and equality and seen as marking out fields for free action.”<sup>30</sup> Accordingly, in Fitzpatrick’s analysis, if law were substantially to counteract administration, it would in fact be undermining the conditions of its own existence: “administration is the necessary ‘dark side’ of law.”<sup>31</sup>

While the primacy of law has increasingly been questioned, the law/discretion binary is not easily shed. It is a constituent and largely taken-for-granted feature of the dominant legal paradigm in Western liberal regimes. The legal paradigm reinterprets social relations and perceived problems in terms of “legal or quasi-legal categories of thought”;<sup>32</sup> problems are thus understood as issuing from inadequate regulation by law or law-like rules, and, therefore, solutions are understood to lie in more law or law-like rules. Moreover, because of its constituent conception of the ideal of the rule of law and the related conception of individual autonomy and free will, the legal paradigm is closely associated “with liberalism as a doctrine of political morality.”<sup>33</sup> The conventional view that the solution to the “problem” is to make administrative decision making more rule bound and legalistic not only distracts from social and political critiques but also gives expression to the liberal legal conceit that the imposition of rules will necessarily result in increased individual justice. This again reveals the close association of liberalism and the dominant legal paradigm, which together privilege individual justice and which regard the rule of law (procedural justice) as essential to the attainment of that justice.

The degree of discretionary power that characterizes administrative regulatory frameworks is generally set against the application of and commitment to the rule of law under liberalism. From a conventional perspective, discretion in administrative decision making has been defended as a crucial feature of individualized justice, as it allows for the tailored and humane application of general rules and laws to individual cases. The critical, but still conventional, view regards discretion as a vehicle for arbitrariness,

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<sup>29</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

<sup>30</sup> *Ibid.*, 154.

<sup>31</sup> *Ibid.*

<sup>32</sup> Lacey, “Jurisprudence of Discretion,” 294.

<sup>33</sup> *Ibid.*, 362.

tyranny, caprice, and discrimination and argues that law and law-like rules are needed to constrain and monitor the exercise of discretion.

From a different perspective, discretion has significant, progressive potential to humanize legal rules and democratize bureaucratic authority.<sup>34</sup> Discretion, from this perspective, is a dialogic relationship between those who exercise discretion and those whose lives are affected by that discretion. Scholars advancing this framework tend to see the exercise of discretion as embedded in social structures and relationships informed by a variety of lived constraints (from funding and human resources to the psychology of decision making and trust). Discretion, on this view, is both a formative and a transformative activity. Because discretion represents the application of broad public power to particular circumstances, it has the potential to recognize and respond to social and economic vulnerability, cultural and racial diversity, and other aspects of individual and shared identities.

Still another perspective regards administrative discretion as a key governmental technology that, under conditions of liberal legality, carves out a domain of freedom that negotiates or accommodates the apparent contradiction between the universality and the particularity of liberal law and that reconciles the gap between law and equity.<sup>35</sup> In contrast to the binary view of discretion as “law’s rival,” scholars drawing from the insights of Michel Foucault have begun to attend to the way in which discretion works to enable different forms of governance in different settings: governing *through* discretion.

These three varied perspectives reflect the way in which we hope this special issue will complicate and enrich understandings of discretion through grounded empirical research and interdisciplinary dialogue. We were curious to see to what extent law’s stronghold on discretion persists, and what kind of influence theoretical developments and empirical findings in law, socio-legal studies, and related fields in Canada and abroad may have had for understanding discretion.

## The Special Issue

Our rather modest hope for this special issue of the *Canadian Journal of Law and Society* is that it might encourage scholars working in a variety of disciplinary domains to think differently about discretion. Each of the articles in the issue presents research that sheds important empirical and analytical light on how discretion works in different settings in ways that move beyond a strictly legal orientation. Not all of the contributing scholars had necessarily previously thought about their studies in terms of discretion, a

<sup>34</sup> See, e.g., Geneviève Cartier, “Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue” (SJD thesis, University of Toronto, 2004); Joel Handler, *The Conditions of Discretion: Autonomy, Community, Democracy* (New York: Russell Sage, 1986); Sossin, “The Politics of Discretion”; Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law,” *Queen’s Law Journal* 27 (2002), 809.

