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#### Recommended Citation

Schneider, Carl E. "The Tension between Rules and Discretion in Family Law: A Report and Reflection." *Fam. L. Q.* 27 (1993): 229-45.

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# The Tension Between Rules and Discretion in Family Law: A Report and Reflection

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CARL E. SCHNEIDER\*

## I. Introduction

The history of law is many things. But one of them is the story of an unremitting struggle between rules and discretion.<sup>1</sup> The tension between these two approaches to legal problems continues to pervade and perplex the law today. Perhaps nowhere is that tension more pronounced and more troubling than in family law. It is probably impossible to practice family law without wrestling with the imponderable choice between rules and discretion.

Consider, for example, how many areas of family law are now being fought over in just those terms. For decades we have lived with an abundantly discretionary way of resolving child-custody disputes: The best-interests-of-the-child standard has long been understood to give judges acres of room to roam. Yet in recent years scholar after scholar has inveighed against the discretionary scope that standard permits judges, and jurisdiction after jurisdiction has adopted one or another standard—the primary caretaker presumption or joint custody, for in-

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\*For the reasons given in Richard A. Posner, *Goodbye to the Bluebook*, 53 U Chicago L Rev 1343 (1986), I use the University of Chicago Manual of Legal Citation (Lawyers Co-operative, 1989).

1. A recent and rich examination of that struggle is Keith Hawkins, ed., *The Uses of Discretion* (Oxford U Press, 1992). My own attempt to examine systematically the analytic components of the struggle (*Discretion and Rules: A Lawyer's View*) is to be found in that volume. Other recent works on discretion include Aharon Barak, *Judicial Discretion* (Yale U Press, 1989); D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford U Press, 1990). A particularly useful recent study of rules in law is Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford U Press, 1991).

stance—intended to cabin, crib, and confine the range of judicial discretion.<sup>2</sup>

Judicial discretion has also been the target of recent reforms in the law of child support. As social determination to charge fathers with the costs of rearing their children has intensified, so has dissatisfaction with the way judges have exercised their very considerable discretion in setting child support obligations. This dissatisfaction has resulted in federal requirements that states substitute relatively mechanical and limiting “guidelines” for judicial discretion.

Judicial discretion has not been the only target of attack. Unhappiness with the way police and prosecutors have exercised their freedom in deciding how to respond to spouse abuse has similarly been assailed. This assault has led to rules which require police to arrest spouse abusers when specified criteria are met and which oblige prosecutors to prosecute with unaccustomed regularity.

In the area of child abuse and neglect we may observe an equally fervent criticism of discretion, albeit one that leads to less prosecution rather than more. In this area, the doubters of discretion have argued that open-ended statutes have given social workers, police, prosecutors, and courts too broad a power to intrude on families. In consequence, the doubters say, intervention is all too likely where it is not justified and even where it will harm more than help. These arguments have helped inspire a movement toward statutes which define child abuse much more precisely and particularly than before and which thus seek to limit the discretion of officials to intervene in the lives of parents and children.<sup>3</sup>

But not all modern family law describes a movement from discretion to rules. For decades—for centuries—American divorce courts have divided marital property according to two rule-based systems—the community-property and the common-law regimes. Over time, each system became increasingly elaborate, formalized, and rule-bound. In the last few years, these defects have helped impel many states to adopt an unashamedly discretionary substitute—the equitable-distribution principle.

Indeed, a number of recent reforms in family law have enlarged the scope of judicial discretion (although that was not their immediate

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2. For a survey and criticism of those critics and a cautious defense of discretion in the law of child custody, see Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich L Rev 2215 (1991).

3. A particularly clear example of this trend is Juvenile Justice Standards Project, Institute of Judicial Administration & American Bar Association, *Standards Relating to Abuse and Neglect* (1981).

purpose). For instance, courts are increasingly willing to enforce various kinds of premarital contracts and contracts between unmarried cohabitants. This reform has heightened the ability of couples to organize their own affairs in legally binding ways. But it has also given courts new kinds of discretion—discretion to choose which contracts to enforce, to evaluate the conscionability of contracts, and to determine how to interpret them. Similarly, courts are now assuming broader discretion than ever before to decide when a group of people is a “family” and what legal consequences that conclusion ought to have.

