EXAMINING ETHICS
TRANSCRIPT - BARRY LAM: THE CASE FOR DISCRETION (06.02.25)

I'm Alex Richardson, and this is Examining Ethics, a show designed to bring insights from the cutting edge of moral philosophy and ethics education to the rest of us. Have you ever tried to get a driver's license in a new state of residence? Have you updated your immunization records lately? These tasks don't exactly inspire excitement, partially due to the labyrinthine systems that we have to navigate to get them done. Modern life in a lot of ways has become a vast sea of rules, regulations, and mandates. These can be protected for us in important ways, but they can also sometimes veer into being arcane or just silly. My guest today has a new book which argues that while use of discretion by bureaucrats in various positions of power in our lives can never be perfect, its absence is not only more conspicuous, but it's actually measurably worse for us. The book is Fewer Rules, Better People, The Case for Discretion. Barry Lam, welcome to the show.

Really happy to join you, Alex, and I believe this is my second time on examining ethics. But the first time, I don't even remember. It must have been eight years ago or something. Yeah. I think it's been a minute.

You've become a little bit of a celebrity since then.

So to start things off, can you tell our audience a bit about your work and your philosophical interest just at a general level?

Sure. So I am a philosophy professor. I have moved to UC Riverside after sixteen years teaching at Vassar College. Probably what most people know me for is the show that I make called Hi Fi Nation, which is a podcast at Slate. It's been on hiatus for a couple years, but the new season is going to be coming out. And most of my philosophical interest, I kind of get out and get from that show. I kind of look for philosophical issues that arise out of everyday life, out of the law, out of science, out of the arts. And I tried and I look at those, the stories, look for conflicts within them, and then talk to various philosophers and figure out what I think about them. And that pretty much explains the show and the book, which was, arose out of the fourth season, which I did on philosophy and its connection to criminal justice. And it just turned out that most of the people within the criminal justice system wanted to talk about discretion rather than these issues that we philosophers talk about in criminal justice. And so I decided, why not just start thinking about that and write my own book about it? That's pretty cool. I think the idea of sort of crowdsourcing problem selection is probably not one that's extraordinarily common amongst philosophers. Yeah. Because philosophers, they they tend to be, like, isolated thinkers. Right? So

the paradigmatic case of a philosopher writing is somebody who sits around, reads a bunch of stuff, and then thinks about it. And even if they wanna talk about contemporary issues, they don't actually go out into the world and, like, hang out with people who are doing the, you know, policing or for instance or, like, or or things are happening to and I just discovered that I just couldn't work that way. I needed to be in the mix. I needed to be amongst the people who are living out philosophical conflicts.

So I wanna jump right into the book here. You begin with a story about Joey, a teenager who steals food for his family kind of under duress. It's a classic story. Why was it important for you to start with this example, and what do you think it reveals importantly about the strengths and weaknesses of rules based systems, like our own criminal justice system, for instance?

Right. So the example really is kind of this timeless story that, you know, human beings have been talking about as early as there was a civilization, which is, what do you do about the person who steals bread to survive? And just as early as there was written law, there was discussion about this. It's in the Old Testament. It's in the Code of Hammurabi. And so I found my very own example of that not too far from where I lived at the time. There's sort of a a squatters, a a squatters community of trailers where there's just this really deep poverty in Dover Plains, New York. And, I've met up one day with a police officer who used to patrol that region, and he told me this story about one of the very first patrols he was on. He was called by a local convenience store owner to pick up a kid who was shoplifting, a kid who lived in this squatters trailer park. And as a very new patrol officer, he and his you know, had to decide what to do in that circumstance. And he found the kid. The kid confessed. He brought the kid down to the convenience store. He was positively identified. There was no difference in the story. The kid stole a pack of white bread, a jar of peanut butter, and a gallon of milk. And it was worth maybe $3.20. And he used it to feed his, you know, four year old brother and his mother and himself who hadn't eaten in a week. And I think it was you know, what's interesting to me about opening with just sort of a timeless problem in a contemporary, context is that we've have these kind of laws that we believe are important, like don't steal. And we also recognize a list of, if not exceptions, but cases where we think that, you know, we should give some kind of excuse to the people who do this stealing. And the police officers or the enforcers who are who are there to, you know, enforce the laws have to make decisions about what they're going to do. They can do exactly what the law tells them to do, which was to arrest this kid, or they can decide that they are gonna try to address the problem in a different way. And it turns out that most of policing on the street is just that. If everybody who violated every law were ticketed or arrested, we wouldn't have enough cops to do it, and we would we would rebel against that, actually. And in fact, society would come to a halt. You wouldn't be able to do much

