Discretion and Its Discontents

Edward L. Rubin
DISCRETION AND ITS DISCONTENTS

BY EDWARD L. RUBIN*

The ubiquity of discretion in the implementation process is now widely recognized,¹ but its character and meaning continue to be a source of mystery. In recent years, social scientists have offered an interesting resolution. Discretion, they suggest, is not ubiquitous at all; the apparent discretion that legal rules allow administrators is frequently constrained by a dense fabric of custom, norms, training, and informal sanctions.² This seems like a convincing point, but it actually understates the case. In fact, the term discretion possesses little value in describing the process of modern government. What we perceive as discretion is, in part, a myth, but more significantly, an artifact of the poor fit between our legal categories and the realities of our modern administrative state.

In assessing one's own category of thought, it is often useful to gain perspective by studying the way that a different culture addresses the same issue. Accordingly, this Article employs a case study of bank supervision in the Federal Republic of Germany and a comparison of the German view of administrative discretion in that setting with the American view of our own supervision process. The most startling aspect of this comparison, from the American perspective, is that the German officials claim that they have no discretion at all; they assert that all their actions are determined by law. Because the law involved is a seventy-five page statute and is accompanied by exactly two regu-

* Professor of Law, University of California, Berkeley. This study was carried out with the generous support of the Smith Richardson Foundation. I want to thank Robert Kagan, William Simon, Uwe Schneider, my informants in Germany, and the participants in Berkeley's Law and Society Workshop.


lations running an additional thirty-five pages,\(^3\) the natural conclusion for an American to reach is that the German officials are lying. As it turns out, they are, and for deeply cultural reasons. Exploring their prevarications reveals some interesting features about administrative implementation, not only in Germany but in the United States as well. These features are not widely recognized by Americans; in fact, we too are lying, and for deeply cultural reasons of our own.

It would be presumptuous and, even worse, distinctly un-postmodern, to suggest that the exposure of these lies would reveal the truth. Rather, what they suggest is the poverty of our legal categories. Discretion, a musty old term redolent of palace intrigue among the confidential courtiers of dissipated monarchs, has been installed at the center of the administrative process, where it serves as a salvation in some observers' view, and a perdition in others. There is no doubt that it is interesting to talk about, but the present study casts doubt on its explanatory power. In reality, there are few administrative settings where the term is of much use; it is simply an alternative and rather mystifying way to refer to ordinary bureaucratic processes of supervision and policymaking. The final conclusion is not that there is some readily identifiable truth, but that we are better off abandoning the idea of discretion and beginning our search for truth with a different set of concepts.

I. THE CONCEPT OF ADMINISTRATIVE DISCRETION

The descriptive account of discretion is the work of social scientists and involves a broad variety of settings, but the normative account is the work of legal scholars and displays these scholars' characteristic obsession with the judiciary. Nonetheless, their claims are couched in general terms and provide a useful starting point.

There are two definitions of discretion that seem to dominate the legal literature, one by Hart and Sacks, the other by Dworkin.\(^4\) According to Hart and Sacks, discretion is "the power to choose between two or more courses of action, each of which is thought of as permissible."\(^5\) Dworkin identifies three different meanings of discretion,
which is itself a sign of conceptual trouble. He begins by noting that any use of the term discretion only applies "when someone is in general charged with making decisions subject to standards set by a particular authority." In this context, discretion can be either weak or strong. Weak discretion, in turn, can mean two different things: that the person is required to exercise judgment in reaching a decision, or that the person "has final authority to make a decision and cannot be reviewed and reversed by any other official." Strong discretion means that the actor "is simply not bound by standards set by the authority in question." Presumably, the operative distinction between weak and strong discretion is that the actor is bound by standards in the former case, although those standards must be interpreted or may not be enforced, but she is not bound by such standards in the latter case. The Hart and Sacks definition can be regarded as describing the feature that is presumably common to all three types of discretion and that justifies the use of a single word. The person who possesses discretion is allowed to make a choice, whether that permission is based on the inevitability of judgment, the absence of review, or the lack of standards.

Dworkin's definition, or set of definitions, is directly related to his theory of judicial decisionmaking. Judges, he readily agrees, exercise discretion in the first weak sense, in that they must use their judgment to interpret the legal authorities that are applicable to the case at hand. Perhaps there are some cases that are so obvious, so easy, that no exercise of judgment is required, but there are many cases which can only be decided through the judge's use of weak discretion. Similarly, it is often the case that the judge possesses discretion in the second weak sense. Decisions of the U.S. Supreme Court are unreviewable by any other authority, as are state law decisions of a state

7. See id.
8. Id. at 32.
9. Id.
10. See id. at 69; id. at 81-130. This type of discretion thus includes Dworkin's well-known category of "hard cases."
11. See Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399 (1985). And perhaps there are no such cases. See Sanford Levinson, What Do Lawyers Know (and What Can They Do With Their Knowledge)? Comments on Schauer and Moore, 58 S. CAL. L. REV. 441 (1985); James W. Nickel, Uneasiness About Easy Cases, 58 S. CAL. L. REV. 477 (1985); David A.J. Richards, Interpretation and Historiography, 58 S. CAL. L. REV. 489, 516-22 (1985). Dworkin assumes that many cases are easily resolved, but the contrary conclusion would not be fatal to his theory.
supreme court, a trial judge's findings of fact are similarly unreviewable. Given limitations on appellate resources, many other decisions are unreviewable for all practical purposes. Dworkin readily concedes this as well. Indeed, since he is concerned with the decisional norms that act upon the judge, it would not affect his theory if all appeals were abolished and every judicial decision rendered unreviewable.

What Dworkin argues is that judges do not properly exercise strong discretion, and that there are no cases where the judge is not bound by standards. Alternatively, to use the Hart and Sacks definition, he argues that a court never has the power to choose between two or more equally permissible results when it is adjudicating the rights of individuals. The position that judges possess such discretionary power reflects, in Dworkin's view, a misunderstanding of our legal system. It is true, as H.L.A. Hart argues, that there are a number of cases where the result cannot be based upon an existing, definitely stated legal rule. But it is a mistake to conclude that the decision is discretionary, that is, that the judge can choose among equally permissible options. It is also a mistake to conclude that the decision can only be based on considerations external to the legal system, such as social policy judgments about what decision will produce the most desirable social consequences. The reason is that the legal system does not consist exclusively of rules; it also, Dworkin argues, contains more general and more malleable principles that can resolve the uncertainties or conflicts of the legal rules. When correctly deployed, these principles always yield a definitive result, thus precluding strong discretion.

Dworkin's theory has been subjected to intensive criticism, most of which challenges the coherence of his categories. For present

12. For Dworkin's treatment of this issue, see Ronald Dworkin, Freedom's Law (1996); Ronald Dworkin, Law's Empire 355-99 (1986) [hereinafter Dworkin, Law's Empire]; Dworkin, supra note 6, at 131-49.
13. See Dworkin, supra note 6, at 69; see also Dworkin, Law's Empire, supra note 12, at 225-312.
14. Dworkin, Law's Empire, supra note 12, at 1 ("It matters how judges decide cases."); see Dworkin, supra note 6, at 1-13.
15. Dworkin, supra note 6, at 81-130; id. app. at 291-366; Dworkin, Law's Empire, supra note 12, at 176-275.
17. Dworkin, supra note 6, at 1-80. The first part of this book is essentially an extended critique of Hart's notion that the law has an "open texture."
purposes, the important point is that the theory makes a variety of claims about the nature of discretion and its role in the judicial process. But the term discretion is presented as a phenomenon of ordinary language, and the distinctions are provided as a means of thinking more coherently about the concept to which the term refers. It is far from obvious, however, that there is a coherent, or particularly useful concept that underlies this term. Not every word that we use to describe our legal system necessarily represents a concept that is useful in understanding that system's operation. Over the course of the last century, after all, the United States has developed a new form of legal system: the administrative state. The terms used in ordinary language, being much older, may no longer fit particularly well with this regime. Thus, instead of appealing to ordinary language as a justification for our use of a particular term, we should consider the term's value in providing us with an understanding of the system we inhabit. If a term does not advance this basic goal—if it is merely the verbal detritus of a long-abandoned mode of governance—then it is more likely to confuse than to explain, and accordingly should be abandoned.

Of course, there is something that the term discretion is being used to describe; it may be a misnomer, but it is not a miasma. And there is no point inventing neologisms for the mere sake of novelty, or even to prune away the inconvenient connotations that have sprouted from an otherwise usable description. The argument that will be advanced here is exactly the opposite, however; it is that we already possess terms that describe the same phenomena as discretion does, and possess a clarity and a precision that discretion lacks. These terms are supervision and policymaking. We tend to avoid them, and resort to the term discretion, because of the very feature that makes them more precise and clear, namely, that they relate directly to the realities of the modern administrative state. Discretion, like so many other terms and concepts, reflects our effort to describe our government in non-administrative or anti-administrative terms. This is a drug that often makes us feel better, but, in the long run, we always pay a price for our indulgence.