In short, family law has recently been roiled by much debate and many changes in which the contest between rules and discretion features centrally. This contest is hardly resolved. Every day lawyers argue in courts and legislatures around the country about whether a judge may and should exercise discretion, about whether a court should adopt a discretion-limiting rule, about whether a legislature should preempt judicial discretion by devising authoritative standards.

So pressing do this subject and these controversies continue to be that at the conference on “Family Law for the Next Century,” they were one of the three principal subjects for consideration among the academics and practicing lawyers who met for discussion. The conferees were asked to try to analyze systematically the advantages and drawbacks of both rules and discretion in the family law setting. They were also asked to investigate whether there is an optimal mix of rules and discretion in family law. This essay reports and reflects on their deliberations.

Before turning to the substance of my report, I should acknowledge the difficulty of recording and recounting the intricate and stimulating conversations that flowed during the nine hours devoted to the topic of rules and discretion. The conferees disagreed freely, frequently, and even fiercely.<sup>4</sup> While they often strove to reach a consensus, and while they sometimes seemed to have succeeded, the consensus was commonly fragile. It quickly cracked and crumbled when further discussions forced the conferees to discover that their agreement was purely semantic, that their concord was merely superficial.<sup>5</sup>

But this inability to reach a stable consensus was not, I think, fortuitous. Rather, it arose from the hard fact that the choice between discre-

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4. Interestingly, disagreements did not develop neatly along the divide between academics and practitioners. The practitioners were perhaps likelier to find attractions in discretion and to fear the bureaucratization of family law; the academics were perhaps likelier to cite empirical studies and deplore their scarcity. But ultimately and notably, academics and practitioners were united by a sense of the complexity and recalcitrance of the problem of discretion and rules.

5. For similar conclusions, see Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 *FAM. L. Q.* 191, 211 (1993).

tion and rules must be a difficult one. Both rules and discretion have numerous and elaborately interacting benefits and burdens, so that when we walk toward one blessing we walk away from another. And the balance of advantage will slide and shift depending on the specific situation in which the choice is posed. Thus the choice between discretion and rules will irredeemably be complex and uncertain and "will depend on factors that will be difficult to assess and that will vary from circumstance to circumstance (so that it is not unreasonable for lawyers to look to particular contexts in evaluating discretion and rules)."<sup>6</sup>

## II. Defining Discretion

As they began to debate the relative merits of rules and discretion, the conferees quickly realized that the legal system rarely if ever presents a plain choice between "rules" on one hand and "discretion" on the other. Rather, there is a continuum between rules and discretion, and most, if not all, legal regimes fall somewhere along, and not on the ends of, the continuum.

On one end of the continuum, of course, are rules. But rules themselves come in varying strengths. Indeed, it is surprisingly difficult to state a rule for an important subject that leaves no room for interpretation at least on its margins. Toward the "rule" end of the continuum are a series of devices that are intended to limit decision-makers but that are less directive than rules. These include the principles, policies, guidelines, presumptions, and lists of factors in which family law abounds.

At the other end of the continuum is discretion. But discretion too comes in strong and weak forms. Professor Dworkin, one of the most influential writers on discretion, says that a person has discretion in the strong form "when he is simply not bound by standards set by the authority in question."<sup>7</sup> Professor Dworkin identifies two "weak" forms of discretion: "Sometimes we use 'discretion' in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment."<sup>8</sup> The other weak sense refers to occasions when "some official has final authority to make a decision and cannot be reviewed and reversed by any other official."<sup>9</sup>

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6. Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, in Keith Hawkins, ed., *The Uses of Discretion* 49 (Oxford U Press, 1992) (Schneider, *Discretion and Rules*).

7. Ronald Dworkin, *Takings Rights Seriously* § 32 (Harvard U Press, 1977).

8. *Id.* at 31.

9. *Id.* at 32.