of anything. And so most of policing is actually encountering a situation where a law has been broken and try to kinda fix the conflict in some way. Yeah. Good. Thanks.

I wanna abstract to the philosophical generals, if you will permit me for a minute. So rules are a pretty common currency of thinking about justice. You get the common principle that like cases are treated alike, but rules can also often force different cases to be treated identically. Right? They're a sort of broad brush or a blunt instrument, so to speak. How do you think we should navigate the tension in rule-making between fairness and flexibility?

Yeah. I think, this is the central problem of rule-making, and this is the central problem of basically living in a society with other people and trying to kind of regulate how we interact with each other. So, you know, what you get from a rule and, exceptionless enforcement is that everybody knows ahead of time that this is going to be done. Right? So, you know, it's kind of like in sports, if you get a touchdown, it's six points. It's six points for everybody. It's not six points for somebody who's can easily score a touchdown. It's, you know, it's six points for somebody who's it it's very hard for them to score a touchdown. You know, whatever the case is, it's always going to be six points. And that's fairness. Right? Equality complete equality under law. You know, the problem with that is that for every rule, almost I mean, I can't think of exceptions to this in, like, in in law of society, but, like, for almost every rule, you know, there are many unlike cases. Like, don't like, shoplifting is a crime, but we know there are differences between people who shoplift out of poverty and desperation and, you know, Hollywood Starlets who shoplift for the thrill of it. There are people who I mean, like, I remember, you know, this is this dates me a little bit. Like, when when Winona Ryder was, like, arrested for, like, shoplifting or, like, sometimes sometimes you get these famous people and, like, they could afford it, you know, but there's just something about people who do it for these other reasons. And in everyday morality, we make distinctions like this. We make we think there are very different kinds of violators of rules. We, distinguish between accidental violations and purposeful violations, for instance. And every rule is sorta like this. Right? There are different reasons people break the speed limit. Right? Someone with a broken odometer can break a speed limit. Someone who is rushing someone to a hospital can break a speed limit. Someone who's racing can break a speed limit. And those differences are kind of completely paved over with the rule that don't go over 65. And so the central that that means that's the central problem of living together. Right? The way that we address this is we give discretion to enforcers all across the board. So it's not just enforcers in the law, but it's, like, enforces referees. In sports, we give it to administrators. And the ideal situation is the one where the enforcer is so wise that they happen to know all of the moral differences between cases and treats all of the cases differently when they are different and don't treat

the cases differently when they're not different. That's what we want. Of course, we all know that not everybody's ideal, but that's what we want. That's why discretion exists.

I wanna make a clarifying distinction if I can between the kinds of these problems, which are just about inefficiency or inconvenience, like the kind of driver's license example that I gave versus what I think is a wealth of interesting cases where rules become so specific and so numerous that they actually stop serving or actively work against their original purpose. So can you walk us through either your favorite or maybe just a good example of how a simpler, more general rule might actually lead to better moral outcomes?

You know, there are so many and there's, like, one that I talk about in the book, which is kind of trivial, but I think it highlights something which is about, you know, trying to get a coffee purchase order, like, approved of by an administrator who approves coffee orders.

Been there.