Dworkin's immediate subject matter is the judiciary, which does not seem to have undergone the transformation experienced by other

parts of our government. His presentation of his definitions as general ones, equally applicable to any governmental function, carries the unstated implication that judges are in some fashion characteristic or most important, an implication that we know for certain to be false in a modern administrative state. From this perspective, the emphasis on the judiciary may not be a way of presenting the concept of discretion in one of its most important roles, but a way of masking the irrelevance of that concept in understanding modern government. That government is essentially administrative, or bureaucratic, in nature. It is a much better strategy to begin with the bureaucracy and then extend the concepts developed in that context to the judiciary than it is to begin with the judiciary and assume that this venerable institution is characteristic of the modern administrative state.

A. From Weak Discretion to Supervision

Dworkin's two weak forms of discretion do not appear, at first glance, to be related to one another in any organic fashion. One, the need for judgment, refers to the mental process of the decisionmaker while the other, the absence of review, refers to the decisionmaker's structural position. In fact, if we place the decisionmaker in the context of a bureaucratic hierarchy, the two categories are revealed to be perfectly complementary. The first describes the process of controlling a subordinate by means of instructions stated in advance, while the second describes the process of controlling a subordinate by means of monitoring the person's behavior during or after the activity in question. These are the characteristic methods of bureaucratic supervision. They represent two different strategies for carrying out the purposive-rational mode of governance that Weber identified as characteristic of bureaucracy;¹⁹ the superior can either describe the task necessary to achieve the purpose in advance, or monitor performance to determine whether the task has been properly carried out. Of course, the two methods can be combined, and often are. The particular mix will depend upon a variety of pragmatic considerations, including the nature of the task, the subordinate's level of training, the superior's level of training, the physical distance between the two, the resources available, the time available, and the nature of the forces acting on the agency.²⁰

²⁰. See Peter M. Blau, The Dynamics of Bureaucracy (rev. ed. 1963); Peter M. Blau & Richard A. Schoenherr, The Structure of Organizations (1971); Sanford
The distinction between instructions and monitoring should not be conflated with the different, and equally important distinction between substantive and procedural supervision. Substantive supervision prescribes the result that the subordinate is expected to achieve, while procedural supervision prescribes the method that the subordinate is expected to employ. Instructions given in advance can state either the required result or the required method; monitoring performance as the activity is proceeding can examine either the result that the subordinate is achieving or the method that is being used to achieve it. There are undoubtedly preferable combinations of these two variables—because each variable has two values, their combination yields the social scientist's beloved four-box grid—but it seems equally clear that the preferable combination will vary from one situation to the next.

Once the two forms of weak discretion are recharacterized as a matter of hierarchical supervision in an administrative apparatus, the term discretion no longer plays any obvious role. It is, as Dworkin concedes, "like the hole in a doughnut."21 But if one has described the doughnut, what is gained by describing the empty space that constitutes the hole? If one has described an administrative hierarchy, located the lines of authority, and indicated the modes of supervision, what is gained by using the term "discretion" to describe the limits of the supervision that superiors exercise over subordinates? There would appear to be four possibilities: first, that the term indicates some additional aspect or perceived meaning of the supervisory process; second, that it captures some part of the subordinate's phenomenological experience; third, that it reveals some structural similarity between the control of subordinates and another set of behaviors; and fourth, that it can be used as a deconstructive technique. In addition, there is the possibility that the term discretion is specially applicable to the judiciary, the primary concern of Hart and Sacks and of Dworkin, even if it serves no useful role in describing administrative behavior.

From the perspective of the person trying to exercise supervision in the administrative hierarchy, or from the perspective of designing the hierarchy as a whole, the term discretion would appear to describe

---


21. Dworkin, supra note 6, at 31.
the extent to which the subordinates are in fact free of supervision. But it is not a particularly good description because it does not tell us why this lack of supervision exists. One reason, for example, may be the time constraints of the existing administrators, or alternatively, the resource constraints of the system designer, which are essentially the same thing. In this case, however, it would be pointless to describe the limitations on the supervisory capabilities of the superiors as a grant of discretion to the subordinates. There is no sense that the subordinates are being afforded a certain amount of freedom so that they can make their own choices. Their freedom is simply a by-product of supervisory limitations, not an independently determined characteristic.

Alternatively, supervision of subordinates might be limited because it is regarded as unnecessary. In this context, the term discretion may appear more useful, but reflection suggests the contrary. Typically, a superior will decide that supervision is unnecessary because the subordinate can be relied upon to do the right thing without it, or because the superior does not care what choice the subordinate makes. The former is the exact opposite of discretion, however; the premise is not that the subordinate can choose, but that the subordinate will be predictable. The latter case will, as Dworkin recognizes, generally lie outside the authority structure entirely. It is pointless to say that a subordinate has discretion to wear blue or brown clothing; in fact, there are no rules about clothing colors because the matter is deemed irrelevant to the agency's objectives. If the subordinate showed up in a Giants T-shirt and cut-offs, this is better described as the breach of an informal norm, not as a misuse of discretion. Another supervisory strategy that might be interpreted as a grant of weak discretion is the decision to use only one mode of supervision, to use only standards or only monitoring, or the separate decision to use only substantive or only procedural control. But the implausibility of the description is indicated most clearly in the case of procedural control; surely, a decision to control one's subordinates by specifying the procedures that they are expected to follow should not be inter-

22. With more resources, one can hire more supervisors, and thus devote more time to supervision. There may, however, be institution-specific shortages of capable supervisors, given the particularized and experiential nature of their skills. See Michael Polanyi, Personal Knowledge: Towards a Post-Critical Philosophy 49-65 (1962).
23. Dworkin, supra note 6, at 31.
24. See Lempert, in The Uses of Discretion, supra note 2, at 186-87.
interpreted as authorizing them to choose any results they see fit. Rather, this mode of supervision is selected precisely because it is regarded as the most reliable way to produce a particular result under a given set of circumstances. Conversely, substantive control does not typically mean that the subordinate can choose any procedure; it means that the subordinate is expected to choose the procedure that is most likely to produce the specified result. The decision to use instructions or monitoring is similarly unrelated to discretion; it is based upon a decision about which method will control the subordinate most effectively given the prevailing constraints upon the process.

To illustrate these points, consider Dworkin's example of the sergeant who is told to "take the five most experienced men" on patrol. Dworkin treats this as a grant of weak discretion and contrasts it with the grant of strong discretion that would be implicit in the command to "pick any five men he chooses." J.P. Baumgartner points out that as a matter of sociological analysis, these two commands could be precisely the same, depending on the norms prevailing within the institution. Kent Greenawalt, in a thorough-going jurisprudential critique, points out that the two are equivalent in theory because even weak discretion involves an exercise of judgment. The argument here is related to these, but it is primarily based on epistemological considerations. Verbal formulations, such as "pick the most experienced men," are aptly described as instructions given in advance that are designed to control the sergeant's behavior. Describing them as a grant of discretion not only seems intuitively wrong, but obscures all the critical questions that the alternative description brings to mind: how clear or ambiguous were the instructions from the commander's point of view; how clear were they from the sergeant's point of view; were they followed up by monitoring either the sergeant's procedures or the patrol's results? These are the questions we would need to determine in order to know whether the two instructions are equivalent or different in their actual effects.

As a general matter, the entire concept of discretion, at least in the weak sense of using judgment or of not being reviewed, is inconsistent with the nature of an administrative hierarchy. Because administrative agencies are purposive-rational, no intrinsic value is attached to choices by subordinate officials; rather, these choices are

25. Dworkin, supra note 6, at 32.
26. Id. at 32-33.
27. Baumgartner, in The Uses of Discretion, supra note 2.
permitted because of the temporal or financial limitations on the supervision process. There is thus no additional aspect or perceived meaning of that process to which the term discretion can be usefully attached.

The term discretion is also of little use in describing the phenomenological position of the subordinate. A subordinate who must use his judgment in following instructions is unlikely to perceive this situation as an authorization to exercise discretion. Rather, it will be perceived as an uncertainty that the subordinate must resolve correctly, that is, in accordance with the demands of his superiors or his general situation. All sorts of crucial matters—salary, promotions, job security, a sense of purpose, a sense of self-worth, and the respect of one’s peers—depend upon the subordinate’s ability to reach the result demanded by the external constraints that act upon him. Consequently, the subordinate confronted with ambiguous instructions is more likely to experience the anxiety of problem-solving than the joy of unconstrained action. He does have a choice to make, but he is expected to choose correctly.