Further complicating the issue is the discovery that discretion comes in a smorgasbord of forms. There is, for instance, discretion to find facts, discretion to choose rules, discretion to make rules, discretion to interpret rules, and discretion to apply the rules to the facts. Furthermore, most legal regimes feature not just one of the approaches I listed, but rather a mix of them. In handling a single case, a judge may, for example, be governed by some rules, some principles, and some presumptions, and may be freed by several forms of discretion. So numerous, so inevitable, and so intertwined are these approaches that, even when you have a highly discretionary standard, there are constraints. And even when you have a highly rule-bound standard, there is room for manoeuvre.

The conferees rapidly identified another complicating feature of the tension between rules and discretion: Any regime's mix of rules and discretion is likely to be dynamic, to be unstable, to be in flux. For instance, if the balance tilts heavily toward the discretion end of the spectrum, rules often begin to emerge. Judges chafe under the burdens of discretion and informally begin to rely on rules of thumb. Those rules of thumb are gradually converted into formally expressed case law. The precedents of case law then begin to shape themselves into articulated rules. Legislatures in their turn sometimes convert those rules into statutory law. Thus is re-enacted the age-old common-law process.

Nor are rules necessarily stable. Over time, a system of rules can become intolerably complex, rigid, and anachronistic. Courts struggle to interpret such rules in ways that accommodate the terms of all the relevant rules, that accord with the applicable case law, and that accomplish justice. Those struggles cannot be wholly successful, and they produce yet more complicated—and inconsistent—rules. Eventually, the structure can collapse of its own weight. This may be part of what has happened to the traditional common-law and community-property systems for dividing marital assets on divorce.

The instability of a pure system of rules has yet another source. The conferees widely believed that, if you try to squeeze off discretion in one place, it will simply ooze out again in another. This can happen in a variety of ways. Most blatantly, judges can simply choose to disregard the law. And given the deference appellate courts commonly concede to judges in many family law subjects, they may be able to get away with doing so.

But the conferees generally felt this did not happen often. Rather, they believed that the complexity of family law decisions gives judges numerous straightforward ways to retrieve lost discretion. Suppose, for example, the legislature says to the judge, you must divide marital

property equally. The judge may conscientiously follow that directive, but devote new attention to the rewardingly discretionary question of how property should be defined. Or suppose that the legislature adopts child-support standards that deprive judges of their former authority in making child-support orders. Judges may respond by altering their alimony, marital-property, and attorney-fee awards to achieve the overall result that they believe just.

The conferees were also impressed by another judicial tactic for preserving discretion. The trial court's power to find facts is not only enormously important. It is also authority quite lightly checked by appellate courts. Several conferees pointed to valuation questions as particularly crucial, complex, and baffling, and as thus permitting judges significant freedom whatever rule of law nominally governed their decisions.

Nor is judicial discretion the only kind that can be hard to suppress. For example, litigants too exercise discretion. They are, after all, the ones who decide when to commence litigation, and they have the power to end it. One function of family law is to try to control when and why litigation is begun and halted. But the litigants are likely to be the players whose discretion may be hardest to control because their behavior is least susceptible to the law's incentives. As one conferee remarked, "It doesn't matter what you call [your child-custody] rule, if the parties want to fight, they will."

In short, every regime will comprise a richly complex mixture of discretion and rules. And any regime's mixture will be kept unstable by many forces. The dynamics and demands of law as a system are one. The need of lawyers to locate arguments that will serve their clients' interests is another. The desire of judges for the authority to make wise decisions is yet a third. And brooding over all these are the broad social developments that change the context in which all the players work and the ways in which they think and act.

### **III. The Delights of Discretion**

What, then, are the attractions of discretion? Perhaps its leading virtue is that it gives a judge authority to respond to the full range of circumstances a case presents and thus to do justice in each individual case. The conferees agreed without noticeable dissent that the need for individualized justice in family law is particularly pressing. People organize and conduct their family lives in a burgeoning and bewildering variety of ways. And a court's resolution of a family dispute will matter

to the parties more deeply and durably than in perhaps any other kind of civil litigation.

Of course, even though family law disputes vary widely and matter greatly, the costs of individualized decisions might still outweigh their benefits. On this point, there may have been some difference between the practitioners and the academics. Practitioner after practitioner was eager to tell the story of a particularly meritorious—irresistibly appealing, even—client whose case would have been unjustly—outrageously, even—resolved had the judge lacked discretion to rise above a narrow interpretation of the applicable rule. The academics, on the other hand, were as a group inclined to think that these stories might be relatively rare exceptions. They suspected that most litigants might fall into a few identifiable categories. They were thus reluctant to foreswear rules.