Exactly. So anyone who's like a a bureaucrat in some company and you have that kind of thing, well, okay. You know what I'll do is I'll I'll give an example that I took out of the book, which was, you know, I was, you know, I was I was selling a house. You know, I decided to downsize, about, I don't know, maybe seven years ago. And, and it it was just a really long process because the couple who bought, our house just had to go through a lot of financial things with the bank and their own sale and so forth. But these things, you know, have this way of, all of a sudden, you have a week or three days to get certain things done so you can go to the lawyer's office and get everything taken care of. And it just turned out that even after this entire process and all kinds of paperwork, I got noticed that there was an open permit on the house, which meant and and the open permit was, like, something like eight years old, and nobody told me when I because I had bought the house not that not even eight years before that. So there's this open permit on the house, which means somebody applied to install a, hot water heater that, and never and forgot to have it inspected, you know, eight years ago so that they can close the permit. And the, and the new homeowners are, well, I want this permit closed. But we're, like, three days away. And so the so, you know, it takes a while, but I got, like, an emergency inspection from the inspector. He came to my house in the middle of a snowstorm and looked and said, this is all good. But the the rules say that in the room in which the the hot water heater is installed, there needs to be a GFCI outlet that's in there, whether or not anything's plugged into the outlet. Now people don't know this. This is a GFCI outlet. It's this thing that you have on your kitchen. Like, it has this little switch on it. So, like, sometimes the switch pops. You know? And the idea behind this is that if there's water in the area, then you don't

get electrocuted, something like that. Mhmm. And there is a GFCI outlet in the basement in which this occurred. But because somebody put a wall between the hot water heater and the rest of the basement, he said, that doesn't count because now this wall has enclosed a new room. So you need to install a GFCI outlet in this new room on this wall. So now I have to go and find an electrician or whatever within three days of, like, the closing of this or this house doesn't close. They won't close the permit. I have to find an electrician, install a GFCI outlet, which nothing is plugged into, by the way. Like, they just need that outlet to exist. And I get the get the inspector to come back and inspect the GFCI outlet to sign off on this. And so, you know, here's what I would have wanted. If they looked and saw that I bought the house without the GFCI outlet and with without the inspection, like, without the permit closed, and they look back, but they could've just said, well, you know what? It's been, like, eight, nine, ten years. It's fine. This is something that's you know, I don't wanna hold up your the closing of your house, but we'll make a mark of it and say that this is something that has to be done. That would be fine. But, no, the inspector says, no. I can't do that. And by the way, now that I'm here, I have to write a report that says, like, this is there and, like, I've inspected or something. So, I mean, like, this is the kind of example where you want somebody to use some kind of sense to recognize the situation that you're in and and, like, make an exception or do something about bending the rules. That's there will be my example.

Barry, I'm not sure we have time for the metaphysics of rooms right now.

Oh, that's right. That's right. And, like, this isn't I mean, like, everybody I talk to about these issues gives me a completely different story about a completely different domain, but it's the same spirit. Right? It could be the same Yeah. Yeah. They're installing a shed in the thing. They're trying to get a reimbursement for a meal they had while they traveled. And then it was like, oh, are you under the federal per diem or whatever? There's always some kind of weird thing that some bureaucrat, like, is trying to hold you to, and you're like, it's, you know I mean, I I feel like sort of what they want from us is is either full compliance or just like, forget about it. I'm not selling my house at all. I reject the premise. Right? Yeah. I don't I'm not gonna I'm not gonna submit any receipts. I'll just pay for it all myself. I feel like that's what the world seems to want from us.

It's an interesting practical deterrent toward engaging with the system really at all.

This brings us to what I think is one of the more interesting conversations in the book about what philosophers call rule fetishism. So this idea that we can often default to rules even when they may not actually help us or when they may make things worse. A lot of people

complain that this is worse in public bureaucracies than in private ones, but I'm not sure if that's the case. In any case, though, what do you think drives our tendency to do this? And importantly, how can we resist it in practice?