<sup>35</sup> Pratt, *Securing Borders*.



situation perhaps explained, at least in part, by the way in which discretion's relation to law is taken for granted. Their empirical findings and analytical insights nevertheless contribute in significant ways to understanding discretion and the ways in which discretion works in different empirical contexts. Included in the issue are contributions from legal scholars, criminologists, anthropologists, and sociologists who explore discretion in relation to a variety of international empirical contexts: academic admissions, high-profile prosecutions in the United Kingdom and South Africa, US–Mexico border control, probation in Canada, immigrant detention in France.

The articles in this special issue reveal the persistence of many of the same themes and tensions that have long dogged questions of law and discretion, and they also bring to bear a variety of conceptual tools in relation to rich new empirical findings that offer provocative and promising new directions for interdisciplinary socio-legal research on discretion. Writing in 2003, Keith Hawkins urged that scholars interested in discretion direct their attention away from individual decisions to the wider forces at play (the “surround”); to the role of other interested players, including the decision subjects and audience; and to decision making that takes place on different empirical sites.<sup>36</sup> A number of ambitious studies followed.<sup>37</sup> We believe that the contributions collected here make some important inroads in these directions.

The article by legal scholar Geneviève Cartier is a fitting entry point for the issue, providing as it does a careful overview of existing critical legal approaches to discretion. Cartier is dissatisfied with the critique offered by what she terms the “discretion as power” approach, which regards discretion as a “legal void” instrumental for arbitrary decision making and political interference. For Cartier, the judicial imposition of legal limits on the exercise of administrative discretion effectively undermines the assumption that discretion is a space ungoverned by law and therefore effectively takes the wind out of the sails of the “discretion as power” approach. Cartier's articulation of a dialogic model of discretion is one that begins to unsettle the usual critical view of discretion as an unchecked space susceptible to political interference and arbitrary or discriminatory decisions. With the aim of finding a way past the endemic tensions between the rule of law and administrative discretion that are characteristic of a welfarist regime, Cartier advances a more Habermasian and much less cynical conception of discretion as a normative opportunity for communication and negotiation between the individual decision subject and the decision maker in the articulation and application of relevant norms and values as part of the decision-making process. She draws from her own experience of making discretionary admissions decisions

<sup>36</sup> Keith Hawkins, “Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making,” in *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond*, ed. Loraine Gelsthorpe and Nicola Padfield (Portland, OR: Willan Publishing, 2003), 186–219.

<sup>37</sup> See, e.g., David Cowan and Simon Halliday, *Appeal of Internal Review: Law, Administrative Justice and the (non-) emergence of disputes* (London: Hart Publishing, 2003); Rosanna Langer “Defining Rights and Wrongs through Administrative Processing” (PhD dissertation, York University, 2003).

as dean of a law school to reflect in a preliminary way on the practical applications of a dialogic view of discretion.

Cartier is not unaware of the potential impact of unequal social relations of power, practical exigencies of high-volume discretionary jurisdictions, and the resistance of decision makers to the fettering of their discretion. She ends her article with a call for interdisciplinary research and dialogue on these and other questions related to discretion. The contributors to this issue begin to answer that call.

Whereas much of the literature on discretion in the criminal process has focused on its applications in high-volume contexts, criminologist Philip Stenning provides a novel focus on four high-profile, contentious prosecutions in the United Kingdom and South Africa and offers up a detailed examination of their factual and political contexts. The case studies presented by Stenning resonate strongly with the view of discretion as top-down political interference, as he details the relationships between governments, prime ministers / presidents, supposedly “independent” prosecutors, and courts in discretionary decision making with respect to “politically sensitive” high-profile cases. Whereas Cartier considers the governing power and promise of the normative conception of “public interest” in dialogic communications, Stenning’s case studies highlight the pliability and hotly contested nature of this very category.