A number of the conferees saw another substantial merit in discretion. They pointed out that we seem to be undergoing a period of rapid social change in those parts of life family law seeks to regulate. They observed that rules are intended to, and often do, change grudgingly and ponderously. Discretion, on the other hand, allows the judge to respond expeditiously to society's evolving preferences and practices.

Flexibility, then, is the leading positive argument for discretion. But that argument can also be usefully put in a negative form: Discretion is necessary where no satisfactory rule can be written. Indeed, as I have suggested elsewhere, the three basic reasons in Western law for granting discretionary authority all arise out of problems in writing rules. What I call *rule-failure discretion* "is created where it is believed that cases will arise in circumstances so varied, so complex, and so unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written."<sup>10</sup> The best-interest standard, among others, is readily understood and often explained in rule-failure terms.

Also arising from problems writing rules is *rule-building discretion*. It is resorted to "where the rule-maker could devise tolerably effective rules, but concludes that better rules would be developed (or that the same rules could be developed more efficiently) if the decision-makers were allowed to develop rules for themselves as they go along."<sup>11</sup> This, of course, is the standard rationale for the common-law process. And it may well explain what is happening today in, for example, the field of marital contracts.

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10. Schneider, *Discretion and Rules* cited in note 6.

11. *Id.* at 64.



Finally, *rule-compromise discretion* has a similar source. It occurs where “the members of the governmental body responsible for instructing the decision-maker cannot agree on rules or even guidelines, and . . . deliberately choose to pass responsibility on to the decision-maker.”<sup>12</sup> The rule-compromise problem may well explain, for instance, why legislatures have simply instructed courts to divide property “equitably” rather than specifying what “equitable” might mean.

The conferees were far too burdened deciphering the larger issues of the tension between discretion and rules to try to show that satisfactory rules could replace discretion in any area of family law. But occasional disagreements on points of substance hinted that writing tolerable rules would not be easy. Part of the problem, to be sure, lay in differences in political and social viewpoints. But even people with similar views on broad questions found it hard to articulate their goals, to anticipate how families might behave, and to specify rules that achieved their goals in all (or even enough) of the situations in which families might find themselves.

Another way of evaluating discretion’s merits is to ask whether it enhances litigants’ sense that justice has been done. Interestingly, a large number of practitioners reported that what their clients often seemed to want most was the opportunity to say their piece, to explain in their own terms why their marriage had ended and why they were entitled to what they claimed. These clients were anxious to believe that someone had listened to them, particularly on questions of marital fault. From this point of view, discretion is attractive because it may give the litigants more scope to appeal to a less-than-formal source of justice.<sup>13</sup>

#### IV. The Rewards of Rules

I have been suggesting that, like other students of discretion, the conferees saw real strengths in the flexibility discretion offers family law. What, then, is to be said in favor of rules? Like other students of

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12. *Id.* at 65. One form of discretion is created for its own sake and not because of difficulties in writing rules. This is what Max Weber called *khadi justice*.

It is created where it is thought that decision-makers can be found who are wise, who understand the principles of justice, and who already know or are well placed to discover the relevant facts, sometimes through acquaintance with the parties or through personal enquiry of people who know them.

*Id.* at 61. King Solomon’s celebrated child-custody decision is a classic example. However, this version of discretion is, in its pure form, foreign to our legal system.

13. One lawyer reported that, in his experience, wise judges listened attentively while litigants had their say, even if that say had little to do with the court’s rules of decision or with the considerations the judge would later rely on.

discretion, the conferees felt that a primary attraction of rules is that they conduce to “efficiency.” Rules reduce the possible range of decisions, thereby saving the time and tempers of courts, lawyers, and clients. And, as Whitehead deliciously observed, rules relieve us of the burden of working out afresh our solutions to recurring problems:

It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking of what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.<sup>14</sup>

“Efficiency” is not a goal family law has historically valued. It is a cold virtue for so warm a subject. But several conferees proposed that efficiency is more desirable than we often think. They noted that most divorcing couples have little property to divide and no money to spare for legal fees. Even if they needed individualized justice (and some of the conferees believed that the problems of such couples were often not complex and regularly fell into identifiable patterns), they simply could not afford it.