I don't think it's worse in public private I mean, public bureaucracies. I mean, it's easy to complain about the public ones because we feel kind of more entitled to a good right? I think I think I think most people complain about the government because we, like, expect more. It's because it's our tax dollars. We're like, we want it to be working very, very well. But, you know, like, try to get try to figure out why you keep getting these weird bills for health care that was supposed to be paid for by your, insurance company. Right? Try Universal experience. Yeah. Yeah. Exactly. Try figuring out why it is so hard to cancel a subscription for, you know, $19.99 a month for something you forgot you did a subscription to. You know? And I'll and, you know, it's just cases like that. Rule fetishization I mean, there are insidious reasons for it. Like, in the corporate world, I always think that, you know, some consultants show that if you put more rules and barriers in between you and the customer, you're going to make this much more money a year. I'm, like, I'm absolutely positive that happens in the corporate world. In in the public domain where there's a lot of oversight and and responsiveness to, you know, democratic outrage and so forth, Most of the rule fetishism happens, I think, for good reasons, even though I don't like them, is that there is this fundamental issue of fairness and rule of law. And the idea is if you have a rule and you start making exceptions to it for various people, you're going to run into things like corruption, favoritism, bias. Right? And, one of the things that we've true value the most about governing is that we don't have that. So I think that's one of the one of the drivers of it. The other driver of it, I think, is mistrust, and I think mistrust is the biggest driver of rule fetishization. So there is a way for us to have speed limits without, you know, without precise speed limits everywhere, and that could be something like every state has a basic speed law, which is never drive faster than it's safe. And it just turns out that for every speed limit that you see on the road, that law trumps that. Right? So it could be 55 in a zone, but if it's cloudy and snowy, then never drive faster than it's safe. You could very well get a ticket for going 55 in a 55 zone. But, you know, one question you might have is why isn't it just that? Why don't we just have the law never drive faster than it's safe? Why don't we just have the law something like, when you travel for business, just submit just tell them how much you spent, and you'll get reimbursed. Right? Or just something like that. And the reason for that is, of course, mistrust. Right? It's the idea that so those in charge may not trust the people that they're in charge over. Like, you're gonna travel. Maybe you're just gonna tell me some number, and it's an exorbitant number, and you're gonna pocket the rest. But the mistrust goes the other way too. People say, I don't want the law to be never drive faster than it's safe. And I think it's

safe, but the police officer doesn't think it's safe, and so they give me a ticket. I don't trust the cop not to exercise their judgment about safety to try to fleece me, the taxpayer, out of my money. Me not trusting the cops means I want a specific law that they can, like, hold on me. And if I think I didn't violate the law, I'd be able to fight them on it. And so this trust runs both ways between enforcers and the people they're governing, and it also runs between enforcers. Right? So one of the reasons why we might have, you know, a law that says every cop has to file a report with everybody who was at the scene, the time in which they arrived at the scene, and the time they left or something like that is because you're like, well, I don't want to to have to trust this particular officer, you know, to remember the details and stuff. So you, like, impose rules on everybody because you mistrust the people who those rules apply to and also the people who are enforcing those rules.

We'll be right back after a short break.

AD BREAK: What's up, everyone? My name is Chiamaka Nbuduokwu, and I'm joining the Examining Ethics team as an Editorial Assistant. As we continue to build on the show's successes, we want to hear from you, our listeners. We've just launched a quick survey to better understand your experience with the podcast, and we'd love your input on the show. As a thank you for your time and insights, we're giving away three exclusive examining ethics swag bags to randomly selected participants. Head over to examiningethics.org or check our show notes for the survey link. Your feedback will help us shape the future of the show and make it bigger and better than ever. When will you receive said swag bags, you ask? Winners will be notified at about a week after the survey closes. Now let's get back to our conversation with Barry Lam right here on Examining Ethics.

So I wanna shift gears, but I do wanna stay with the theme of trust for a moment. People do, as you say, tend to distrust not only rules, but those bureaucrats who enforce them. But a world with fewer rules relies really heavily on trust. Right? And probably would require some changes to this picture. So what would it look like for an institution to try and intentionally create or cultivate the kind of moral judgment and trustworthiness that an argument like this might depend on?