An absence of direct supervision, on the other hand, is quite likely to be a source of joy. But the nature of this gleeful sensation is more aptly described as freedom from hassle than as a grant of discretion. After all, the lack of direct supervision tells us nothing about the precision of the subordinate’s instructions, whether substantive, procedural, or both. It tells us only that neither her results nor her methods will be closely observed by her superiors. Consider, for example, two nighttime building guards, each of whom is instructed to follow a particular path around the building at specified intervals during the night. One building has closed-circuit monitors that the guard must pass in front of as she makes her circuit; the other has no monitor, no night watchman’s keys, or any other monitoring devices. The second guard has greater power to disobey her instructions than the first, but she does not have any more discretion; she is still expected to follow the prescribed path. She certainly has not been given, by the mere lack of supervision, what Sanford and Mortimer Kadish call discretion to disobey. Rather, the nature and scope of her freedom is fully described by describing her instructions and the level of monitoring

29. See Chris Argyris, Interpersonal Competence and Organizational Effectiveness (1962); Dornbusch & Scott, supra note 20; Rosabeth Moss Kantor, Men and Women of the Corporation (1977).
which is imposed on her. To use the term discretion in this context is not an impossible locution, but it is largely a useless one.

Public choice theory has built upon the concept of discretion in its somewhat desperate effort to model administrative behavior. The underlying methodology of public choice is microeconomics, a methodology which is based on the idea that an actor is trying to maximize some subjectively perceived condition. In the market, microeconomics assumes that actors are trying to maximize their material well-being; while this is not necessarily true, because crazy people go shopping, too, it possesses vast empirical support and enormous explanatory power. In electoral politics, a microeconomic analysis has been based upon the idea that politicians maximize their chance of re-election. This assumption possesses some empirical support, and more limited, but still significant explanatory power. But what are government bureaucrats trying to maximize? William Niskanen has suggested they are trying to maximize their agency’s budget, a position that possesses the virtue of anti-government cynicism, but suffers from the vice of limited empirical support. The more recent public choice attempts to implement a microeconomic analysis of the bureaucracy is based on the idea that bureaucrats are maximizing their “slack,” or discretion. This relies on the premise that discretion is a consumption good, something that the bureaucrats value for its own sake, like chocolate.

As an empirical matter, this seems implausible, even accepting an intuitive, ordinary language notion of discretion. The general image of bureaucrats held by people who are not obsessed with property rights and the injustice of government regulation is that they are unimaginative and rule-bound, not that they are aggressive, power-hungry, and egomaniacal. The deeper problem, however, is that the entire notion of slack-maximizing reifies the concept of discretion; it

assumes that the phenomenological experience of discretion is so satisfying that people will sacrifice their time, and perhaps their job security, to maximize it. But if bureaucrats are generally subject to standards, if their performance is expected to achieve some particular set of results, then there is really no discretion for them to maximize. What they want to maximize is their chances of reaching the desired outcome, since their salary, promotions, and peer relations depend upon their capacity to do so.

Alternatively, bureaucrats may be trying to maximize their freedom from supervision. But this freedom, as just discussed, does not represent a grant of discretion. It is nothing other than itself—namely freedom from supervision—and is more likely to be granted to the predictable, the obedient, indeed the obsequious, than to the power hungry. This desire to be free of supervision might be more justifiably and usefully described as hassle-minimizing, rather than slack-maximizing. This would appear to be a better empirical description of the average bureaucrat, particularly at the lower levels where weak discretion is at issue. The most common problem with subordinates is that they try to avoid supervision, avoid additional work, and maintain their job security, not that they try to make as many choices as possible, particularly when those choices are not officially permitted or when they lead to sub-optimal results. Hassle-minimizing is not only more empirically plausible, but it is also more consistent with the behavioral assumptions of microeconomics, being classic risk-averse behavior. Of course, microeconomics does not deny that people sometimes take risks, but it strongly suggests that they will tend to avoid risks that have no potential for increasing their material well-being. The fact that public choice scholars would advance such an implausible and internally inconsistent theory of bureaucracy as discretion-maximizing is partially a reflection of their difficulties in describing bureaucratic behavior. But it also indicates the misleading character of discretion as a concept for describing behavior in an administrative hierarchy.

The third reason why the term discretion might be used to describe some aspect of bureaucratic supervision is because it reveals a structure similarly between that aspect and another phenomena. But this possibility suffers from the preliminary problem that the two forms of weak discretion are not even similar to each other. The need to use judgment in interpreting one’s instructions is very different, in

terms of either the actor's experience or the observer's assessment, from an absence of monitoring or review. Clearly, review can be absent when the subordinate is required to use his judgment, or when the subordinate is expected to follow a mechanical rule, and review can also be present in either case. The only link between the two forms of weak discretion lies through the concept that, it has been argued, can replace them both—namely, administrative supervision. Judgment-based discretion is the by-product of supervision by instructions, while freedom from review is a by-product of supervision by monitoring. Apart from this linkage, however, there is no apparent connection between the two.

Neither is there any apparent connection between weak discretion, in either guise, and strong discretion. The latter is defined by Dworkin as an absence of any binding standards. It would appear to be mutually exclusive with weak discretion based on judgment, since the judgment in question involves interpretation of an applicable standard. And like that form of weak discretion, it is unrelated to the absence of review; review can be eliminated whether there are applicable standards or not, and it can be imposed in either case as well. Where there are no standards, the reviewer can simply substitute her decision for the decision of the subordinate, and it is quite possible that review might be deemed more crucial under such circumstances.

Again, there is nothing logically incorrect about using the term discretion in all these settings, and then distinguishing, as Dworkin does, among its different forms. But doing so contributes nothing to our understanding of the activities involved, and may in fact create unnecessary and avoidable confusion. It conveys the impression that there is some structural characteristic, or phenomenological state, that is uniform from one situation to the next, and this does not appear to be the case. The situation is not unlike the use of the term “elements” to refer to water, air, earth, and fire. This terminology was used for literally thousands of years, but it turns out to be quite useless in describing physical reality: water is a simple compound, air a specific mixture of elements and simple compounds, earth an enormous variety of simple and extremely complex compounds, and fire a type of reaction. Indeed, the purported similarity between these disparate things may have retarded the growth of scientific knowledge by suggesting relationships and regularities which could not serve as the basis of a workable theory, and obscuring those which could. Similarly,

36. Dworkin, supra note 6, at 32.
the term discretion seems to link unrelated phenomena, phenomena that are better described in terms of the allocation of authority and control within the agency.

The superiority of supervision as a description of bureaucratic behavior might suggest that discretion remains valuable for purposes of deconstruction; it would be what Derrida calls a dangerous supplement.\textsuperscript{37} An agency could be described as supervising its subordinate officials by various means, including instructions and continuous monitoring of both the substantive and procedural aspects of the subordinates' decisions. For such a description, the term discretion would be a dangerous supplement, indicating that the subordinates are not in fact controlled, but that they are both required and empowered to make choices on their own. It would connect with those situations where the bureaucratic aspiration to be logical, orderly, and perfectly efficient failed or, more significantly, those situations where the general failure of the aspiration was revealed. Kenneth Davis' classic study of administrative discretion evinces this deconstructive character.\textsuperscript{38}

The problem is that only a legal scholar, who began from a normative commitment to democratically enacted rules, would need the concept of discretion to recognize the uncontrolled aspects of a bureaucratic system. In fact, these were discovered long before, by sociologists who undertook a descriptive account of large organizations. Beginning in the 1930s, the human relations school recognized that such organizations possess an informal structure that operates independently of, and often in opposition to, the formal mechanisms of control.\textsuperscript{39} A short time thereafter, decision theory, developed most notably by Herbert Simon, explored the cognitive and structural limits on large organizations;\textsuperscript{40} by constructing a microanalysis of the way orders and information were transmitted through an administrative hierarchy, this approach problematized the entire concept of control or supervision. Microeconomic analysis added agency theory to this set of concerns. It suggests that the subordinate will be primarily motivated by his own desire for advancement, job security, or salary in-

\begin{itemize}
  \item \textsuperscript{37} Jacques Derrida, Of Grammatology (Gayatri Spivak trans., 1976).
  \item \textsuperscript{38} Davis, \textit{supra} note 1.
  \item \textsuperscript{39} See, e.g., Chris Argyris, Personality and Organization (1957); George C. Homans, The Human Group (1950); Perrow, \textit{supra} note 20; Philip Selznick, Leadership in Administration (1957).
  \item \textsuperscript{40} Herbert Simon, Administrative Behavior (2d ed. 1961).
\end{itemize}
creases, rather than by the orders of his superiors. In order for the superior to impose control, she must use sanctions, or otherwise alter the incentive structure of the subordinate. Recent work has focused on the role of norms in determining organizational behavior; in new institutional economics, the organization appears as a complex governance structure, while in new institutional sociology, it appears as a complex sub-culture.

In other words, the social science study of organizations has addressed the problem of supervision, explicitly and emphatically, for more than half a century. It has done so without making much use of the term discretion or the jurisprudentialist's concerns about the rule of law. The purpose of a dangerous supplement is to disrupt existing patterns of thought and to generate doubt about the taken-for-granted, but the behavior that the term discretion illuminates has been well known to sociologists for many decades. From their perspective, discretion is more like an innocuous supplement, something that re-states insights that the field recognized a long time before, and has now gone beyond with the development of more complex, modulated theories. From the perspective of legal scholarship, discretion is not a dangerous supplement but a dangerous digression, leading to the exploration of dry wells and dead-end passageways.