Efficiency is not the only goal rules are usually thought to serve well. The planning function is another. People need to know what the law says so that they can organize their lives rationally. Rules seem likelier than discretion to inform people what the law is and what courts will do. Rules are, after all, publicly stated and thus are, relatively, accessible to prospective litigants. And rules are precisely an attempt to state in advance how cases should be decided.

In family law, the planning function may be relevant in two ways. First, people may want to know what the law is while they are married so that they can maximize their chances in any eventual divorce action. Second, people may want to understand the law when they are seeking a divorce so that they can “bargain in the shadow of the law.”<sup>15</sup> The conferees asked how much families sought and used information about the law in each of those circumstances.

The conferees were generally skeptical that many people were much interested in or affected by family law while they are married. This surely seems plausible. Most people doubt that they are the ones who

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14. Alfred North Whitehead, *An Introduction to Mathematics* 61 (H Holt and Co 1911).

15. This phrase, which was often deployed in our discussions, is from Robert H. Mnookin & Lewis A. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950 (1979).

will become divorce statistics. And most people are likelier to shape their behavior according to their own moral beliefs and to the social norms that surround them than to the more distant commands of the law. For that matter, most people don't know what the law of divorce is.<sup>16</sup>

Of course, all this could change when a husband and wife decide to divorce and know that, if they cannot resolve their differences, a court will do it for them. Nevertheless, the conferees pointed out that many spouses will still not be significantly affected by the law. First, in many cases the law's dictates will be irrelevant because the couple will not have disputes the law offers to solve. That is, many divorcing couples have neither property nor children to divide.

Second, some couples will, despite incentives to the contrary, not know what the law is. Third, some couples will know what the law is, but believe the chances of actually going all the way through litigation are so slim that it is not worth taking the law into account.<sup>17</sup> Fourth, some—perhaps many—couples will know what the law is and believe that they may eventually have to go to court, but be more swayed by their personal preferences and their own moral and social codes than by the law.<sup>18</sup>

But there is a further wrinkle. Even if spouses engaged in bargaining know and respond to the law's commands, it is not plain that rules

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16. On this last point, see, e.g., Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U Mich J L Reform 217, 236–37 (1990). For an extended examination of the general irrelevance of family law to most of family life, see Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L Rev 197, 203–09. One practitioner did report, however, having a client who decided several years in advance to seek a divorce and who consulted the practitioner for advice on how to behave during those years in order to maximize the chance of receiving custody of the couple's children.

17. The usual estimate is that at least 90% of divorces are settled without litigation. A careful, thorough, and recent study (albeit one confined to California) by Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 159 (Harvard U Press, 1992), reports that only about 1.5% of the cases studied eventuated in a formal adjudication. This study also learned that three-quarters of the families investigated "experienced little if any conflict over the terms of the divorce decree." *Id.*

18. Some interesting hints of the true complexity of these questions may be found in the study by Maccoby and Mnookin I cited in the preceding footnote. They report, for instance, that while the law's requirement that the non-custodial parent ordinarily have visitation rights and pay child support seems to have affected settlement agreements, it is far from clear that the law has had real effect on the larger question of which parent should receive custody. As to that question, "family law may reflect and reinforce some tendencies, but its effects will be mainly at the margins, affecting mainly those cases in which the preexisting parental roles are unclear or in which parents are ambivalent about what they want." *Id.* at 280.

announce those commands markedly better than discretion, at least (and of course this is a significant qualification) for those spouses who have lawyers. A number of practitioners confidently reported that they could predict with reasonable assurance what any single judge was likely to do. And a great many practitioners were basically convinced that they could accurately predict what their local bench in general would usually do.<sup>19</sup>

As I have been reporting, the conferees broadly agreed that rules generally serve law's efficiency and planning functions better than discretion. They were also alert to another way in which rules might be preferable to discretion in family law. They frequently remarked that rules often promote better than discretion law's "expressive" function. The expressive function is mobilized when the law is used to make statements that have symbolic importance.<sup>20</sup>