Yeah. You know, people are gonna have to trust the enforcers, referees, and sports, you know, would be a great example of this. In order for us to move away from rural, fetishization. I mean, like, here are two examples from sports that can, you know so there are certain kinds of sports where scoring really is almost completely discretionary, not rule based. So in football, you know, every point is rule based. Touchdowns are six. Field goals are three. But in, figure skating, for instance, it's all up to the judges. Right? And in boxing, it's kind of a mix. Right? Like, if you knock the hell out of

somebody, that's it. You win. But then when it goes to the judges' scorecard, that's when you get these fights among fans. And the more fans think that the judges get it wrong, the more they'll mistrust it, and the more they're going to move towards, you know, a kind of scoring system or a kind of sport where you don't have that. You remove all of that. And what I'm saying about governing as a whole kind of applies in this kind of circumstance. So I think that in every bureaucratic organization, if you're going to increase discretion, like I want people to do, I don't want them to fetishize rules, You're going to have to cultivate a culture of people examining past decisions and determining whether they were good or bad decisions and to work on those kinds of decisions. It turns out in sports, things have are getting better. NBA referees are actually less biased and more accurate than they were. So are so are NFL, referees. In the medical system, I think a really great example of this is something like off label prescribing. So doctors there is no rule that says doctors can only prescribe for what a drug is approved for by the FDA. So that's completely discretionary. But we all know that there could be horrible decisions made by doctors for this. You know, the opioid crisis could very well be just an example of that happening. What's the solution? Is the solution to ban off label prescription? I think everybody will tell you that's a terrible rule to implement for doctors. The response has to be something like, we need to train doctors to be better decision makers and hold them accountable. Have a record. Right? Not of particular patients, but of their record. Like, is this doctor sorely above the average of the prescriptions of opioids? Right? How much above the average? Is there any reason to think that this person is seeing more patients who need opioids? Are they responsive to that data? If you give it to them, do they, like, have a reason for it? Do they, respond by lowering their like, this is all it's gonna look differently from different for different institutions. You know, for doctors, it's gonna be about prescribing. For cops, it's gonna be about other things that are metrics for performance. So I think the way that you go toward move towards discretion is this is this you have institutions of training and ongoing training for the practice of making decisions. I mean, that's why they call medicine a practice. I think a lot of bureaucrats should be considered practitioners who are constantly improving their decision making.

So I wanna get at a criticism that waits in the wings for us here. There's a concern that, you know, many members of our audience might share that giving bureaucrats more discretion could reinforce existing inequities, particularly for those who are already vulnerable to things like discrimination or marginalization. There's a sort of abstract philosophical version of this that sort of reflects on equity, but then there's also a kind of close to the ground version of it that's brought out, I think, by the policing example pretty beautifully. Recent years have seen a lot of conversation about the excesses and abuses of policing. A lot of people actually think this

results from officers having too much discretion rather than too little. So how do you respond to someone worried about giving them even more, not just in the sort of philosophically abstract sense, but in the sense that their lives are affected by this?

You know, I mean, these are all not only legitimate concerns. They're concerns I have. And the problem isn't discretion. Because if you think about what the opposite of discretion is, it's going to be mandatory enforcement. Right? It's going to be okay. Now we're just gonna implement rules and specific rules on when you can do x, y, or z. The form that that's taken in the past is you don't have to make a decision about who you're gonna pull over or who you're going to arrest on a call. You better come back with an arrest. Right? There's a mandate. The opposite mandate is you don't make sure you don't arrest anybody, but it's still a mandate. And what those mandates do is that it clouds over situations in which an arrest is proper, or it clouds over situations in which non arrest is proper. And so unless you want that, like a blanket rule enforcement, or you think that you are in a position to lay out ahead of time in every possible contingent circumstance that a police officer finds themselves in. You issue a mandate about what is it that they're going to do in that circumstance, right, then you're you believe in discretion for police officers also. Right? Right? So, like, you know, so, you know, the question of racial bias is, like, definitely I mean, there's a lots of empirical evidence to suggest that this is a real phenomena. Think about trying to formulate a rule that fixes that. Right? Forget about discretionary availability. Think about what is the rule. Like, do you say is the rule going to be okay. Since black people are disproportionately, arrested for the this kind of crime at a rate of 28% or 30%, reduce arrests of black people by 30% as a mandate. That I don't think anybody nobody even those Who are concerned with just social justice are thinking that that's going to be the right solution to that. So if we don't think that mandates and formulating rules ahead of time that that constrains police officers is the right answer, then the only other answer is we believe in discretionary ability. We think they're using discretion poorly. We need to put mechanisms in place to make them use discretion well. Now what are those mechanisms? It's like there's there isn't a one size fits all because, you know, it really depends on what it is that's going wrong systematically as a pattern in these situations. So what we know in the medical system, for instance, that most of what was going around wrong concerned incentives for doctors concerning, you know, trips and paid things, advertisement, and also genuine misinformation about the addictive qualities of right? So so that was what was going around. In the policing space, there are incentives. Like, there are so many studies about, you know, what it is for certain police departments, but not others to use ticketing and enforcement as a revenue source. Like, that's bad. And when that's part of the incentive structure of policing, then you're going to be making discretionary decisions. You don't have to make those decisions, but you're inclined to because