The language of supervision and control may apply to administrators, but it seems less relevant, perhaps even offensive, when applied to the judiciary. There may thus be a separate role for the term in this more limited, but still important, context. In fact, however, its only role would be to mask the essential similarity between judges and administrators. The judiciary is essentially a means of enforcing the law, a hierarchically organized group of specialists who are given instructions by the legislature through statutes, by administrators through regulations, or by superior judges through decided cases. The judiciary's role is no different, in its essence, from that of any other imple-


mentation mechanism. It is true that our sense of the propriety of the role requires legislators or administrators to supervise the courts by instructions only, although those instructions are both substantive laws directed to the public and procedural, rules of adjudication. Monitoring is not allowed, although there is a bit of it between different levels of the judicial system. This gives judges a good deal of choice, but the amount and type of choice is fully described by the nature of the instructions and the absence of monitoring. The term discretion contributes nothing to this description.

B. From Strong Discretion to Policymaking

Dworkin's other major category is strong discretion, where the actor "is simply not bound by standards set by the authority in question." Such situations do not appear to be subject to the same analysis that was applied to weak discretion, and might therefore represent a more promising use of the term. Further consideration, however, indicates that the term is equally unhelpful in this context, but also suggests at least some of the reasons for its continuing appeal.

A useful place to begin is with Dworkin's theory of judicial decisionmaking. His theory does not play much of a role in the analysis of weak discretion, since he readily concedes, as do most other observers, that his judicial process regularly involves both forms of such discretion. A more useful way to state this, as suggested, is that the supervisory instructions that the legislature, the higher courts, or the Constitution issue to judges are ambiguous, and judicial decisions are not always subject to review, or monitoring. In any event, the distinctive aspect of Dworkin's theory is his claim that judges never properly exercise strong discretion. There is always a "right answer" to a question involving legal rights, he asserts, although that answer may be determined by social principles rather than by legal rules.

46. Dworkin, supra note 6, at 32.
49. See Dworkin, supra note 6, at 81-130; Dworkin, Law's Empire, supra note 12, at 225-75.
The strong discretion that Dworkin wants to deny is a bit of a straw man, however. To say that a decision is "not bound by standards" may mean only that it meets the Hart and Sacks' definition that there are two or more permissible courses of action, but it at least implies the stronger claim that there are no applicable standards at all. Clearly these are rather different things. A decision can be guided, indeed strongly guided, by standards, even if those standards do not lead to one definitive result. If Dworkin is claiming that judges never have a choice between permissible options, he is probably wrong; if he is claiming that judges are never confronted by a complete lack of standards, he is probably correct.

Part of the rhetorical force of Dworkin's claim depends upon this ambiguity. One way to assess this claim, therefore, is to translate Dworkin's quasi-neologisms into more familiar language. When Dworkin speaks of law as being composed of legal rules and legal principles, he is really talking about legal doctrine. Doctrine is a body of rules ("all contracts must be supported by consideration"), exceptions ("consideration is not necessary if the promisee has detrimentally relied on the promise"), second order rules ("contracts should be strictly construed against a professional drafter"), and social principles ("contracts should not be oppressive"). In any given case, the doctrine must be interpreted, just as Dworkin says; it may yield a definitive answer in all cases to which it applies, as Dworkin also says, or in some cases, as Frederick Schauer, H.L.A. Hart and many others say, or in no cases, as the critical legal studies movement says. This is a matter that need not be addressed for present purposes. But there are some judicial decisions that do not rely on the interpretation of doctrine at all; rather, the judge reaches the decision that she believes will produce the most desirable social consequences.


51. See sources cited supra note 47.


Dworkin notes that such decisions can be described as being based on social policy, but he also wants to describe them as an exercise of strong discretion. The use of this latter terminology makes these decisions appear strange, mysterious, and by implication, entirely unguided by standards. Use of the term policymaking, in contrast, makes these decisions seem quite ordinary. Policymaking, after all, is a common mode of governmental action that every legislature, most every agency, and many senior administrators undertake as an essential aspect of their role. The vast majority of social scientists who have studied the judiciary concluded that it is also a common mode of judicial decisionmaking. Once non-doctrinal decisions are identified as policymaking, we can dispense with the term discretion, or strong discretion, in this context. There is, of course, no logical reason why discretion cannot be used as a synonym for policymaking, but it is not particularly helpful to amplify a relatively clear, familiar term with a vaguer, more mysterious one.

The reason why Dworkin may avoid the familiar contrast between doctrine and policymaking, in favor of a less familiar contrast between law and strong discretion, lies in a basic difficulty with his theory, namely, its oscillation between descriptive and normative discourse. Strictly speaking, Dworkin's theory is normative. He asserts that judges are wrong to engage in policymaking, or strong discretion, and he presents an argument based on the nature of personal rights to support this claim. But, as Brian Leiter points out, Dworkin does not want to be in the position of arguing that all judges are acting incorrectly; his politics, and his entire approach, are too moderate to make that stance a comfortable one. For Dworkin to describe the approach he rejects as policymaking, and the approach he favors as doc-

54. Dworkin, supra note 6, at 22-28; Dworkin, Law's Empire, supra note 12, at 225-441.
trine following, however, would place him in precisely this position, since most observers agree that judges regularly make public policy and often depart from any clear interpretation of doctrine.\textsuperscript{57} It is better for Dworkin to describe his rejected approach as something called strong discretion, and his favored approach as law, which leaves the frequency of judicial violations of his preferred standard unclear. In the final analysis, of course, the result is essentially the same. He effectively concedes this when he postulates a superhuman judge as the one person who can consistently implement his normative recommendations: a norm that can only be consistently followed by a superior being is one that will be regularly violated by ordinary mortals.\textsuperscript{58}

For present purposes, the most important conclusion is that the term strong discretion, as Dworkin uses it, is an artifact of his idiosyncratic theory of judicial decisionmaking, and an inducement to confusion. The term does not perform any useful function other than resolving Dworkin's personal dilemma. Just as weak discretion can be replaced with an analysis of administrative control, strong discretion can be replaced with an analysis of policymaking. Policymaking is the process by which a government agent, whether legislator, executive, administrator, or judge, uses some articulated method to establish general rules, or standards, for the implementation of governmental efforts.\textsuperscript{59} It is a more accurate and useful term because it illuminates both the nature of the process and the relationship between that process and other aspects of governance.

Given the availability of the term policymaking, what is gained by using the term discretion, or strong discretion, as a synonym for it? With respect to weak discretion, four possible arguments were suggested above for retaining the term discretion. These same arguments can be invoked in favor of strong discretion as well, but they are equally unpersuasive.

When a legislature grants rulemaking power to an agency, and when those in charge of the agency exercise that power, they are of course making choices, often choices that are not subject to direct review. But the Hart and Sacks notion that two or more choices are equally permissible, and Dworkin's notion that there are no binding

\textsuperscript{57} See sources cited supra note 55.

\textsuperscript{58} DWORKIN, supra note 6, at 105-30; DWORKIN, LAW'S EMPIRE, supra note 12, at 225-399.

standards, both mischaracterize a process that the term policymaking describes much more accurately. The agency is not given a choice because it has earned the right to have one, or because it is entitled to the legislature's respect, or for any other deontological reason. Rather, the declared purpose of the agency's power of choice is to advance the public good. It is instrumental to a social goal. This goal can be stated in the most general terms—"public convenience and necessity, for example"—or it can be specified in mind-benumbing detail, but the declared motivation is the same. One can, of course, question the sincerity of this motivation, as public choice and critical scholarship regularly do. But this does not alter the underlying idea that the legislature has a particular purpose in mind, even if that purpose is the less laudable one of protecting special interest groups.

The fact remains that what the legislature asks the agency to do, and what the agency perceives itself as doing, is to make public policy, not exercise discretion. The agency is expected to gather information, review various options, and decide which option best implements the legislature's goal. That is, of course, the classic description of the policymaking process. Specific methods for carrying out these tasks, such as cost-benefit analysis, only emphasize the instrumental nature of the undertaking. Even "muddling through," Charles Lindblom's alternative to the classic approach, possesses this same instrumental character, and differs only in its assessment of the agency's cognitive capacities.

To be sure, the line between policymaking and implementation is far from clear. "Street-level bureaucrats," as Michael Lipsky points out, often make their own rules based on judgments about desirable social consequences. Policymakers often issue pronouncements whose authoritativeness is uncertain, and ferociously complicated for an outsider to access. In fact, the relationship between policymaking and implementation is often a relative rather than an intrinsic one. From the legislature's point of view, agency rulemaking is a means of implementing its enactment; from the agency's point of view, it is a declaration of policy that street-level bureaucrats are expected to fol-

60. This is the operative language of our first administrative statute, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). See James A. Rohr, To Run a Constitution: The Legitimacy of the Administrative State 90-110 (1986).
61. See generally sources cited supra note 59.
low. But all this complexity and relativity argues for using a policymaking and control model, rather than a strong and weak discretion model, because the former model helps us analyze these complex, relative relationships, and the latter does not. Policymaking may be viewed as the process of using some defined methodology to formulate general rules for the control of one’s subordinates; it can be carried out by issuing instructions in advance, with either substantive or procedural content, or by monitoring either performance or results on either basis. The terms strong and weak discretion, in contrast, seem like intrinsic possessions or qualities of the person who exercises them, and offer no insight into their connection with each other.