The law of child custody provides several illuminating examples of the use and usefulness of the law's expressive function. Several of the conferees remarked that women continue to receive custody in a notably high proportion of the cases no matter what legal rule purports to govern custody decisions. Why then do so many people continue to be exercised about custody rules? Partly, these conferees contended, because those rules have symbolic resonances that matter to people and that may even shape thinking and behavior. For instance, some of the conferees saw the primary-custodian rule as making a valuable statement about the legitimacy of women's claims to custody. Others saw that rule as a way of telling fathers as a class to get lost. Even the best-interest standard can be understood as a social affirmation that the concerns of children are overridingly important.<sup>21</sup>

Finally some conferees saw a virtue in rules where other conferees had seen a virtue in discretion. These conferees argued that rules could

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19. Even this interesting point does not fully end the list of relevant considerations. The standard "law and economics" view is that certain rules promote settlements, since such rules should give one party a powerful tool for exacting agreement from the other. On the other hand, several lawyers at the conference reached the opposite conclusion. They believed that litigants are driven by uncertain rules to finding some mutual accommodation rather than trusting to the uncertain preferences of an unpredictable court. It might also be said that, the more uncertain the law, the more room the parties have to negotiate the agreement that comes closest to reflecting their own preferences and standards.

20. On the expressive function in family law, see Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard U Press, 1987); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 *Yale L J* 293 (1988); and Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 *UC DAVIS L REV* 991 (1989). On the functions of family law generally, see Carl E. Schneider, *Family Law* (West Publishing, forthcoming).

21. Similarly, a number of conferees saw the presumption that marital property should be divided equally as a social pronouncement on the moral basis of marriage.

enhance litigants' satisfaction (or, more accurately, reduce their dissatisfaction) better than discretion. Litigants may feel that a decision based observably on rules is at least not arbitrary and discriminatory. As one lawyer commended, "Clients want to be treated the same way as everybody else." Rules make even-handedness easier to demonstrate and to perceive.

Along these lines, several lawyers commented that rules helped them in their relations with their clients. As one lawyer observed, "Sometimes clients have very unreasonable expectations, and clear rules help control them." ("Control" here meant guiding the client toward claims that stood some chance of success and toward the hope of settling the dispute on reasonable terms.) Ultimately, however, the conferees ruefully acknowledged that few losing litigants can summon up the detachment to be happy with their encounter with the law.

These observations about how rules can promote the satisfaction of litigants could be expanded to make a more general point. Rules may serve better than discretion the goal of treating like cases alike. If each decision-maker has discretion to decide case by case what principles to apply and how to apply them, cases that are essentially similar are likely to be decided differently. Rules, on the other hand, work to suppress differences of opinion among decision-makers. Furthermore, rules serve as record-keeping devices, so that decision-makers can more easily coordinate their rulings over time and among themselves.

However, there is a counter-argument. It might be said that the problem with rules is exactly that they work by establishing large categories in which a range of factual situations is subsumed. Even though a group of cases fits under a single rule, there will usually be some differences among them. In other words, rules lump cases together which are not identical, and in this way rules seem to ensure that like cases will not be decided alike. There is a solution to this failing of rules, of course. It is to write rules as narrowly as possible. But the more narrowly a rule is written, the more difficult it becomes to write and the more rigid it becomes to apply.

## **V. Why is Discretion Tolerable?**

Both lawyers and the laity conventionally regard law as a system of rules. The drawbacks and dangers of discretion are well-known and often recited. Yet discretion pervades law. Legislators and the executive exercise the authority they receive from "the people" in dramatically discretionary ways. Administrators high and low command wide swaths of discretion in deciding how their agencies should perform the tasks

they are assigned. Judges wield all the kinds of discretion we have already charted, and more besides. Jurors exercise their fact-finding authority almost without formal supervision. And not just the litigants, but also their lawyers, make discretionary decisions that are far from trivial.