you're bringing in revenue for the city. So racial bias, that's something that we know has been around in The US for a long time. What do you do to fix racial bias? Do you implement a rule? I'm sorry, but, like, the best things that we know about individual decision making and racial bias is that, you know, you just address it head on. We believe there's racial bias occurring. Here's some data. Are the people recalcitrant, or are they responsive to it? And if they're recalcitrant, you do one thing, and if they're responsive to it, you do another thing. I mean, I wish I had a, like, a good, you know, shortcut to the hard work that's involved, but there there really isn't.

That's fair. I think this is actually kind of an elegant way of diagnosing what we've seen in recent years. We've seen police departments take these criticisms in hand and respond with exactly the kinds of mandates you've suggested. Response to something like a criticism of over policing in certain communities is sometimes interpreted to justify a bureaucratic mandate to really not police them at all or at least certainly less. In some ways, leaving those communities to their own devices in ways that even they wouldn't actually support despite, you know, all of their hackles with the police.

I mean, one of the big problems in policing is six month training, right, before you get on the job. I mean, that's true of the biggest police force, here in Los Angeles. That's the second largest police force in the in the entire country. I mean, six months. In any other kind of profession that has as high of a risks as and I'm not just talking about risk to police officers, but, like, risk to the public that depend on split second decision making. Six months just isn't enough. Forget about, like, the cognitive part of it, like, decision making, whether to arrest, not arrest, whether to draw your gun, stuff like that.Forget about that. Right? If anybody if you have ever tried to start a sport or a martial art or dance, you will know that six months is not nearly enough for you to forget about getting on stage, but you're performing in front of your family. Right? And that's and, like, there's a huge part of policing that's physical. That's about, you know, using putting your hands on somebody and restraining them in such a way that they don't die. Right? Like, you know, if you ever sat in a, you know, tried to learn how to throw a punch or a kick in a martial arts city, you know, like, I'm terrible at it. And even after six months, it takes at least a year, if not a year and a half, to learn how to control your body in a certain way. Right? So I you know, like, even if you just had more and longer and education, I think you're gonna, increase good decision making. That is discretionary decision making. With any hope, virtue acquisition by osmosis. Yeah. Yeah. I mean, like, I you know, so many of the ways that we govern have been a kind of outlier case, outrage, and then new rule. Right? New mandate. And that's called for by people from all political wings. Right? Because it's reactive. And when it's reactive, it's reactive

for, like, short term optics. And, you know, one of the things that I'm trying to combat in the book is just this idea that we had these rules. Something happened. We don't like what the thing happened. Let's update it. Let's and, usually, that means we add to the rule. Right? It was violated in this way. Okay. Now we're just gonna add a a prohibition to the Right. Other prohibition, another prohibition, another prohibition. And that's why you have rule books that are, you know, thousands of pages.