Thus, neither the structural position of the policymaker, nor the policymaker’s phenomenological experience, is usefully described as an exercise of discretion. As previously discussed, the term discretion cannot be used to reveal structural similarities between policymaking, receiving ambiguous instructions, and not being reviewed. These are different activities, with no intuitive or logical linkages among them. Indeed, policymaking is in some sense the opposite of discretion, because it is typically part of the supervision process; it establishes the generalized instructions that are communicated to subordinate officials for the purpose of controlling their behavior. One might use the term discretion as a source of irony, to indicate that a subordinate official, supposedly subject to supervision, actually possesses as wide a range of choice as a policymaker. But the mere fact that the comparison generates irony indicates that the two types of choice are qualitatively different. The first is a by-product of the practical limits on the supervision process, while the second represents the process of evaluating different sets of rules to determine which will best implement the agency’s goals. There are some similarities, to be sure, but not enough to justify the use of an otherwise uninformative term.

Nor is the term discretion of much deconstructive value with respect to the policymaking process. No one other than the most addled proponents of cost-benefit analysis ever imagined that policymaking was a precise science, or that it could generate definitive results. Dworkin’s claim that judicial decisionmaking can generate definitive results has been greeted with widespread scepticism, even though judges are not supposed to be policymakers according to the standard account. But policymakers are supposed to be policymakers, and the open-ended nature of their task has been generally conceded. The

64. See sources cited supra note 18.
assertion that policymakers possess discretion is merely an awkward restatement of the standard position, hardly a formulation with much deconstructive force.

There is a deconstructive aspect to discretion, but it does not apply to bureaucratic control or policymaking, which already incorporate all the insights that the term suggests. Rather, it applies to the underlying attitudes that motivate observers to employ the term discretion itself. The basis of this deconstruction is a possibility that lurks behind both Hart and Sacks’ and Dworkin’s definitions. According to Hart and Sacks, discretion describes a situation where two or more choices are equally permissible. If only two choices are permissible, however, the discretion would be quite limited; the dangerous supplement to this notion, perhaps, is unlimited discretion, where any choice at all is permissible. According to Dworkin, strong discretion describes a situation where there are no binding standards. If there are some standards present, even if they are not binding, then the discretion, however strong, is once again quite limited. But what about the possibility that there are no standards of any kind, and the discretion is once again unlimited? This could be described as super-strong discretion.

The most interesting feature of super-strong discretion is that it is unknown in the modern administrative state. To be given authority to do anything one chooses, or authority subject to no standards at all, is to be in the position of an absolute monarch. One could then declare, as monarchs often have, that one reached a decision “because it was my sovereign will.” The words would sound risible coming from the Secretary of the Treasury, who is, after all, a very high-ranking official; they would even sound risible coming from the Federal Reserve Board. No one in the administrative apparatus of a modern state is granted authority of that nature. Rather, their authority, however great, is always instrumental to some public purpose; the range of choices is always limited, and there are always some applicable standards. Even elected officials, who possess the broadest grant of authority in a democratic state, do not have super-strong discretion. They are constrained not only by the substantive views of those who elected them, and will decide whether to re-elect them, but also by the instrumentalist conception of the state as a mechanism for implementing the public good. The legislator who declares that he voted for a measure “because it was my sovereign will” is not likely to be re-elected or taken seriously by his colleagues.
Because super-strong discretion is so inconsistent with our entire conception of governmental system, it is conceivably the dangerous supplement to the other types of discretion—weak and strong—that are regularly described as being important aspects of that system. In holding up a sort of fun-house mirror to those standard usages, it suggests why observers are so devoted to those usages, even though they convey so little useful information. Once this devotion is explained, it may be possible to counteract it, and thus replace the concept of discretion with systematic accounts of administrative supervision and public policymaking.

Discretion seems to play two different roles in the account of modern government. For some, it justifies that government by securing flexibility and opening a space for empathy.\footnote{See Lipsky, supra note 63, at 81-156; Unger, infra note 69; Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539; Cynthia R. Farina, *Conceiving Due Process*, 3 *Yale J.L. & Feminism* 189 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *Buff. L. Rev.* 1 (1990).} The administrator with discretion can respond to unexpected circumstances and to the equities of an individual case. She is not a pod person or a borg; she has "a human face." For other observers, probably the larger number, discretion condemns modern government because it violates the rule of law.\footnote{See, e.g., F.A. Hayek, *The Road to Serfdom* 63-96 (50th Anniversary ed. 1994); Theodore Lowi, *The End of Liberalism* 92-126 (2d ed. 1979); David Schoenbrod, *Power Without Responsibility* (1993); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 1 (1982).} The administrator with discretion can maximize his own something-or-other, perhaps his budget, or perhaps that very discretion, to the detriment of the public, or he can oppress honest, law-abiding property owners out of some warped sense of the public good.

Modern bureaucracy possesses both these features, but neither is central to its promises or its dangers. The real possibilities of bureaucracy, for good and evil, lie in a completely different arena, and demand a completely different mode of analysis. There is nothing obscure about this analysis; it is the one Max Weber developed when he first articulated the contours of modern bureaucratic government. Weber's assessment, in brief, is that bureaucracy, as a purposive-rational mechanism of governance, creates unprecedented possibilities for the mobilization of social resources and the exercise of political control.\footnote{Max Weber, *Economy and Society* 973-78 (1968).} But purposive-rational behavior is fulfilling only to the extent that the individual or the society can identify its purposes; if that does not occur, then efficiency becomes a purpose of its own, and the
bureaucratic apparatus turns into an enclosed, self-sustaining system that imprisons its society in an iron cage.\textsuperscript{68}

Both the proponents and the critics of discretion are invoking the concept of discretion as a means of combating Weber's bleak but convincing prognosis. For the proponents, discretion humanizes the bureaucracy, leavening its hierarchical, mechanistic structure with the flexibility and empathy that characterized, at least in theory, the traditional governments of pre-bureaucratic times. Thus, the path of escape from the iron cage lies in more diverse administrators, who can empathize with a broader range of clients, more pragmatic administrators, who can vary their instructions more thoroughly and intelligently, or more progressive administrators, who can combat the oppressive features of bureaucracy from inside the system.\textsuperscript{69} For the critics, discretion permits the bureaucracy to follow its own goals, and ignores or frustrates those that the people have chosen through their democratically-elected leaders. The path of escape lies in reasserting democratic control, eliminating or at least strictly curbing that discretion so that the bureaucracy's actions reflect the decisions made by the chief executive or the legislators, and for which they are answerable to the people.\textsuperscript{70}

The image of super-strong discretion is a dangerous supplement for these standard views because it suggests that only such discretion, which of course does not exist, could do the work that both proponents and critics have assigned to the more general category. With respect to humanizing the bureaucracy, the translation of weak or strong discretion into the more useful terms of supervision and policymaking indicates that such humanization is unlikely to occur. Weakening the formal controls may increase random variations in behavior, but its only consistent effect will be to increase the effects of informal norms. Very often, it is the strength or acceptability of the informal norms that makes weakened control acceptable. But these informal norms may be either more or less pragmatic or humane than their alternatives; they may embody greater empathy for the clients, but they may also embody rejection and contempt. Debates about the


\textsuperscript{69} See, e.g., Roberto Mangabeira Unger, False Necessity (1987).

\textsuperscript{70} See Hayek, supra note 66, at 13-27; Lowi, supra note 66, at 295-313.
desirability of discretion for administrators, or for judges, often turn on the differing empirical assessments about which of these possibilities will occur. In any event, the behavior, even when controls are weakened, is likely to reveal a pattern. The image of the bureaucrat who follows her own philosophy—empathetic, progressive, or pragmatic—is an unrealistic one; it implies an act of will, and a rejection of prevailing standards, that it never permitted and very rarely assumed. It is the motion picture image of the courageous cop who slams his badge down on the lieutenant's desk and says, “I'm sick of all your rules. I'm following my own rules now!”

The critics' image of discretion is equally unrealistic. Of course administrators, or judges, have extensive authority in modern governments, but once we recognize this authority as policymaking, not discretion, it becomes apparent that it will not really be decreased by elected officials. The administrators and judges are not exercising that authority on their own, as a result of some surreptitious, quasi-conspiratorial power grab. They were granted such authority by the elected officials because an administrative state is what those officials want, and ultimately what the people want. That state has been developing for two hundred years, simultaneously with the growth of democracy as we know it; it is society's response to the complexities of modern industrial society. If administrative or judicial policymaking violates the rule of law, at least according to some definition of this concept, then it seems clear that the people of Western democracies want government services a good deal more than they want law. The image of the bureaucrats as exerting authority through an act of will, in disobedience of the hapless executive and legislature, is again the unrealistic image of super-strong discretion.

