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Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case

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RETHINKING JUDICIAL DISCRETION: SANCTIONS AND THE CONUNDRUM OF THE CLOSE CASE

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I. INTRODUCTION: JUDICIAL DISCRETION, THE CLOSE CASE, AND RULE 11

WHEN I started writing an article about the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"),[1] it quickly became apparent that in order to do so, I needed to address the issue of judicial discretion. Rule 11 relies heavily upon the broad delegation of authority to the courts to exercise discretion in issuing, or refusing to issue, sanctions. While it seemed obvious that it was impossible to write about procedure without addressing the question of discretion, this has not been the general perception.

There is a rich genre of legal scholarship that looks at procedure[2] and an equally rich and developing genre of legal scholarship that examines the question of judicial discretion.[3] But the two seldom intersect. This is a rich and growing field, yet there is limited cross reference or citation outside of recognized genres. Writers seemingly talking about the same thing, or at least different facets of the same phenomenon, appear to ignore, or at least fail to cite to, complementary bodies of research.[4] The major commentators addressing Rule 11 routinely refer to the problem of judicial discretion, and how it is to be defined and exercised, without ever citing to the growing body of literature on the subject.[5] The reluctance to examine judicial discretion analytically is more peculiar given its importance to the procedural enterprise.

Jumping into the Rule 11 debate[6] is like leaping headfirst into a juris-

1. FED. R. CIV. P. 11.
2. *See infra* notes 7-11.
3. *See infra* notes 12-27.
4. George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (pointing out the commonality of concerns among such writers).
5. *See, e.g.*, Stephen B. Burbank, Comment, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).
6. FED. R. CIV. P. 11. This Article addresses the 1993 revisions to Rule 11. Enacted in 1945, Rule 11 was originally amended in 1983. *See* COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE U.S. DISTRICT COURTS, H.R. DOC. NO. 54, 98th Cong., 1st Sess. 1 (1983); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-10 (June 1981); Thomas E. Patton, *New Rules Intended to Streamline Pretrial Process*, LEGAL TIMES, May 16, 1983, at 14. Drafted and adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2071 (1966), the 1983 amendments proposed to remove the "bad faith" requirement from the rule, impose a clearer requirement for prefiling investigations, and require attorney certification that the motion or paper is "well grounded in fact . . . is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and . . . is not interposed for any improper purpose."

prudential whirlpool.

> [Thus] when a new or doubtful case arises to which two different rules seem, when taken literally, to be equally applicable, it may be, and often is, the function of jurisprudence to consider the ultimate effect which would be produced if each rule were applied to an indefinite number of similar cases . . . .[7]

In the Rule 11 context, the jurisprudential question has been, and continues to be, how to define, describe, limit, conceptualize, or regulate the exercise of the court's power to sanction. This Article will look at the close case and the differential impact two different "rules" of discretion can have. One "rule" produces expansive exercise of Rule 11's sanction powers by anticipating competing outcomes in a close case. The other "rule," however, limits the application of these powers in reference to the ultimate outcome of the close case by allowing the court to err on the side of no sanction. This jurisprudential debate is seen throughout the commentary. Some commentators question the utility of Rule 11 in light of its adverse impact, while others argue that the adverse impact of Rule 11 (its inclusive application and chilling effect, or over-deterrence) is worth the improvement in the court's functions.[8] This Article proposes a solu-

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Patton, *supra*, at 14. As important as the removal of the bad faith element from the rule was the imposition of the mandatory sanction; if a pleading violates the rule, the court "shall" impose sanctions. JAMES W. MOORE, MOORE'S FEDERAL PRACTICE: 1996 RULES PAMPHLET PART II ¶ 11.2 (1996) (discussing the advisory committee's note to the 1983 Amendment of Rule 11) [hereinafter Committee's Note]. Two telling points were made in the Committee's Note. The Committee claimed that the "new language is intended to reduce the reluctance of courts to impose sanctions" and acknowledged that the new "standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." *Id.* *See also* Burbank, *supra* note 5, at 1006 (discussing removal of the bad faith standard as a predicate to sanctions). Burbank questions whether

> [T]he Supreme Court [has] the power under the Rules Enabling Act to promulgate rules that authorize the imposition of sanctions, including reasonable attorney's fees, on parties or their attorneys for conduct that is negligent (or, if you like, non-willful, not in bad faith, or whatever similar formulation is necessary to remove the proposed amendments from any protective umbrella of section 1927 and inherent power as defined in *Roadway Express*).

Burbank, *supra* note 5, at 1006. The 1983 amendments caused a flurry of excitement and less than 10 years after their enactment another Call for Comment prefatory to amendment was issued. COMMITTEE ON PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES (Aug. 1990) [hereinafter CALL FOR COMMENT]. At the time Rule 11 was undergoing revision, Congress too was taking legislative action to address the problems of escalating litigation costs, delays in case resolution, and the overburdening of scarce judicial resources. S. REP. NO. 416, 101st Cong., 2nd Sess. 6 (1990) (discussing the Judicial Improvements Act). This is the context within which Rule 11 was amended in 1993.

7. BLACK'S LAW DICTIONARY 992 (4th ed. 1968) (defining jurisprudence).

8. *See* Vairo, *supra* note 5, at 486 (refuting assumptions about the disruptive impact of "frivolous litigation" and the role of Rule 11 in deterring marginal or doubtful litigation). Vairo documents the differential impact of Rule 11 on plaintiffs in civil rights, employment discrimination, securities fraud, and antitrust litigation; questions whether Rule 11 is worth the cost; and raises again the issue of a "legal conduct-" versus "legal product-" based approach. Resolution of the "Rule 11 debate implicates the fundamental tenets of the federal system of civil procedure." *Id.* *But see* Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judg-*

tion to that problem—use of the close case paradigm to define the limits of the court's discretion and, therefore, power to sanction. In this Article, the close case is proposed as the articulable outer limit of judicial discretion that most closely approximates the phenomenological experience of a sitting judge, in particular the dimension of discretion called into play when a judge is uncertain about an outcome.[9] This Article recommends use of the close case as an explicit decisional methodology to define the boundaries of a court's discretion under Rule 11. This methodology has been tested by the courts and has proven its utility in helping a court conceptualize its own uncertainty about the likely outcomes of a decision.[10] Next, this Article proceeds on the basic assumption that if a sitting judge can look at a sanctions case and by calling it a close case articulate for herself the likelihood that another sitting judge would not impose sanctions, then, *a priori*, the claim is not frivolous or at least raises a sufficient doubt that the frivolity is too uncertain to warrant a sanction.[11]