I often joke about this with people when I'm talking about teaching. The idea that your syllabi sort of lengthened over the years in response to various infractions and screw ups that you didn't realize you needed to write about. And it becomes this really sort of cumbersome policy document. If we could do it with philosophy courses, imagine what a more towering bureaucracy with some real power could do.

You know, people who don't go to college don't know this, but our syllabi are the little regulations are longer than the reading list of the assignment list.

They are. They're longer than the content of the course.

Yeah. You have this whole content in the course, and then you're like, okay. And then here's the policy about help. Here's the policy about ChatGPT. Here's the policy if you need accommodations. Here are policies. Like, every last little thing little policy is added onto a syllabus.

Yeah. There's not a lot of room for those, human moments. The "come talk to me and we'll figure it out" kind of vibe. There's not a lot of room for, you know, discretion. I think you show this pretty well throughout the book, but in examples like Joey's case, discretion clearly leads to a more humane better outcome. But how do we ensure that discretion itself doesn't become arbitrary or unjust? Particularly in cases like policing where we're talking about systems with historical patterns of bias and injustice. You could imagine, for instance, a very nearby possible world to use a little philosopher speak in which the ending to the police officer's application of discretion in Joey's case, was different and not for the better. So are you worried about the good outcomes being a product of discretion as being sort of uncomfortably contingent in a sense?

You know, it's always gonna be contingent in some way. Like, the the the the good guy in the case of Joey when the cops so we and we never actually told the listeners, like, so the decision that was made was the officer brokered this agreement between Joey and the shop owner that Joey would do some work for the shop. And in return, the shop owner would not press charges. The shop owner not only liked it, but ended up, like, saying, Joey, just come back, and I'll give you bread

and peanut butter, and then you could sweep up the shop. And they just let it go, which, by the way, is also illegal. Right? Right? And but that's another use of discretion. Right? You can't you can't hire a teenager and give them bread. Like, that violates child labor laws, but, you know, that was the discretion. Like, you look the other way at enforcing that. You know, the good guy is not just the discretion. The discretion just means the cop is able to make the decision between arrest or trying to do something else. Right? The good guy is that they made the right choice in that circumstance. There could very easily have been officers who made the wrong choice in that circumstance. If you want me, who advocates discretion as a right? Obviously, I want discretion and everybody makes the right choice, but it's a cost that when you give people discretion, they will always make the wrong some people will make the wrong choice. And that is a concern, but it's a concern when you have rules that are mandated also. Right? There there are when you mandate rules, you have an arbitrariness to those rules too. This is something that I wanna say. Right? So here's a very simple case where we all like the rule. We don't you don't get to vote until you're 18. Right? That's a rule. Everybody accepts that. Maybe some people don't accept it, but that's generally a rule that we've accepted as a society. It replaces a very different rule that I kinda like, which is you get to vote when you're mature enough to vote. That's a very discretionary rule. But right? And we don't have that rule because we're afraid that people will make the wrong choices. They're gonna get they're gonna grant voting to people who aren't mature enough, or they're gonna prevent people who are mature enough. So we don't like that rule because there might be arbitrary from decisions people with discretion make. Here's my argument to all against that too. Just because you have the rule doesn't mean it's not arbitrary. You have that rule. It means that some people who aren't 18 yet don't get to vote, but they are mature enough. And it also means that some people who are 25 or 55, who are definitely not mature enough to vote, still get to vote. Rules introduce a kind of arbitrariness also. Right? Except for a rule, the only way to address that arbitrariness is more rules. And so then you start making exceptions. You give cognitive tests for or something like that. Rather, what we've done is we've learned to accept the arbitrariness of the rule and say, that's a cost. Right? There is gonna be arbitrariness, some of it. With decision making for people, I am more hopeful that that's the kind of way thing you can talk or educate somebody out of. Right? If there are cops who are actually involved in their training to become police officers to encounter actual, like, cases. Let's all talk about it as a classroom, cadets. Suppose Joey is shoplifting and blah blah. What would you do in these circumstances? Circumstance. Here's what officer Mike did. What was good about what officer Mike did? What was bad about what officer Mike did, etcetera, etcetera. The hope is that you can teach people to make good decisions by teaching them ethics and morality and so forth. The alternative would be forget about ethics and morality. Just give them another rule to follow. And I think that's a very that's detrimental

to human beings, and I think it's detrimental to the people who are around to enforce our laws.