How then will we escape from Weber's iron cage? At some level, we will not; we live in a society with a highly organized, bureaucratic government; the range of choices that the members of that government possess is best described by the concepts of supervision and policymaking. The concept of discretion, whether strong or weak, good or bad, is only a source of confusion. But it is only Weber's sensibility that renders bureaucratic government an iron cage, or if we take his metaphor as descriptive, that attaches such negative associations to it. It is for us to improve that government, according to our own ideas of efficiency, fairness, and virtue. If we want bureaucrats to be more em-

---

71. According to Weber, modern bureaucracy is escape-proof. WEBER, supra note 19, at 1399-1403.
pathetic, for example, the answer does not lie in granting them discretion, but in establishing a policy of empathy, and choosing the level of control that is necessary to achieve it—low, if the existing bureaucrats are already empathetic, high if they are not. If we are concerned that bureaucrats are interfering too heavily with private enterprise, the answer does not lie in restricting discretion but in establishing a policy that supports entrepreneurs. Discretion is simply not a useful term in a modern bureaucratic state. It may express our dissatisfactions with that state, but it will not yield any improvements of the sort that can be developed by analyzing control and policymaking mechanisms. The classic wrong question, it always produces the wrong answer.

II. BANK REGULATION IN THE FEDERAL REPUBLIC OF GERMANY

In the Federal Republic of Germany, as in the United States, bank regulation is carried out by both an independent central bank and a financial regulator answerable to the nation's chief executive. Germany's central bank is the Bundesbank, with its headquarters in Frankfurt.72 Its financial regulator is the Federal Bank Supervisory Office ("FBSO"), a part of the Ministry of Finance.73 The FBSO was originally located in Bonn, but since reunification, its offices have been transferred to Berlin.74

The Bundesbank is a large operation; in addition to its main headquarters, it has nine subsidiary banks at the regional level, called Land Central Banks. These were originally independent institutions, but were placed under centralized control in a 1957 reorganization.75 In addition, the Bundesbank has approximately two hundred branches, one in most major cities within Germany.76 The FBSO, in contrast, is quite small, employing only a few hundred professional employees.

The declared purpose of regulating banks in Germany, as in the United States, is to ensure their safety and soundness;77 for ordinary businesses, insolvency is viewed as a quasi-Darwinian mechanism that

73. See id. at 1, 16-17; Deutsche Bundesbank, supra note 3, §§ 5-8.
74. Interview with Volker Kerl, Regierungsdirektor im Bundesaufsichtsamt für das Kreditwesen, in Berlin, Germany (June 28, 1995) [hereinafter Kerl Interview].
75. See GAO, supra note 72, at 8-9; Interview with Bertold Wahlig & Gerd Eichhorn, Bundesbankdirektors, Deutsche Bundesbank, in Frankfurt, Germany (June 27, 1995) [hereinafter Wahlig Interview].
76. Wahlig Interview, supra note 75.
77. Deutsche Bundesbank, supra note 3, at 6-7 (1994).
improves the health of the corporate herd, but for banks it is viewed as a social disaster. To prevent insolvency, the German legislature has enacted a banking law that specifies capital and liquidity ratios, lending restrictions, requirements for the auditing of balance sheets, and criteria for the qualifications of owners and managers. 78 Notably absent from this list, in comparison with the U.S., is any restriction on the sorts of businesses in which banks may engage. Germany allows universal banking and the legislature does not regard the mixture of commercial and investment banking, or of banking and commerce, as a source of any particular risk. 79

The balance sheets of German banks are not audited by the regulatory authorities, as they are in the United States; rather, each bank is required to appoint its own auditor, invariably a private accounting firm. 80 The audit reports are sent to the Land Central Bank of the relevant region, where a professional staff member prepares a summary, or “extraction.” 81 This also includes data from the monthly reports that the bank is required to provide, data from the previous year’s audit, and comments by the staff member on the quality of the bank’s assets and the quality of its management. 82 The comments are based on tables of various criteria and ratios which are developed within the Land Central Bank. 83 Upon its completion, the audit report and the summary are sent to the FBSO in Berlin, which reviews the documents and takes action in appropriate cases. 84

A. No Discretion?

I interviewed a number of German bank officials in the summer of 1995 to explore their views about the level of discretion that they exercise in carrying out their tasks. They responded that they exercised no discretion at all, that their activities were fully specified in the seventy-five page, large print, single column Banking Act. 85 For ex-

78. See Deutsche Bundesbank, supra note 3.
79. See GAO, supra note 72, at 10. See Deutsche Bundesbank, supra note 3, § 3.
80. See GAO, supra note 72, at 23-28; Kerl Interview, supra note 74; Interview with Walter Sander, Bundesbankoberrat, Landeszentralbank in Berlin und Brandenburg, Berlin, Germany (June 29, 1995) [hereinafter Sander Interview].
81. See GAO, supra note 72, at 14-17; Sander Interview, supra note 80.
82. See sources cited supra note 81.
83. See sources cited supra note 81.
84. See Sander Interview, supra note 80.
85. See Kerl Interview, supra note 74; Sander Interview, supra note 80; Wahlig Interview, supra note 75; Interview with Uwe Schneider, University Professor, Institut für internationales Recht des Spar-, Giro- und Kreditwesens an der Johannes Gutenberg-Universität, in Darmstadt, Germany (June 25, 1995) [hereinafter Schneider Interview].
ample, the statute requires each bank to have at least two managers, and then specifies the criteria for FBSO approval of these managers. This provision reads, in its entirety, as follows:

A prerequisite of the professional qualifications for managing a credit institution . . . is that [all managers] have adequate theoretical and practical knowledge of banking, as well as managerial experience. A person shall normally be assumed to have the professional qualifications necessary for managing a credit institution if three years' managerial experience in a credit institution of comparable size is proved.86

An FBSO official told me that various types of managerial experience are acceptable, but that experience in a peripheral department such as payments would not be.87 Another official, in charge of approving foreign banks, told me that experience generally means three years in Germany, but someone with one year's experience in Germany and three years overall would generally be approved.88 Many people in the banking industry believe that there are additional, unstated criteria—for example, that only managers with experience as loan officers would be approved—and that the regulators are acting on a highly discretionary basis. All the regulators insist, however, that they are not exercising any discretion at all in making these fairly detailed determinations, but merely implementing the language of the statute.89

In the context of American bank regulation, where the relevant statutes for commercial banks run at least 500 closely-printed, double-column pages in the U.S. Code,90 the relevant regulations run at least 1,500 pages in the CFR,91 and the regulators are generally acknowledged to have plenty of discretion nonetheless, the assertion of the German regulators seems incredible. Since it is difficult to accuse people of lying, however, I did so as gently as I could. No, I was assured, their job was simply to follow the statute, and that is what they were doing. I finally obtained a concession, from both an attorney at the FBSO92 and a staff officer at the Land Central Bank of Berlin and

86. See Deutshe Bundesbank, supra note 3, § 33(2).
87. See Kerl Interview, supra note 74.
88. See interview with Volckmar Bartels, Regierungsdirektor im Bundesaufsichtsamt für das Kreditwesen, in Berlin, Germany (June 28, 1995) [hereinafter Bartels Interview].
89. See Kerl Interview, supra note 74.
92. See interview with Joachim Doerr, Regierungsdirektor im Bundesaufsichtsamt für das Kreditwesen, in Berlin, Germany (June 28, 1995) [hereinafter Doerr Interview].
Brandenburg,\textsuperscript{93} that an element of discretion was involved in the process of approving bank managers. This was valuable in reassuring me that my preconceptions were correct, but it told me very little about the nature of German bank regulation or the phenomenological experience of its regulators.

Having thus spent some time asking the wrong question, I thought of a somewhat better one. "Why," I asked, "is it so important for you to not exercise discretion?" The answer I received involved Germany's historical experience. The words "Nazi," "Fascist," or "Hitler" were never used; usually, the phraseology was "because of what happened in World War II."\textsuperscript{94} What the Germans, or at least the German bureaucracy, seem to have concluded from that experience is that they are people who cannot be trusted; therefore, it is necessary that they follow a set of prescribed rules and do not exercise discretion.