Some commentators argue that the problem of discretion and Rule 11 has been rendered moot by the 1993 amendments. In reality, amended Rule 11 gives the courts virtually absolute discretion "not to sanction."[12] The important question is how that discretion is to be used. This dimension of the court's sanction discretion renders the conundrum of the close case in the Rule 11 context even more problematic than it otherwise might be. If the court has the absolute discretion not to sanction, why or when in a close case should a court enter a sanction order? To date, the close Rule 11 case has been treated as a sanction decision in equipoise—to sanction or not is equally tolerable. This conundrum, tolerating conflicting sanction decisions in a close case, highlights the lack of a Rule 11 jurisprudence[13] looking at judicial discretion as a significant dimension of the sanction decision.[14] The close case defines the grey area of judicial discretion wherein treating inconsistency as the norm reflects a particular view of the nature of that inconsistency or variability—it is clearly predictable and tolerable. But why?

Consistency poses its own problems. If a decision is truly discretionary, the legal determinates of the outcome are balanced and variability in outcome is predictable. This variability, from the perspective of the legal

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ment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure, 67 N.C. L. REV. 1023, 1035 (1989) (looking at Rule 11 as a successful part of the court's efforts to reform the litigation "interception/discouragement systems" of the Federal Rules). Not only is Rule 11 worth the cost, Professor Louis argues that the bias in the American system should shift away from a position which errs "on the side of, or give[s] the benefit of the doubt to, the party opposing interception," to a system which uses fee shifts more broadly. Louis, *supra*, at 1035.

9. *See infra* notes 238-99 and accompanying text.

10. *See infra* notes 239-324.

11. *See infra* notes 300-24 and accompanying text.

12. Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 772 (1996).

13. *See infra* notes 95-110 and accompanying text.

14. *See infra* notes 68-95 and accompanying text.

paradigm, reflects the differential impact of factors traditionally viewed as nonlegal. The problem is that inconsistency in highly discretionary decisions may also reflect the adverse or questionable impact of "traditionally" nonlegal factors or factors subject to question.[15] Discretion is the aperture that allows us to look at law and legal decision making in a legal context. It is the theoretical breakpoint between a legal perspective that assumes an enclosed, explicit, and wholly self-referring legal paradigm, defined solely by reference to the law and a perspective that acknowledges that all judicial decisions take place within a larger context.[16]

This Article, using Rule 11, develops and proposes use of the close case as an analytic schema to redress the lack of a regulatory bright line between sanctionable and acceptable (albeit marginal) litigation. Several important insights developed in the scholarly literature on judicial discretion and decision making are brought to bear upon the question of the proper scope of the court's discretion under Rule 11 in a close case.[17] The most important is the need to make the judicial decision maker aware of the discretionary dimensions of the sanction decision and to force jurists to address that discretion explicitly. The argument that making decision makers aware of their discretion can have a positive impact has been made in other contexts by authors who have attempted to force the judiciary to explicitly consider alternative decisional methodologies.[18]

The goal of this Article is to begin a dialogue about judicial discretion between the jurist and the advocate. This legal discourse will hopefully address the scope and nature of judicial discretion in a more productive and less reductive manner in the Rule 11 arena than has been the case in the past.[19] Note that to use the term discretion to describe the personal input of decision makers results in a discussion at cross purposes. Some discuss "discretion as inevitable" while "others think of discretion as derived solely from the absence of 'governing rules.' The problem is complicated, further, by the intrusion of technical references to discretion as managerial authority."[20] Fletcher's concern is that the "infelicitous consequences of interweaving" different senses of discretion can blur relevant distinctions in a "reductionist" manner wherein "the entire range and diversity of decisional possibilities is reduced to one repetitive description."[21] Fletcher identifies a number of different types or dimensions of discretion: "(1) discretion as wisdom; (2) discretion as

15. Armour, *supra* note 12, at 732-34.

16. Martinez, *supra* note 4, at 614-18.

17. *See infra* notes 47-73 and accompanying text.

18. *See* Martinez, *supra* note 4, at 611-18. Professor Martinez's analysis takes the concept of discretion, here the dimension of personal input in the resolution of substantive claims when largely indeterminate "laws" are at issue, and develops an empirical analysis of a body of case law which illustrates the impact of larger contextual biases—racism—on seemingly neutral judicial decisions.

19. *See* George P. Fletcher, *Some Unwise Reflections About Discretion*, 47 LAW & CONTEMP. PROBS. 269, 277-81 (1984).

20. *Id.* at 278.

21. *Id.* at 279.

managerial authority; (3) discretion as personal input; (4) discretion as power."[22] Decisions are discretionary also in the sense in which they could be further constrained,[23] or in the sense that the decision maker is justified in referring to their "discretion" in justifying the decision.[24] This "self-referring appeal to one's own judgment and subjective input in the decisionmaking process" has limited scope and would not be acceptable in determining a matter of substantive law,[25] but it is usually deemed appropriate in areas involving the court's exercise of managerial or procedural authority.[26] This problem treats the court's managerial or procedural discretion as has been addressed elsewhere.[27]

A. How Did We Get Here?

Originally amended in an era of judicial reform,[28] Rule 11 can only be understood within the context of the following: institutional and professional critiques aimed at the perceived liberality of the federal procedures,[29] the ethical boundaries of the role of attorneys,[30] and the

22. *Id.* at 276.
23. *Id.* at 282-83.
24. *Id.* at 283.
25. *Id.* at 284.
26. *Id.* at 285.
27. Armour, *supra* note 12, at 714-15.
28. *See* Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 262-68 (1991) (describing the procedural reforms of the 1980s as a decade of "counter revolution" spawned by the profession's increasing belief that existing pretrial termination procedures were not being effectively used by the courts). While efforts to amend Federal Rule of Civil Procedure 68 and thus render it a de facto fee shift were thwarted, the conservative elements of reform gained ground in Rule 11. *Id.* at 264-65 n.35.
29. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 88 (1989) (looking at the impetus to "strike a balance between the social interest in predictability and certainty, on the one hand, and the social interests served by a dynamic legal system and an individualized approach to justice, on the other" in procedural reform); Louis, *supra* note 8, at 1052-61 (urging expansion of pretrial interception procedures and the adoption of a modified English Rule); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 (1988) (questioning changes in summary judgment procedures); Stempel, *supra* note 28; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 98-100 (1988) (describing the impact upon summary judgment procedures of the impetus to reform characteristics of the 1980s, rendering it the primary tool for making the system efficient and resulting in judicial reform of summary judgment standards and procedures).
30. Attorneys' roles are institutionally defined both in terms of their ideal form and performance. The role of the attorney within the broad representational paradigm is client centered, the zealous advocate of the profession's code. The role of the attorney as an officer of the court is institution centered, the gatekeeper and defender of scarce judicial resources. Attorneys deciding whether to pursue a close case in the face of Rule 11 are forced into professional schizophrenia: zealous advocates pursue the close case, willingly challenging the law and valuing the courtroom as the dynamic core of the common law. The court's officers express concern over the close case and the limits of merit-based litigation. Will it overburden the courts, and, if not successful, what purpose is served? *See* Anthony V. Alfieri, *Critical Theories and Legal Ethics: Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987)

adversarial paradigm[31] pervasive at the time. While Rule 11 is one of several tools available to the courts to address litigation abuse,[32] the