Oh, good. This keeps you and I and probably several members of our audience in a job.

Right.

I think there's something really powerful about the idea that the right kind of discretion is teachable. And it does seem kinda straightforward that the only solution to plugging holes in rules is creating more sequences of rules. So it's not super clear that the costs are much lower.

No. I think that's right. And the history of doing it just the rule based way isn't great.The history of doing it just the discretionary way isn't great either. But one of the things that we have in our era that we don't have a lot of in past eras is data about your own decision making. Right? You can't you can't argue with, you know, your history of decisions have been logged, doctor so and so, and here's how all of your other colleagues prescribe opioids, and here's how you prescribe them. You can't argue with that. It was just so much harder in the fifties and sixties to do that.

So I wanna directly ask our last question on behalf of the audience. A lot of our listeners are probably bureaucrats, And I don't mean that as a pejorative kind of thing. I I mean it to say a little bit about the pervasiveness of this kind of decision making. So if someone listening is in a position of authority, say a teacher, someone who manages decisions, a policymaker even, what's a concrete step that they could take to begin shifting their approach from this kind of overt focus on rules that you characterize to a more general approach to character or discretion?

I think that if you are a rule maker, my advice to you would be to make sure that your rules every rule that you make has a discretionary clause. Right? The equivalent of unless a reasonable exception occurs to the person in charge here. Right? It's kind of like the never drive faster than it's safe kind of clause to a speed law. I I think that every single rule should have that. So if somebody says, you know, I can't approve your coffee order because, you know, it's not coming through vendor a, which is approved on the list because it's coming through vendor b. If there was such a clause, the first thing you could say is, like, yeah. But you can make an exception. Vendor a is not available right now, and vendor a charges us this much, and vendor b is actually cheaper. So approve the damn order. And if they don't if they don't, then you can actually, like, hold them to that. Right? Like, you are the kind of bureaucrat who, like, is very bad at your job. Because your only job is to approve, like, you know, orders. Okay. So I would I would I would, you know, include something like

that. And then the other thing I would say if you're a rule maker is kind of embrace vague rules. So, you know, with students, you know, I used to be one of these people that said, the paper will be between 1,215 words for every day, counting from twenty four hours after it was due, you will have a one third of a grade off per thing to something like this. The paper will be about 1,200 words, and late papers will be penalized unless you have a good excuse. Right? And so I think that this kind of requires a student to cultivate judgment about how much about. If it's about if it's 1,500, is it too much over? But, like, that's sort of one of the things you're trying to learn as a student. Right? Which is, like, how to write shorter when you have to or how to write longer when you need to. And then, like, penalized. How much penalized? Well, how much do I think? Well, you know, how much are you how much are you, like, flouting this versus how much do you have an excuse? Like, I don't want them to look at a rule and go, okay. I'm good. I want them to be able to, like, think through what I think, right, about it. And that's just living in society. So I think if you're a bureaucrat, especially if you're a rule maker, those are two recommendations. If you're not a rule maker, just an enforcer, I would say use discretion. Right? Don't let rules over whelm. Don't let rules, veto, like, what you think is the morally right thing to do.

This has been a conversation with Barry Lam about his new book, Fewer Rules, Better People: The Case for Discretion. It's available now from Norton Shorts. Barry, thanks so much for coming on the show!

Thanks for having me, Alex.

Examining Ethics is hosted and produced by Alex Richardson and brought to you by the Janet Prindle Institute for Ethics at DePauw University. The views represented here are those of our guests and don't reflect the position of the Prindle Institute or of DePauw University. Our show's music is by Blue Dot Sessions. You can learn more about today's episode and check out supplementary resources at examiningethics.org. As always, you can contact us directly at examiningethics@depauw.edu. Thanks for listening, and we'll see you next time.