This is a fairly striking response because the standard American diagnosis of what went wrong in Germany is exactly the reverse: that the Germans were thoughtlessly and slavishly following established rules when they should have been using their judgment. This was, indeed, the premise of the now-notorious Milgram experiment.\textsuperscript{95} Milgram's original idea was to determine whether German people were more willing to follow orders than Americans. He designed an experiment where the subject was told to administer increasingly severe electric shocks whenever a person in the next room, who was trying to learn a particular task, made a mistake. As the level of the supposed shocks increased, and the learner's screams of pain became louder (those were being faked, of course), the subject experienced increasing stress, but continued to administer the shocks at the behest of the experimenter. Many of the subjects assumed that the learner had died by the end of the experiment. Ultimately, Milgram found the Americans so willing to take orders that he concluded Germans could not possibly be more obedient, and never ran the experiment in Germany.\textsuperscript{96} He has, of course, become notorious for his willingness to cause his subjects real anguish; in demonstrating that Americans were prepared to follow the practices of Adolph Eichmann, he unwittingly

\textsuperscript{93} See Sander Interview, supra note 80.
\textsuperscript{94} See Bartels Interview, supra note 88; Doerr Interview, supra note 92; Kerl Interview, supra note 74; Wahlig Interview, supra note 75.
\textsuperscript{95} STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974).
\textsuperscript{96} For an insightful interpretation of the reason why the experimental subjects were so willing to obey, see ROBERT A. BURT, TAKING CARE OF STRANGERS 72-91 (1979).
followed the practices of Dr. Mengele.\textsuperscript{97} Nonetheless his experiment indicates the strength of the American belief that the Germans' behavior during World War II stemmed from their willingness to follow orders.

The Germans' assessment of the situation was different. In their view, their mistake was not their willingness to follow orders, but to follow the wrong orders. Hitler was a tyrant; he had seized power illegally and established a regime that was immoral from the outset for its lack of democratic participation and its annihilation of human rights. It was regarded as immoral by the democratic nations of its time. The current German government, however, is a democracy that recognizes human rights, and it is regarded as a just regime by all the other nations of the world that merit such a characterization. Orders issued by the current government, therefore, are orders that deserve to be followed. Indeed, German bureaucrats would be acting immorally if they exercised discretion;\textsuperscript{98} they would be ignoring the desires of the German people, as expressed through their duly constituted democratic organs, and possibly opening a space in which the demons that still lie within them could once again go on the prowl.

Clearly, then, the claim by German bureaucrats that they have no discretion plays an important psychological role for them, and for German society at large. It reassures them that they are under control and that their government obeys the rule of law. That law, moreover, is not the false law of a tyrant, but genuine moral law, generated by a duly constituted legislature, grounded in the policy choices of the German people as a whole, and supported by the system of democracy and human rights that now represents the most unified moral theory that the Western world has possessed since Pope Leo IX excommunicated the patriarch of Constantinople.\textsuperscript{99}

Stated in this fashion, there is nothing particularly unusual about the German view. It responds to an anxiety that is quite common, although not quite as poignant or insistent, in Anglo-American legal culture. We too fear the anti-democratic aspects of bureaucracy; sometimes this fear comes from the left, and joins with the German view that discretionary bureaucrats can threaten the human rights of

\textsuperscript{97} See id. at 84-91.
\textsuperscript{98} See Bartels Interview, supra note 88; Doerr Interview, supra note 92; Kerl Interview, supra note 74; Wahlig Interview, supra note 75.
individuals. More often, it comes from the right, and is envisioned as a threat to private property or efficient business practices. But whether the specter one is haunted by is fascism or communism, the concern is widespread in our legal culture. It is expressed in Frederick Hayek’s and Theodore Lowi’s condemnation of legislative delegations, and in Kenneth Davis’ complaint about unconstrained bureaucrats. It is also expressed, remembering that the judiciary is an institution and, to some extent, a bureaucratic one, in the entire legal process analysis of the “counter-majoritarian difficulty” with judicial review, and in the general concern about judicial activism.

None of this, however, alters the fact that German bureaucrats are lying when they assert that they have no discretion. They may have good reasons for wanting to avoid discretion, but it is simply not credible that their puny little statute can cover the entire subject matter. The question, then, is how a group of reasonable, intelligent people can persuade themselves of such an implausible, albeit much-desired, view of their own level of discretion.

The principal difficulty in answering this question lies in the analytically intractable character of its crucial term. As long as one relies upon the concept of discretion, it remains mysterious how that quality can be disclaimed by bureaucrats who clearly must rely upon their judgment, and often possess no apparent standards to guide their actions. But German bank supervisors are, needless to say, bureaucrats, and in a bureaucratic context, the term discretion can only produce confusion. If one replaces it with the concepts of control and policymaking, the inquiry immediately becomes more focused. Bank supervision in Germany is carried out by a large, widely dispersed group of officials in the Land Central Banks. How are these officials controlled? To what extent are their judgments about bank balance sheets, about the credentials of bank managers, and about various

100. See, e.g., Unger, supra note 69; Austin, supra note 65; Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1276 (1984); White, supra note 65.


102. Hayek, supra note 66; Lowi, supra note 66.

103. Davis, supra note 1.

104. See generally Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1962); Charles L. Black, Jr., The People and the Court (1960); Jesse H. Choper, Judicial Review and the National Political Process (1980); John Hart Ely, Democracy and Distrust (1980).
other issues subjected to some sort of supervision, and to what extent are they unsupervised?

B. Instructions

As stated above, bureaucrats can be controlled by either instructions or monitoring, and this control can be substantive or procedural in character.\textsuperscript{105} The paltry size and general language of the statute indicates that such control is not being exercised by instructions issued by the legislature; the absence of published regulations means that it is not being exercised by instructions issued by the top echelon of agency officials. This does not necessarily indicate that the bureaucrats are uncontrolled, however; it simply means that one particular form of control—instructions by a superior official—is not being employed.

If one suspects, as I did, that the absence of instructions does not mean that German bank regulators are free to make any decisions they choose regarding the safety and soundness of a bank, then the natural line of inquiry is to look for other modes of supervision. Two possibilities present themselves: first, that supervision by instructions is regarded as unnecessary because the regulators' behavior is predictable; and second, that they are being controlled by continuous monitoring, rather than by advance instructions.

Inquiries about the predictability of German bank regulators, at least if one wants to avoid unconvincing cultural stereotypes, focus naturally on training, and reveal a fairly dramatic aspect of the German system. When people are hired as bank regulators in the United States, they typically undergo a few weeks of on-the-job training. When people are hired to be bank regulators in Germany, they are sent to a special "university" in Hachenburg, run by the Bundesbank.\textsuperscript{106} High school graduates, that is, twenty-year olds with a baccalaureate degree, are trained at this institution for three years; university graduates with practical experience are trained for two years.\textsuperscript{107} The training is conducted by specialized staff members of the Bundesbank.\textsuperscript{108} There are no course books and no theoretical instruction. Instead, the students are taught the rules and procedures of their particular role for the entire two or three year period.\textsuperscript{109}

\textsuperscript{105} See supra text accompanying notes 19-20.
\textsuperscript{106} See Wahlig Interview, supra note 75.
\textsuperscript{107} See id.
\textsuperscript{108} See id.
\textsuperscript{109} See id.
In light of this extended training period, the absence of detailed statutory or regulatory instructions in Germany no longer seems quite so astonishing. No such instructions are required to ensure administrative regularity. Two or three years of full-time training in the specifics of one's job, at a relatively isolated facility devoted solely to that purpose, will produce regularity quite nicely. The absence of formal instructions therefore does not mean that German bank regulators have "discretion"; as Baumgartner suggests, there are many mechanisms by which control is exercised in a bureaucratic setting. This control is both procedural and substantive; the regulators know precisely how to go about reaching their decisions, and they know the kinds of decisions they are expected to reach.

Consider, for example, the process by which officials at the Land Central Banks examine the auditor's report from a private banking institution. As stated above, an "extraction," or summary, is prepared for each report, and it is this summary that is reviewed by the FBSO in Berlin. There are no regulations specifying the categories of information that go into the extraction; however, every extraction covers the quality of the bank's loans, the size of its loan loss reserves, the match between assets and liabilities, liquidity levels, profit levels, and the presence of relatively large loans to a single borrower. Since all the officials have been trained, literally for years, on the way to prepare an extraction, it is hardly surprising that all of them provide the same information, even without any written instructions to this effect. Indeed, an official who omitted some of the categories, and provided some new ones in their place, would not be regarded as having exercised discretion; he would be regarded as having gone insane.

The substantive decision about whether a person has sufficient experience to serve as a bank manager is a more subtle, contextual one. Being a loan officer is clearly a preferred status, and managing a payments operation is a disfavored one. Given the complexity of modern banking, however, there are innumerable positions aside from these two, as well as innumerable variations of each position. The disagreement between the regulatory officials and the private bankers about precisely what the standards are bespeaks a lack of clarity, or transparency, in the regulators' approach. Yet it is hard to imagine that any of the regulatory officials have an experience that

110. Baumgartner, supra note 2.
111. See Sander Interview, supra note 80.
113. See supra text accompanying notes 86-88.
can be usefully described as "discretion" when making such determi-
nations. Rather, their training has given them a rather specific, if not 
entirely articulable, sense of what an experienced bank manager looks 
like, and they are trying to apply that understanding to the specific 
person under consideration as accurately as they can.