(discussing the nature of the attorney-client relationship and the value of client autonomy); Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307 (1988) (discussing competing views of the representational relationship as reflecting competing societal norms—individualism, contractual relationships, and adversarialism versus cooperation and communalism); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 30 (1978) [hereinafter Simon, *The Idealogy of Advocacy*] (conducting a critical examination of the ideology of advocacy as defining the ethical boundaries of the representational relationship); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984).

31. The critique of adversarialism views it as an inherently inefficient way to resolve disputes—guaranteeing no better outcomes than other less onerous methods—and as a method which creates incentives to use the courts as a pawn in the litigative struggle. This critique has given rise not only to judicial reform, but to a paradigm shift which values the courts for their ability to resolve disputes, via pretrial procedures and settlements, rather than as principled, adjudicative fora. In this context, dispute resolution is valued and viewed contextually and particularistically as a way to address the legal, but more importantly, nonlegal dimensions of the problem, while formal adjudication becomes the court of last resort. Ironically, Rule 11 addresses the problem of court reform by refusing access to adjudication, while settlement addresses the problem of court reform by creating incentives to avoid adjudication. *See* John B. Attanasio, *Foreword: Verstehen and Dispute Resolution*, 67 NOTRE DAME L. REV. 1317 (1992) (discussing the adversarial method of dispute resolution—each party putting forth their strongest arguments to a neutral judge and jury to determine who wins—as one among many methods of legal dispute resolution representing a continuum of formal, principled methods); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (rejecting settlement as preferable to judgment and looking at it as a "highly problematic technique for streamlining dockets . . . [and] a capitulation to the conditions of mass society . . . [which] should neither be encouraged nor praised"); Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 794 (1989) (noting the "spirit of judicial management and control evinced in the 1983 amendments" and expressed further in the Supreme Court's summary judgment trilogy); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 5 (1992) (Current policies favor settlement largely as a result of critical judgments regarding the adversary system, a system which traditionally favors strong party control and a "deep distrust of the tribunal's . . . competence and neutrality." This challenges the assumptions that underlay the critique of adversarialism and the favorable treatment of settlements.); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833 (1990) (looking at the impact on the overall conceptualization of the adjudicative system on the lack of trial and fact of settlement); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2220, 2228 (1989) (Resnik questions whether the agenda of judicial reform is in fact "fueled solely by a 'neutral' agenda of . . . efficiency . . . [or] 'economy,'" since it appears to reflect in part a political agenda of exclusion. Resnik's comments illustrate the point that limiting access to the courts is a way to redistribute power, or deny power, to certain groups in society—the politicization of rulemaking has occurred and control of the process rests in the hands of the powerful. One telling comment by Professor Resnik captures the nature of the debate: "I am concerned about the hostility to and trivialization of individual claims. I have often heard from federal judges that they don't have the time to spend on a small claim—that it's not 'worth it,' that their time (and they) are too important . . . ." If the courts do not exist for individual claims, for whom do they exist?); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824 (1989) (looking at the "problem" facing the courts, the definition of disputes, the ends sought to be achieved through dispute resolution, and the impact alternative dispute resolution mechanisms would have).

32. *See* WARREN FREEDMAN, FRIVOLOUS LAWSUITS AND FRIVOLOUS DEFENSES: UNJUSTIFIABLE LITIGATION (1987) (focusing on the availability of civil actions to punish such conduct, including actions for abuse of process, malicious prosecution, legal malpractice, contempt, and the tort of interference with advantageous relationship); GREGORY P. JO-

others are rooted in the paradigm of judicial restraint and the institutional values that came before the procedural reforms of the 1980s.[33] It is within the arena of Rule 11[34] and its companion, the inherent powers doctrine, that the courts have worked hardest to further their own agenda for reform.[35] This agenda includes an expansive delegation of power to the courts to manage their dockets, and concomitantly litigation, with little appellate review.

As originally enacted in 1945, Rule 11 was limited in scope to require honesty in fact in the filing of pleadings and a showing of bad faith for its

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SEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 2-5 (1994) (covering a range of procedural and statutory mechanisms which authorize sanctions, including Federal Rules of Civil Procedure 11, 16(f) (pretrial orders), 26(g), and 37 (discovery abuse); Appellate Rule 38 and 28 U.S.C. § 1912 (1992) (frivolous appeals); the court's inherent powers (sanctioning bad faith litigation abuse); and 28 U.S.C. § 1927 (1992) (sanctions for vexatiously and unreasonably multiplying litigation)); Gregory P. Joseph, *Rule 11 Is only the Beginning*, 74 A.B.A. J. 62, 62 (May 1988) (notes limited scope of Rule 11 and resurgence of interest in other sanction powers); Paul Reidinger, *The Metes and Bounds of Advocacy*, 73 A.B.A. J. 66, 69 (July 1987); S.D. Shuler, Chambers v. Nasco, Inc.: *Moving Beyond Rule 11 into the Uncharted Territory of Courts Inherent Power to Sanction*, 66 TUL. L. REV. 591, 596-99 (1991); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 490 (1986); Carolyn L. Dessin, Note, *Civil Procedure—Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process*, 31 VILL. L. REV. 1073, 1073 (1986); John W. Wright, Note, *Taxation: Frivolous Tax Litigation: Pecuniary Sanctions Against Taxpayers and Their Attorneys*, 39 OKLA. L. REV. 156, 164-65 (1986).

33. *See* Burbank, *supra* note 5, at 998-1000 (discussing the public policies of judicial restraint and open court system that underlie the other available sanction provisions).

34. *See* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991).