What, if anything, makes all this discretion tolerable? The conferees talked interestingly about one little-remarked but basic factor that speaks directly to the tolerability and desirability of discretion—the ability and reliability of judges. As Professor Cooper sensibly wrote in considering discretion and interlocutory appeals:

The nature and quality of the federal district judges is the single most important factor to be counted. The better the judges are, the less need there is for frequent interlocutory appeal—they will make fewer mistakes, and more often correct their own mistakes before serious harm is done. . . . To the extent that we do not trust trial judges, on the other hand, we will be driven to rely more on clear rules or on discretionary devices that are controlled by the courts of appeals.<sup>22</sup>

In short, we want good judges to have discretion, but not bad ones. A bad rule can do more harm than a single bad judge. A crucial question, then, is how many bad judges there are. Most intriguingly, a truly substantial number of conferees said that the judges who decide family law cases are, as a whole, competent and conscientious, although not brilliant.<sup>23</sup> Several conferees calculated that they had only had to deal with one really incompetent judge at any one time or even over the course of their careers.

Not everyone concurred in this (rather temperate) praise of the bench. A few conferees dissented, and some others said that judicial “bias” could influence judicial decisions. But it was not clear what the nature, depth, or perils of those biases were, and they did not loom large in our discussions.

The conferees identified another reason that discretion is tolerable. They observed (as I remarked earlier) that pure discretion is actually rare. As Justice Cardozo wrote,

Complete freedom—unfettered and undirected—there never is. A thousand limitations—the product some of statute, some of precedent, some of vague

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22. Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 *Law & Contemporary Problems* 157, 158–59 (1984).

23. As one conferee frankly put it, “Our judges aren’t great, but they’re competent. They are the C students, not the best and the brightest.” In this respect, it is noteworthy that one conferee reported that judges were more likely to go astray on financial rather than child-custody issues, since while the latter cases were emotionally difficult, the former could be so complex and abstruse that judges would badly misunderstand the issues they faced.

tradition or of an immemorial technique—encompass and hedge us even when we think of ourselves as ranging freely and at large. . . . Narrow at best is any freedom that is allotted to us.<sup>24</sup>

But what are these “thousand limitations”? The conferees were specially interested in one such limitation that is notable but too little noticed: Judges tend to curtail their own discretion. This tendency has several practical sources.

Efficiency and fairness concerns, simple laziness, a wish to avoid responsibility, and even a desire to escape the boredom of constantly repeating the reasoning necessary to decide a case can drive decision-makers toward relying on their own earlier decisions in factually similar cases rather than embarking on fresh discretionary frolics.<sup>25</sup>

Thus a number of conferees reported that judges frequently devised and deployed their own rules of thumb and that such rules of thumb could become quite well known and even be formalized. There was even some feeling that, far from searching for ways of expanding their discretionary authority, judges sometimes apply case-law or statutory rules mechanically and uncritically, treating them as easy ways out of hard decisions.

Another means by which judges forswear the discretion they might exercise is by deferring to the parties and the witnesses. Most judges are more than eager to persuade litigants to relieve the court of the entire burden of decision by settling their dispute out of court. Similarly, some conferees felt that judges sometimes deferred more than generously in child-custody disputes to the preferences of guardians *ad litem*, the recommendations of social workers, and the pronouncements of psychologists.<sup>26</sup>

Furthermore, a multitude of other pressures crowd around the judge and cabin judicial discretion. Those who appoint or select judges may seek to limit judicial discretion by choosing judges who seem likely to behave in desirable ways. Judges are generally socialized in the society in which they work, and they have commonly internalized many of its values (including the value of not abusing discretion). Judges have undergone training designed to teach them to “think like a lawyer,” and thus to reject some kinds of judicial choices as unthinkable. And

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24. Benjamin N. Cardozo, *The Growth of the Law* 61 (Yale U Press 1924).

25. Schneider, *Discretion and Rules* cited in note 6 at 82. For a first-rate description of this tendency, see Richard Lempert, *Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board*, in Keith Hawkins, ed., *The Uses of Discretion* (Oxford U Press, 1992).

26. For carefully documented insights into this tendency, see Robert J. Levy, *Custody Investigations as Evidence in Divorce Cases*, 21 *Family L Q* 149 (1987).

the lessons of law school are often elaborated and reinforced by long apprenticeships in the practice of law.