But these behaviors by regulatory officials do not mean that the 
Germans are telling the truth about the operation of their statute. It 
is not the statute that is supplying the requisite detail; it is the instruc-
tional staff at the Bundesbank training facility. It would be equally 
incorrect, however, to say that this faculty is exercising "discretion." 
Clearly, they do not teach whatever they choose; any instructor who 
made up his own curriculum would quickly be dismissed. What they 
teach, rather, is Bundesbank and FBSO practices—practices that re-
sult from structured policymaking by a large number of leading bu-
reaucrats. These bureaucrats, in turn, are guided by the language of 
the statute, their knowledge of the statute’s meaning, their contacts 
with legislators and other political figures, their long experience in 
banking and bank regulation, and a variety of more diffuse but none-
theless effective social signals. The instructors perceive themselves as 
carrying out their role to the best of their abilities, not as acting in the 
absence of standards or expressing their personal and sovereign will.

Consideration of this pattern suggests that we Americans are also 
lying when we assert that our bureaucrats exercise discretion despite 
all the detailed statutes and regulations which instruct them. The 
claim is not that these statutes and regulations are unambiguous. The 
point, rather, is that verbal instructions do not constitute the totality 
of any bureaucratic system’s control mechanisms. American bank 
regulators do not receive two or three years of intensive training, but 
they are subject to the same kinds of social pressures, informal signals, 
and implicit understandings as their German counterparts. Thus the 
two systems bear a basic similarity, with detailed instruction in the 
United States taking the place of the training program in Germany. 
Whether one or the other results in a higher level of control is not 
immediately apparent and would require detailed analysis. Indeed, 
that is the principal point; the nature of a bureaucratic system can be 
understood only by considering the various means by which superiors 
exercise control over subordinates. The concept of control and super-
vision provides a way of focusing this essential inquiry; the concept of 
discretion only obscures it.

References to discretion continue, despite their disutility as a de-
scription of modern bureaucratic systems, because of the psychologi-
cal needs that they fulfill. For the Germans, the term serves as a way to characterize their fears of autocracy, and its denial reassures them that they have learned their lesson. For Americans, that same denial of discretion reassures us that we are indeed a democracy, but the assertion of its continuation convinces us that within the inevitably hierarchical and technocratic components of our government, spontaneity and humanity survive. The fact that these uses are contradictory not only deepens the confusion, but also increases the psychological value of the term. It becomes a means of defining morally contested territory, a marker for an important debate about the distribution of authority in our society. Do we want "street-level" bureaucrats to make contextualized decisions, or do we want to control them so that they react to similar situations similarly? This is indeed a serious question about the bureaucratic state, one whose answer will determine, in Germany as in the United States, how many instructions are issued and by whom, how much training is provided, and how the administrative hierarchy is structured. But the answer can only be provided if we think in terms of supervision and control. The concept of discretion leads us nowhere; indeed, because it makes us feel that we are grappling effectively with the moral issues of our modern state, when we are in fact not doing so, it may lead to someplace worse than nowhere.

C. Monitoring and Policymaking

The supervision of bureaucrats is not limited to instructions issued in advance or to training and cultural conditioning that takes the place of instructions. It also involves monitoring, by which the supervisor observes the subordinate's behavior during or after the activity in question has occurred. Like instructions, monitoring is often combined with policymaking, that is, a single agency is responsible for making certain decisions and implementing those decisions. In Germany, this dual function is carried out by both the Bundesbank and the FBSO. For example, the extractions of the audit reports are the particular responsibility of the FBSO. As previously stated, this is an agency of a few hundred professional people, located in a single facility in Berlin. All the extractions are sent to this agency and systematically reviewed. Minor corrections can be made by a single official, but thorny ones are referred to the FBSO's department heads.

114. See Sander Interview, supra note 80.
115. See Doerr Interview, supra note 92; Kerl Interview, supra note 74.
Every week, the department heads meet together to discuss these difficult cases and other policy matters. If they disagree with a decision made by the regulators in the Land Central Bank, they will write a letter of advice explaining their position. Such letters are circulated for signature by the department heads, then are promulgated on behalf of the President of the FBSO.

One can understand the FBSO's role in terms of both monitoring and policymaking. The extreme centralization of the FBSO review process enables it to impose uniform standards without issuing regulations that provide instructions in advance. Since all the extractions are reviewed in a single office, by a relatively small group of officials who interact on a regular basis, the responses to them are likely to be rather uniform. Since these responses are communicated in a letter signed by the President of the FBSO, they are likely to be taken rather seriously; one can safely assume that such a letter circulates throughout the Land Central Bank whose staff member has received it, and that it exercises a definitive effect on that agency's procedures and results.

The drafting of such letters can be a straightforward case of correcting erroneous decisions, but it can also be a source of policymaking by the FBSO. Once a particular extraction has been brought to the weekly meeting, and the department heads of the FBSO are all gathered in the room to discuss it, the opportunity to make policy is obviously presented. This is not strong discretion, however, and it is certainly not super-strong discretion. Rather, the FBSO regulators see themselves as implementing a statutory scheme that experience and training has given many layers of meaning. As one official told me, the regulators really do know that they are not directly bound by the statutory language, but they believe there is one proper interpretation of the statute, and once they reach that determination, they are reluctant to change it. Indeed, they have no regular procedure for promulgating changes.

The officials in the Land Central Bank certainly see FBSO decisions as an exercise of policymaking authority. In fact, they see the FBSO as more lenient toward the banks, and often feel somewhat be-

116. See sources cited supra note 115.
117. See sources cited supra note 115. The FBSO officials generally consult with the Bundesbank before writing to one of the Land Central Banks. See id.; see also GAO, supra note 72, at 21-22.
118. See Doerr Interview, supra note 92.
119. See Kerl Interview, supra note 74. This was confirmed by FBSO counsel. See Doerr Interview, supra note 92.
trayed by its reversals of their judgments.\textsuperscript{120} It will be recalled that these officials are members of a separate institution; the Land Central Banks are subsidiaries of the Bundesbank, not of the FBSO. The fact that the extractions, in being submitted for review, must cross an institutional boundary may well contribute to the sense that the FBSO is imposing a somewhat different and distinctive interpretation of the statute. On the other hand, the relatively smooth and consistent way that such an institutionally complex monitoring system can be carried out reminds us that Weber's basic insight about the efficiency of bureaucratic structures remains sound, despite all the intervening doubts. Bureaucrats make policy and implement that policy on an ongoing basis. This is not some exercise of will, some lapse of regular controls, some hole in the administrative doughnut; it is a regular, well understood component of our modern system of governance.

In conducting the interviews on which this account of German bank regulation is based, I visited the headquarters of the FBSO in Berlin. It is located in a quiet residential neighborhood, well outside the center of the city, and consists of about eight long, somewhat run-down-looking red brick buildings arranged along the sides of a large, rectangular athletic field.\textsuperscript{121} Originally, it had been a set of military barracks, built as a training facility by the Prussian monarchy, but many of the structures were added when it was expanded under the Third Reich. In 1945, after the fall of Germany, some of the American occupation forces were housed in the facility; when they vacated it in 1995, the FBSO moved in. At the time of my visit, the doors to all the offices still bore their U.S. Army designations. One had the words "Third Platoon" on it, and a little American flag, while others were labeled "Dayroom," "Commanding Officer's Room," "Orderly Room," "Interpreter," and so forth. After asking my informants various questions about the German bank regulation, it occurred to me to ask why these designations had been left on the doors. The answer I received was that repainting the doors to indicate the facility's current use had not been authorized. "All right, but why couldn't you just repaint the doors yourselves?" I asked. This question elicited some bewilderment, with the best guess of my informants being that the Federal Banking Supervisory Office could not afford the paint.

Now perhaps this really was the reason; I have probably accused enough people of prevarication in this article already. But there is

\textsuperscript{120} See Sander Interview, \textit{supra} note 80.
\textsuperscript{121} The location is Gardenshützenwef 71-101, Berlin, F.R.G.
surely some symbolic significance to those un-repainted doors. Here is the FBSO, protecting itself from Germany’s Fascist past, and reassuring itself that it really is the instrumentality of a democratic regime, with a layer of paint left by the army that imposed democracy on Germany. For the German bureaucrats, the denial that they exercise discretion plays essentially the same role as the paint on the doors. For American bureaucrats, the assertion that they still possess discretion serves essentially the same symbolic function.

**Conclusion**

The term discretion is far too familiar to replace, and any concerted effort to do so would only seem awkward and artificial. But it serves no real purpose in describing modern government, or in devising new solutions to the serious issues we confront. It merely reflects our cultural attitudes, particularly the deep ambivalence toward modern bureaucratic government that exists in both the United States and Germany. If we want to describe that government, and devise ways to improve it, we need to speak in terms that actually reflect its operation. The ones suggested here are supervision and policymaking. Supervision is the process by which superiors in an administrative hierarchy control their subordinates. It can be exercised by instructions issued in advance, or by monitoring instructions carried out during or after the activity in question. Policymaking is the process by which a government official uses some articulable method to establish general rules or procedures for the implementation of governmental efforts. These terms may sound a bit cold, and they certainly lack some of the psychological reassurance that we gain from speaking about discretion. But they represent our current reality; we should not bypass them, and keep talking about discretion, because we cannot afford the paint.