Anthropologist Josiah Heyman’s richly ethnographic study moves away from the law and the courts to examine border-control decision making at the US—Mexico border, a very high volume discretionary jurisdiction in which the stakes are high and unequal social relations of power are core. Heyman investigates the complex socio-economic bases for the discretionary and informal sorting of trusted and targeted travellers on the front line by border officers, using Hawkins’ multilayered and dynamic conception of discretion as “surround, field, and frame” to unpack the policing decisions of front-line border officers at or near the south-western border region of the United States. Heyman systematically decodes the bases for decisions about when, on whom, and on what grounds to act, but also about when and on whom *not* to act; his interrogation of the shaping and deployment of perceptions of trust at the border provides an important supplement to the prominent focus on the constitution of border risks in the border-control literature. Heyman carefully unravels the discretionary bases for “acts and non-acts” in different border settings to reveal the intersecting racial, national, and class-based categories that underpin perceptions and allocations of trust, riskiness, and experiences of privilege at the border. He takes as his starting point Pratt’s conception of discretion as a positive form of power to emphasize that discretionary decisions are usefully analysed in terms of social power relations. The association between discretion and law is largely displaced by the question of how discretion enables racialized and classed modes of governance at the border and how this in turn sheds important light on broader socio-historic processes around race, nationality, and global developments relating to the governance of mobility.

Criminologist Kelly Hannah-Moffat, sociologist Paula Maurutto, and criminologist Sarah Turnbull take up the question of discretion in relation to the advent and proliferation of actuarially based risk/need assessments in Canadian criminal justice decision making in general, and probationary decision making in particular. The authors argue that risk tools restructure, reshape, and conceal—rather than eliminating or even substantially constraining—the discretion of practitioners. Rather than being imposed on practitioners in any simple way, risk assessment is found to be a negotiated process. While a key effect of the application of risk tools is the objectification and, therefore, the legitimation of the decision making of practitioners, the study finds that, in fact, practitioners actively negotiate the application of standardized risk tools to better accord with their own experiences with and clinical knowledge of offenders. Interestingly, in contrast with the common critique of discretion as a conduit for discrimination, one finding of this study is that practitioners will often modify the application of risk tools precisely in order to mitigate the otherwise discriminatory effects of these “objective” tools. While discretion is here associated with the realm of professional ideologies, individual dispositions, and beliefs in opposition to the rule-based dictates of policy directives, the findings also complicate this oppositional pairing, as we learn that there is indeed a rather tangled and mutually constitutive relation at play, with a variety of diverse and surprising effects.

The final article in this special issue takes us perhaps the farthest away from conventional accounts of law and discretion. Anthropologist Chowra Makaremi’s case study draws on Foucaultian understandings of discipline and law to provide an alternative account of the development of border detention in France from the early 1980s through 2006. Makaremi’s study offers a response to those who might argue that discretion in the context of immigrant detention decision making takes place within a “gap” created by law, or that it represents in any simple way an instance of the sovereign exception along the lines developed by Giorgio Agamben. Makaremi also draws important analytical attention to the extent to which the institutionalization of waiting zones in France over the period in question was in fact propelled not by a territorially defensive, top-down sovereign power but, rather, by a campaign waged by a network of anti-detention activists, human-rights advocates, and other agents drawn from civil society. Paradoxically, and revealing again the powerful influence of the law/discretion binary, as a solution to the “problem” of sweeping discretion in the “no-law” zones of border detention, *anti-detention* activists called for the *entrenchment* of border detention through legalization.

In Makaremi’s account, discretion is not a lack of or a loophole in regulation but, rather, is a distinct mechanism that operates, in this case, to manage populations through the confinement and displacement of bodies in the context of tangled legal and administrative systems. This discretion is mobilized within the context of a changing conception of sovereignty, adapting to a global context in which borders have become more fluid and sovereignty is no longer tied to territory in the usual ways.

Makaremi's study thus takes us considerable distance from existing approaches that have grappled with the law/discretion relationship. It points the way toward a more fundamental unsettling of certain core assumptions about discretion: that law is the primary mode of regulation; that discretion is a space for autonomous decision making more or less unconstrained by legal or law-like rules; and that decision makers are essentially autonomous in their choices, though more or less constrained.

All of the articles in this issue highlight in different ways how discretion works in varied, historically specific, empirical contexts to enable different forms of governance: from progressive dialogic and democratic forms, to hotly political and authoritarian forms, to racialized, classed, and other oppressive forms, to risk-based forms, to biopolitical, sovereign, and disciplinary forms. Our hope is that this collection will provide an engaging point of departure for this interdisciplinary dialogue on the dilemmas of discretion.