35. The Supreme Court in two sanctions cases, one involving the inherent powers doctrine, Chambers v. Nasco, 501 U.S. 32 (1991), and the other Rule 11, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), laid the doctrinal groundwork for its reform agenda. While *Nasco* addressed the "implied powers" vested in the courts by their very nature and *Cooter & Gell* addressed the scope of the trial court's discretion to sanction under Rule 11, both pursued a common theme: Trial courts are best positioned to regulate the litigation before them and should be given broad discretion to do so. *See* Shuler, *supra* note 32, at 598-602 (touching on the distinction between the court's inherent powers and their powers under the Rules Enabling Act—one can be regulated by Congress the other can't, thus reaffirming the court's power to sanction bad faith litigation). It is important to note that Justice Scalia rejected the imposition of a bad faith limitation on the court's inherent powers to shift fees and argued that the inherent sanctioning powers should extend to less than bad faith. *Cf.* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 89 n.227 (1985) (debating the Supreme Court's power under the Rules Enabling Act to enact a comprehensive provision such as Rule 68); Jennifer O'Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290 (1989); David A. Rammelt, Note, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965 (1990); *see infra* notes 155-60 and accompanying text (discussing *Cooter & Gell v. Hartmarx Corp.*).

application.[36] Despite some cautionary voices,[37] Rule 11 was amended in 1983, substituting an objective standard of care for the preexisting bad faith standard.[38] The 1983 amendment generated little concern at the time about the court's ability to move aggressively via its rulemaking power into the arena of attorney regulation.[39] Overall, the amended rule was greeted with enthusiasm as one of the court reforms most likely to increase judicial efficiency by deterring the filing and pursuit of frivolous litigation. This justification for Rule 11, however, is routinely cited with-

36. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 55-58 (1976) (cautioning against the use of Rule 11 to sanction "improper espousal of a legal position," or imposing such a strict factual threshold as to unduly restrict access to the courts). Risinger found that the subjective standard of the rule, the bad faith requirement, was not itself a problem. "The problem arises when the finder of fact is not willing to indulge in the normal process of circumstantial inference concerning the intentional or wilful [sic] nature of an act." *Id.* at 60. Risinger questioned the use of objective standards on grounds that they "take us from the realm of ethical considerations to the realm of negligence." *Id.*

37. *See* Burbank, *supra* note 5, at 1001-09 (criticizing the Advisory Committee's melange of "authority" for the newly amended rule); *cf.* Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 SW. L.J. 1011 (1989) (questioning whether the court's imposition of sanctions has been a legitimate use of the inherent powers doctrine); Donna E. Ostruff, Note, *Civil Procedure—The Demise of a Subjective Bad Faith Standard Under Amended Rule 11*—Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), 59 TEMP. L.Q. 107 (1986).

38. *See* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1323-25 (1986) (arguing that an emphasis upon sanctions as punishment heightens the "chilling" impact of the rule); Morton Stavis, *Rule 11: Which is Worse—The Problem or the Cure?*, 5 GEO. J. LEGAL ETHICS 597, 599 (1992) (questioning the assumption that the prior system of sanction controls was inadequate to control bad faith or abusive litigation); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 217 (1988) (noting that many of the sanction cases appear to be "very close" calls on the question of frivolousness).

39. *See* Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2514-17 (1993) (discussing lawyer's empathy and ability to appreciate a client's story and the legal system's problem in recognizing the contextual dimensions of the representational relationship); Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361 (1989); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575 (1987); Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793 (1991); Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 28-30 (1987) (critiquing the traditional ethic of adversary zeal, citing Rule 11 as the cornerstone for enforcing acceptable standards of conduct, and arguing that Rule 11 is one of the procedural tools available to the court to regulate the process of adjudication warranting appellate deference); Richard H. Underwood, *Curbing Litigation Abuses: Judicial Control of Adversary Ethics—The Model Rules of Professional Conduct and Proposed Amendments to the Rules of Civil Procedure*, 56 ST. JOHN'S L. REV. 625 (1982); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 818-19 (1992) (discussing the contextual differences which relate to the definition of the lawyer's role and the identity of the client and the regulatory systems available to enforce the related professional norms); Karen S. Beck, Note, *Rule 11 and Its Effect on Attorney/Client Relations*, 65 S. CAL. L. REV. 875 (1992).

out any empirical basis[40] in the supporting commentary to the rule.[41] Recited with almost mantra-like regularity at the beginning of most Rule 11 articles, the "litigation explosion" has become an article of faith—an unquestioned assumption underlying Rule 11. Yet, there is a growing consensus among commentators that the assumption is unfounded.[42]

Despite its broad based support, there were critics who questioned the

40. There is no data linking the alleged litigation explosion with an increased filing of frivolous litigation—that is the ultimate "cosmic anecdote" and the driving force behind Rule 11. In light of the plethora of empirical studies of Rule 11 undertaken to date, it is ironic that the impetus for procedural reform resulting in the amendment of Rule 11 had no empirical justification. Reformers relied instead on the anecdotal experience of judges with individual cases and dockets to support the conclusion that frivolous litigation was adversely impacting the courts. There is no data indicating that docket congestion and ligation delays are due in any significant way to frivolous litigation or the "lack of a reasonable prefiling inquiry." Armour, *supra* note 12, at 782. Nor is there any empirical baseline data reflecting statistical profiles of federal dockets which show that cases intercepted prior to trial, through summary judgement or motions to dismiss, raise legal or factual issues that could have been resolved prior to filing by more "investigation." It is worth noting that empiricism is raised defensively at the amendment stage to refute the critiques of Rule 11, yet it was never raised at the outset of the highly politicized process of judicial reform culminating in the 1983 amendments to the rules to document the court's need for the reform. *See* Herbert Kritzer et al., *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269, 269 (1992) (asserting the connection between attorney conduct and the "litigation explosion" without referencing an empirical basis for either); *cf.* Arthur B. LaFrance, *Federal Rule 11 and the Public Interest Litigation*, 22 VAL. U. L. REV. 331, 344-46 (1988) (Rule 11 directly challenged congressional policy favoring open courts and yet it did so without providing any statistics "substantiating" the problem of frivolous litigation.).