In addition, judges are subject to criticism from their local bar, from their colleagues on the bench, and even from their friends and families. Judges may be reversed if they misuse their discretion (an experience judges tend to find disagreeable). In some jurisdictions, joint committees of lawyers and judges or surveys conducted by bar associations provide forums in which the conduct of judges may be scrutinized. If judges continually behave improperly, they are (ultimately, in principle) subject to discipline and even removal. And the conferees pointed with particular approval to another limitation on judicial power: Judges must follow procedural rules which limit what a judge hears, what a judge can do, and when a judge can act.

One measure of the success of this host of confining forces is a fact I mentioned before. A large number of practitioners were confident that they could ordinarily predict how a judge would decide a case. This suggests not only that judges were limited by the thousand constraints surrounding them, but that they were limited in regularized, systematic ways. It is, in short, the concerted pressure of these constraints that makes discretion tolerable.

## **VI. Some Concluding Observations**

We may briefly summarize the conference's thinking about the tension in family law between discretion and rules in this way. The conferees concluded that legal systems characteristically do not offer a choice between discretion and rules, but rather develop for each substantive area a mix of discretion and rules that falls somewhere along a continuum. They believed that that mix was dynamic, that it would change according to the dynamics of the common law process and the developing attitudes and customs of the jurisdiction.

The conferees tended to think that the subjects family law regulates are too multitudinous and multifarious to be satisfactorily reduced to flat rules. But the conferees were simultaneously drawn to the efficiency of rules and to their claims to serve the planning and expressive functions better than discretion.

The conferees well understood some of the forces that limit the discretionary authority with which the family law judge seems so well endowed. They fully grasped that judges often seek to limit their own powers by devising rules of thumb and by deferring to litigants and experts. They perceived that judges are further inhibited by their socialization, their professional training, the criticism to which they are sub-



ject, the institutional setting in which they must work, and by the procedural and substantive commands they must follow.

Most basically, I think, the conferees knew that the proper mix of discretion and rules in any given area of law cannot be determined a priori. The advantages and disadvantages of both discretion and rules are numerous and interrelated in wickedly complex ways. All will depend, then, on who the judges are, who the litigants are, what the subject for decision is, and what political, social, economic, and legal forces impinge on the decision.

All this, I think, fairly describes how the conferees analyzed the questions placed before them. But it does not fully reflect all the concerns about discretion and rules in family law that many of the conferees felt, and felt intensely. Let me close by sketching the most prominent and penetrating of those concerns.

A number of the conferees felt that we are seeing a momentous development in family law. As the rate of divorce has climbed to its present height, as the population has become richer and thus better able to buy legal services, and as a larger view of what constitutes a legal problem has taken hold, the demand on family law for its services has grown impressively. When an institution must provide extensive, elaborate, and difficult services to multitudes of people, it quickly discovers that it is on the way toward becoming a bureaucracy.

Many of the conferees were afraid that we today are witnessing the bureaucratization of family law. They saw the recent federal requirement that states adopt child-support guidelines as a telling step in that direction. They believed that that bureaucratization was being hastened along by another trend—the federalization of family law. Federal child-support legislation is one example of this trend; federal responses to the problem of child abuse are another. The conferees feared that, the more family law responds to central commands, the more bureaucratic it must become.

The bureaucratization of family law, of course, has deep and extensive consequences for the balance between rules and discretion. The essential question of bureaucratic organization is how to control and make consistent the similar decisions of legions of parallel decision-makers. The standard answer to that question is to impose rules of an effectively binding sort on those decision-makers—to deprive them of their discretion.

Some conferees certainly appreciated the advantages of the bureaucratization of family law. A number of people asked whether we can afford to offer individualized justice in an area where the demand for it is great, its cost is overwhelming, and its success is questionable.

Nevertheless, the movement toward bureaucratization disturbed some of the conferees acutely.

The conferees who were concerned about the trend toward bureaucratization worried about what such a routinization of family law could mean for them professionally. They feared that judges deprived of discretion could hardly be distinguished from computers and that lawyers who argued to such judges could hardly be more than low-level data processors.

But these conferees also saw the trend as frustrating their clients in the way bureaucracies frustrate everyone—by being elaborately rule-bound and unable to respond to the individual circumstances of real people. “But we’re supposed to be lawyers looking for justice,” protested one conferee. And we all wondered how far this might be possible in the new world we face.