41. *See* Roger M. Baron, *Stepping on Board the Rule 11 Bandwagon*, 35 CLEV. ST. L. REV. 249, 259 (1986-87) (arguing that the Rule 11 standards are being uniformly applied throughout the circuits to deter frivolous litigation); Paul A. Batista, *Introductory Remarks*, 54 FORDHAM L. REV. 1, 1 (1985) (discussing the use of Rule 11 to sanction "abuse of the litigation process"); Robert L. Carter, *The History and Purposes of Rule 11*, 54 FORDHAM L. REV. 4, 7 (1985) (concluding that the amended rule "replaces the vague good faith formula with a reasonableness standard . . . a stricter and more precise standard than good faith"); Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 500 (1986) (discussing the dual purpose of Rule 11: "(1) to deter dilatory or abusive behavior; and (2) to streamline litigation," and noting that Rule 11 was one of several rules amended in 1983 to address the problem of docket load, litigation delay, and court costs) (citing Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (1983)); Julian A. Cook, Jr., *Rule 11: A Judicial Approach to an Effective Administration of Justice in the United States Courts*, 15 OHIO N.U. L. REV. 397, 397 (1988) (examining the "efforts of the federal judiciary to deal with a burgeoning civil case load" through the mechanism of Rule 11); Howard D. DuBosar & Ubaldo J. Perez, Jr., Comment, *Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11*, 40 U. MIAMI L. REV. 1267, 1273, 1286-96 (1986) (Rule 11 is being applied consistent with its standards, and continued enforcement will achieve the purpose of deterring litigation abuse. While noting extensive criticism of the rule, in particular its inconsistency with the traditional adversarial model, the authors are sanguine that the costs are warranted and that the rule will give rise to a new adversarial model.); Michael E. Peeples, Note, *Litigant Responsibility: Federal Rule of Civil Procedure 11 and Its Application*, 27 B.C. L. REV. 385, 403 (1986) (Rule 11 is accomplishing "the purpose of deterring litigation abuses and streamlining litigation without stifling creative and zealous advocacy."); Symposium, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 FORDHAM L. REV. 1 (1985).

42. *See* Vairo, *supra* note 5, at 481.

> [T]he recent Federal Judicial Center Preliminary Report . . . suggests that the problem of frivolous lawsuits is illusory and that Rule 11 may not be the best deterrent for improper filings. Indeed, approximately three-quarters of the

rule's use to limit access to the courts,[43] its differential application,[44] and the potential use of attorney fee shifts as sanctions in violation of the American Rule.[45] Proponents of the rule favored giving it more time to see if the problems would simply work themselves out.[46] The rule's critics favored amendment,[47] including more determinate standards to re-

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responding judges thought groundless litigation was either only a small problem or no problem at all.

Id. (citing E. WIGGINS & T. WILLGING, RULE 11 JUDGE SURVEY AND FIELD STUDY PRELIMINARY REPORTS § 4, at 2 (Federal Judicial Center 1991)). Efforts to develop any baseline measure of frivolous litigation for purposes of comparison with Rule 11 activity have uniformly relied on self-reported, rough thumb perceptions of the court's docket. There has been hard baseline data developed since 1983 with which to evaluate the impact of the rule. *Id.*

43. *See* Edward Greer, *Rule 11: Substantive Bias in Formal Uniformity After the Supreme Court Trilogy*, 26 NEW ENG. L. REV. 111, 111-14 (1991); Melissa L. Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 393 (1990); Donna Marino, Note, *Rule 11 and Public Interest Litigation: The Trend Toward Limiting Access to the Federal Courts*, 44 RUTGERS L. REV. 923, 923 (1992); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV. L. REV. 1111, 1121-28 (1993).

44. *See, e.g.*, Nelken, *supra* note 29, at 53; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1792-93 (1992).

45. *See* NEW YORK STATE BAR ASSOCIATION, REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEYS' FEES 25-27 (June 8, 1987) (The sanctions exception may have swallowed the American Rule. The general sanctions exception to the American Rule requires "bad faith," something more than mere negligence, frivolousness, or improvidence. "Rule 11, amended in 1983, goes well beyond the limited 'bad faith' exception. . . . Thus fee shifting as a result of a sanction is becoming a common exception to the American Rule."); E. Richard Larson, *The Origins and History of Attorneys' Fees Law*, *in* COURT AWARDS OF ATTORNEY'S FEES: LITIGATING ANTITRUST, CIVIL RIGHTS, PUBLIC INTEREST, AND SECURITIES CASES, at 29-39 (PLI Litig. & Admin. Practice Course Handbook Series No. 324, 1987); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 31-36 (1984); Nelken, *supra* note 43, at 401-02 (Most "courts have resisted the argument that a losing paper is necessarily a sanctionable paper, the ultimate cost-shifting view." Moreover, there is a tension in the rule between the attorney's conduct and product; unlike traditional fee-shifting statutes, "Rule 11 focuses on inputs, not outputs, conduct rather than result." Yet many courts rely upon the filing of an objectively frivolous paper to permit the inference that a reasonable inquiry was not undertaken.) (citing Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 932 (7th Cir. 1989) (en banc)); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651-80 (1982) (discussing the various rationales for fee shifting); William M. Simmons, *The "Equal Access to Justice Act": Private Enforcement of Public Contract Law*, 12 PUB. CONT. L.J. 284, 304-05 (1982); Joseph C. Kopec, Note, *The Use of Rule 11 Sanctions and Prevailing Party Fee-Shifting Statutes After Rule 41(a)(1)(i) Notice Dismissal*, 88 COLUM. L. REV. 1512, 1512 (1988); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1241-50 (1988) (proposing a fee-shifting mechanism that combines both incentive and deterrent elements); *infra* notes 263-94 and accompanying text (discussing *Pierce v. Underwood* and the potential overlap between Rule 11 sanctions and attorney fee shifts).

46. *See* Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 505-06 (1990).

47. *See* Hon. A. Leon Higginbotham, Jr. et al., *Bench Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159, 162-64 (1991); Kerian Bunch, *Taming the Fury: Do the 1991 Proposed Amendments to Rule 11 Go Far Enough?*, 5 GEO. J. LEGAL ETHICS 957, 971 (1992) (The rule needs to include a definition of frivolousness that excludes any claim that "could gather the support of a significant number of competent and well-informed attorneys." The rule also needs to shift to a conduct-, not product-based, determination and to acknowledge that cases will be brought that should not be sanctioned, that is, others would have done the same thing, despite consensus among practitioners that there was little like-

duce the perceived variability in the rule's application, stricter appellate review, and the requirement of a full evidentiary hearing on the record.[48] The critics won and the rule was amended in 1993 in an effort to address these concerns.

B. Redefining the Question of Discretion

This Article looks at the issue of discretion to sanction and how it should be defined, exercised, and supervised. In doing so, this Article focuses on two dimensions of discretion: (1) its legal infrastructure or context which defines the substantive limits within which the court's discretion is exercised;[49] and (2) the institutional context and norms that guide the court's exercise of that discretion.[50] The debate over the proper scope and exercise of the court's discretion to sanction is driven in large part by conflicting conceptualizations of the court's power and role: (1) discretion to sanction based on pragmatic considerations or (2) judicial discretion viewed as principled decision making. The former favors an expansive definition of the court's powers under Rule 11, while the latter represents a more restrictive traditional or formalistic view of the legitimate exercise of judicial power and the scope of Rule 11.[51]

These competing views of the court's discretion to sanction reflect a more fundamental role conflict—a conflict between the paradigms of principled and pragmatic adjudication that increasingly define the debate concerning the appropriate role of the judicial system and the courts.[52]

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lihood of success on the merits.); Hon. Sam D. Johnson et al., *The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions*, 43 BAYLOR L. REV. 647, 675 (1991) (critiquing Rule 11 as an exception to the American Rule, arguing for limited sanctions, vigorous appellate review, and a "call for judicial tolerance"); *cf.* Tobias, *supra* note 44, at 1792-93.

48. Greer, *supra* note 43, at 111-14; Hon. Sam D. Johnson et al., *The Least Severe Sanction Adequate: Reversing the Trend in Rule 11 Sanctions*, 61 MISS. L.J. 39, 43-54 (1991); Marino, *supra* note 43, at 983-84; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 303 (1989) (posing the problem of the adverse impact of Rule 11 on public interest litigation, particularly in close cases); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 513-26 (1988-1989).

49. *See infra* notes 66-73 and 279-306 and accompanying text.

50. *See* Fletcher, *supra* note 19, at 271-73 (looking at the difference between a judge's exercise of her managerial discretion, raising case and trial management issues, as distinct from discretionary decisions involving more traditional adjudicative activity, and noting that variability in the former is more easily tolerated than in the latter); *infra* notes 66-73 and 140-84 and accompanying text.

51. *See* P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1249-72 (1980).

52. Principled adjudication centers around the paradigm of the judicial application of law which adheres to a set of norms that value objectivity, impartiality, restraint, and reason. *See* AHARON BARAK, JUDICIAL DISCRETION 113-91 (Yadin Kaufman trans., 1989) (setting forth the norms of formal adjudication including objectivity, rationality, self-restraint, and awareness of judicial discretion); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921); WILLIAM L. REYNOLDS, JUDICIAL PROCESS 112-67 (1991); Carl E. Schneider, *Discretion and Rules: A Lawyers View*, *in* THE USES OF DISCRETION 47 (Keith Hawkins ed., 1992) (discussing the normative values imbedded in a system of justice based on rules fairly applied and the inevitable tension between rules and judicial discretion); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 121 (1982) (describing adjudication as a process which gives meaning

Professor Atiyah looks at the shift in the relative importance of different dimensions of the judicial process, from a system of deterrence or incentive—the "hortatory function" of the courts—to a system focused on the immediate short term resolution of disputes, and notes the tension between these dimensions of the judicial system: "It is easy enough to see the nature of this tension by considering how best the courts would discharge their dispute-settlement function if they could ignore their hortatory function entirely, or at least ignore it so far as it concerns the general public."[53] If courts could ignore the future impact of their decisions, for example by avoiding published decisions, and simply fashion a result based on the single case before them, their work would be much easier. As Professor Atiyah observed: "For the desire to settle a present dispute by imposing a decision which does justice in all the circumstances of the case is often likely to conflict with the desire to encourage or discourage particular types of behaviour [sic] in the future."[54] The ease with which pragmatism offers a justification for discretion and variable outcomes is a theme picked up by Fletcher in his efforts to distinguish procedural and substantive discretion.[55] The goal of principled adjudication is to ensure maximum control of the decisional process by norms and guides viewed as external to the decision maker. In this context, the norms of predictability and uniformity become indirect measures reflecting the relative success of the external legal constraints. These distinct and conflicting adjudicative roles are aptly described by Professor Atiyah:

> A decision on principle is a decision determined by the hortatory effect which the court wishes its decision to have in the future; a pragmatic decision is a decision designed to achieve justice in the particular circumstances of the case, irrespective of the possible impact of the decision in the future.[56]

Professor Atiyah suggests that the courts are increasingly moving from principled to pragmatic adjudication in an effort to redefine their role and address what they see as the modern challenge of judicial administration. This suggestion is echoed by other commentators as well.[57]

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and expression to social values and norms that rise to the level of law); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357-81 (1978) (looking at adjudication as generating binding norms); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 849-59 (1984) (discussing the procedural norms of the adjudicative process including reallocation of power, impartiality, visibility, rationality, consistency, and norm enforcement). Pragmatic adjudication looks at judicial intervention from a more particularistic perspective which values the individual skills of the jurist in handling the litigation and resolving the dispute. *See supra* note 39 and *infra* notes 140-84 and accompanying text.

53. Atiyah, *supra* note 51, at 1250.

54. *Id.*

55. Fletcher, *supra* note 19.

56. Atiyah, *supra* note 51, at 1250-51.

57. *See, e.g.*, Fletcher, *supra* note 19, at 277 (discussing the growing procedural pragmatism of the courts); Catharine P. Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1728-40 (1990). Professor Wells discusses the growing pragmatic conceptualization of the role of judges as scholars "recognize[s] that all judges bring their own situated perspective to the case and do the best they can, under all the circumstances, to reach a fair and just disposition." Wells, *supra*, at 1728. Professor Wells offers "two models of normative

The Rule 11 debate regarding the scope and exercise of the court's sanction powers cannot be fully understood outside of the context of this institutional debate. Discretion and variability have no meaning without this analytic context: Discretion to do what? How much variability is normal and acceptable? When does a decision exceed that range?[58]

Proponents of an expansive application of Rule 11 claim it is needed to ensure the efficient administration of the system of dispute resolution. This expansive application is grounded in a firm belief in the practical skills of the judiciary. Additionally, appellate supervision should be limited by the pragmatic considerations of time and the utility of investing institutional resources in the review of such decisions.[59] Critics, on the other hand, are concerned with the lack of adherence in the structure and application of the rule to the traditional legal paradigm. The problem concerns articulating and applying legal standards in a uniform, predictable manner. Critics are concerned with the inherent limits of judicial discretion in a system of "law."[60]

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decision making:" (1) structured decision making, which relies upon principled analysis to yield a decision, *id.* at 1730-33; and (2) contextual decision making, which "treats a case as an individual set of circumstances that requires resolution upon its own terms," *id.* at 1734. Her point is simplicity itself: "[L]egal decision-making has both structured and contextual elements. The structured elements are highly visible in the simplest reconstructions of legal method. The contextual elements are less visible but can be seen in the common law preference for case-by-case adjudication . . . ." *Id.* at 1737. Professor Wells argues further that each model describes "a set of activities that are essential to normative decisionmaking." *Id.* at 1740 (emphasis removed). Professor Martinez, *supra* note 4, at 613-15, also notes that pragmatism is highly contextual and anticipates variable outcomes based on nonlegal principles. When used to critique judicial action, pragmatism helps identify the contextual dimensions of judicial discretion and supplies the potential for conscious reform of the judicial process through principled decision making which articulates the applicable contextual norms. *Id.* at 614 (citing Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1722-23 (1990)); Eric Rakowski, *Posner's Pragmatism*, 104 HARV. L. REV. 1681, 1689-92 (1991) (reviewing RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)) (discussing the problem posed by pragmatism and how the potential for judicial disagreement should be addressed and arguing that pragmatism does not offer an answer to the challenge of the hard or close case).

58. *Cf.* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 439 (1990)(discussing the fact that indeterminacy need not render the legal system illegitimate if it falls within acceptable bounds and provides for "desirable flexibility within which a fact-responsive equity has room to operate").

59. *See infra* part III.

60. *See* Fletcher, *supra* note 19, at 279. Fletcher focuses on the distinction between discretion as "managerial authority" and the discretion involved in "determining the rights of litigants" as a significant distinction that needs to be made in the jurisprudential debates about discretion. *Id.* While both involved "personal input" and "power," two general characteristics of discretion, to treat these decisions as the same "reflects an unfortunate tendency toward reductionist thinking." *Id.* In developing his analytic schema for discretion, Fletcher considers a decision to prosecute not unlike the court's decision to sanction under Rule 11. The decision to prosecute is similar to a Rule 11 decision because it involves both the exercise of substantive discretion ("an assessment of the rights of the competing parties") and the exercise of managerial discretion (making the decision to pursue this particular crime to trial). *Id.* at 280. Fletcher's analysis points to an important dimension of discretion—the nexus between the discretionary decision and the issue of merits. If Fletcher is correct, challenging the Advisory Committee's reductionist approach to defining the scope and proper exercise of judicial discretion in a Rule 11 decision along this dimension should help define more clearly the true dimensions of that discretion. Is it to

The complexity of the debate over the proper role of the court and the proper scope of judicial discretion was raised at the outset of the amendment process, but has been ignored in the basic restructuring of the rule.[61] As a result, the 1993 amendments give courts greater discretion to impose sanctions, but with fewer guidelines, creating in effect the absolute right not to sanction.[62] While it is true that the threshold issue, whether or not a claim is legally or factually frivolous, has been linked to doctrines and procedures aimed at pretrial disposition of the case,[63] the result is to further confuse, not clarify, the distinction between a determination of "frivolousness" and a decision on the merits.[64] These problems cannot be addressed unless the current reductive treatment of judicial discretion in the Rule 11 context is rejected in favor of an approach that addresses the unique dimensions of the court's discretion to impose sanctions under the rule. This includes the potential overlap between the court's traditional adjudicative decision on the merits and the exercise of their managerial discretion to oversee the litigation process from its inception through trial.[65]

II. THE RULE 11 DEBATE CONTINUES: DEFINING THE SCOPE OF JUDICIAL DISCRETION

Judicial discretion is not one dimensional, and use of the term in a generic and reductive sense obscures the issues in the debate about the proper scope of the trial court's discretion to sanction under Rule 11. Much of the theoretical literature addressing judicial discretion locates discretion in a decision that is not determined by the external restraint of the rule of law, that must rely upon the articulation of institutional and

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be treated as the exclusive exercise of the court's managerial discretion or does it fall within, or overlap, the exercise of discretion in a merits-based decision? *See infra* notes 140-84 and accompanying text.

61. *See infra* part III (discussing the lack of guidance in the restructuring of the rule).

62. *See infra* notes 204-20 and accompanying text.

63. The new substantive standards are linked to summary judgments and standards of "evidence." *See* Nelken, *supra* note 43, at 390-91 (commenting on the lack of standards regarding the interaction of Rule 11 with the "primary methods for pretrial determination of a case on the merits"); Stempel, *supra* note 28, at 262-88 (The movement toward procedural reform in the 1980s was paralleled by judicial development of pretrial disposition procedures that were increasingly hostile to the preexisting tolerant attitude toward litigants' claims. Stempel argues in favor of an anti-sanctions presumption when a claim has survived a challenge such as summary judgment. While not an absolute defense to sanctions, this approach would shift the risk of error in the denial of such motions from the litigant to the courts in most situations.); Beverly Dyer, Note, *A Genuine Ground in Summary Judgment for Rule 11*, 99 YALE L.J. 411, 425 (1989) (The "[e]valuation of the merits of factual and legal issues is not only appropriate under Rule 11—it is a primary concern and an integral part of the investigation into an attorney's inquiry or purpose." Dyer argues in favor of a second tier, merits-based jurisprudence linking Rule 11 to the standards applicable to predetermine the need for trial.).

64. *See infra* notes 263-74 and accompanying text (discussing *Pierce* and the link between Rule 11 and fee shifts that are merits-based).

65. *See* Fletcher, *supra* note 19, at 271-73 (discussing the distinction between the court's exercise of discretion in determining the merits of a claim and the discretion characteristic of its managerial role); *infra* notes 263-74 (discussing *Pierce* and link between Rule 11 and merits-based fee shifts).

judicial norms, and that contemplates alternative outcomes falling within a range of acceptable variability. Hence the conundrum of the close case. If there is no single correct answer, warranting appellate intrusion, how should the court decide between the competing alternatives—to sanction or not to sanction—if both are acceptable?[66] As the Call for Comment indicates, attempts to amend Rule 11 and develop legal guidelines that

66. *See* BARAK, *supra* note 52, at 113-51; REYNOLDS, *supra* note 52, at 65-67; Schneider, *supra* note 52, at 47, 121 ("[D]iscretion [is] the capacity afforded by a structure of legal rules to choose otherwise." Schneider looks at the question posed by legal philosophers: "Do judges in some cases have freedom in resolving legal issues to decide them more than one way, or are judges always legally bound to reach one conclusion rather than any others?"); George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 747-49 (1986) (looking at discretionary decisions as those in which variable outcomes are likely, either because the court can determine its own standards or the appellate court has decided to treat the decision with a presumption of correctness by adopting the abuse of discretion standard); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082-99 (1975) (arguing that existing legal materials should be adequate to generate a single correct answer for every legal issue even in the hard or close case); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-31 (1967) [hereinafter Dworkin, *Rules*] (Dworkin discusses how standards other than legal rules guide judicial decisions. These standards include policies, "that kind of standard that sets out a goal to be reached" and principles, "a standard that is to be observed . . . because it is a requirement of justice or fairness or some other dimension of morality." Dworkin responds to the positivist thesis "that when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation" by arguing that principled decision makers rely on a variety of policies and principles, in addition to formal rules, to reach their decisions. Dworkin also recognizes that judicial discretion may require deciding between opposing outcomes.); Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754 (1982) (citing Henry Hart & Albert Sacks, The Legal Process 162 (1958) (unpublished manuscript)) (The abuse of discretion standard is the institutional response to this conceptualization of discretion. Discretion is "the power to choose between two or more courses of action each of which is thought of as permissible."); Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 364-73 (1975) [hereinafter Greenawalt, *Discretion*] (Greenawalt sees discretion as a function of the open texture of the law and what remains "after a judge has thoroughly considered all relevant legal norms." The concern is whether "judges in some cases have freedom in resolving legal issues to decide them more than one way, or are judges always legally bound to reach one conclusion rather than any others." Greenawalt notes that a judge has discretion in the "strong sense" when either of two conflicting decisions would be deemed legally correct.); Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1035-53 (1977) [hereinafter Greenawalt, *Policy*] (discussing Ronald Dworkin's "theory of judicial responsibility when difficult legal issues are presented," which attempts to determine where judges should look for guidance in the hard case when traditional legal materials fail to generate a single answer); Anthony T. Kronman, *The Problem of Judicial Discretion*, 36 J. LEGAL EDUC. 481, 481-84 (1986) (addressing the issue of legitimacy in discretionary adjudication when the judge exercises interpretive freedom, the discretion that is left after all of the rules have been taken into account in deciding a case); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 425-27 (1989) (looking at discretion as a function of both the range of decisional alternatives available to the trial court and the extent to which that decision will be reviewed by the appellate court—adoption of an abuse of discretion standard for review effectively granting to the trial court the limited right to be wrong); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 653 (1971) (finding that the appellate standard "abuse of discretion" creates a "limited right to be wrong"); Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 (1990) (examining at the proposition that "in virtually every case the legal decisionmaker, in the paradigmatic case the trial judge, was free to decide the case in directly contradictory ways . . . and then find adequate grounds for justifying either result").

can be routinely, uniformly, and predictably applied are of limited utility. The rule must ultimately rely on the jurists exercising their own discretion to fill in the gaps when applying the rule. But what guidelines or norms should guide that process? Where does a jurist look when the law is not determinative of the outcome?[67]

The problem with determining both what judges do and what they should do when making discretionary decisions has prompted numerous studies of judicial discretion.[68] Some studies focus on the normative and descriptive theories of adjudication,[69] or on the skill dimension of discretionary decisions,[70] while others have attempted to link the different dimensions of judicial discretion to different types of legal decisions.[71] Recent commentary has enriched our understanding of discretion and adjudication by looking at contextual factors, such as race and gender, and their impact on substantive decision making and the law.[72] Other commentators, however, look at the contextual dimensions associated with the court's managerial discretion—an institutional context for judicial decision making that is viewed as distinct from the resolution of substantive, that is, merits-based issues.[73] These latter commentators are more concerned with the process of the dispute than its product.

A. An Annotated Analysis of the Call for Comment

The following portions of the Call for Comment reveal the expansive scope of the Advisory Committee's intended review of Rule 11 and the problem of judicial discretion as expressed at the beginning of the amendment process. Many of the troubling issues raised by the Advisory Committee regarding the nature and scope of the court's discretion to sanction remain unresolved.

> [I]t has been argued that the rule leaves more discretion with the district courts than is necessary or desirable, or perhaps tolerable. At the same time, it has also been proposed that the 1983 amendments were too mandatory in language, that "may" should be substi-

67. The Advisory Committee, despite its expressed concern regarding indeterminacy in the rule, ultimately resolved that determinate guidelines were not possible and the exercise of judicial discretion was inevitable. *See infra* notes 74-103 and accompanying text.

68. *See supra* note 66.

69. *See* BARAK, *supra* note 52; Atiyah, *supra* note 51; Dworkin, *Rules*, *supra* note 66.

70. *See* George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 38-56 (1992) (looking at the dimension of skill as a way to distinguish between questions of law and questions of fact); Rosenberg, *supra* note 66, at 662-65 (discussing the trial court's skill in developing precedent over time); Yablon, *supra* note 66, at 261-62.

71. *See* Christie, *supra* note 70 (discussing the fact-law distinction as a way to characterize the exercise of judicial discretion); Fletcher, *supra* note 19 (discussing the difference between merits-based and procedural decisions); Yablon, *supra* note 66 (discussing the different types of judicial skills called into play in different types of indeterminate decisions).

72. *See* Martinez, *supra* note 4 (discussing the impact of race on judicial decision making); Wells, *supra* note 57 (discussing the impact of "external" or contextual norms on judicial decisions).

73. *See* Fletcher, *supra* note 19; Mengler, *supra* note 66 (discussing the nature of judicial discretion given play in the Federal Rules of Evidence).

tuted for "shall" in Rule 11.[74]

The Civil Rules have generally favored judicial discretion as a means to secure just results and, thus, have avoided procedural rigidity.[75] On the other hand, indeterminacy in the sanctions rules can weaken their instructive value.[76] The conduct of lawyers and litigants is less likely to be influenced by a rule that is unpredictable in application.[77] There may also be

74. CALL FOR COMMENT, *supra* note 6, at 6. The Committee makes these statements and then never returns to specifically address this issue again. In looking at the structure of the new rule, *see infra* notes 185-203, the question of the court's discretion to determine if there has been a violation is addressed through the strategy of redrafting the substantive standards. But there is no effort to describe how this impacts the court's decisional discretion under the old rule, or what dimension of the discretion to determine if a claim is legally or factually frivolous is to be constrained or freed up by the redrafting. With regard to the second aspect of the decisional structure, the decision to sanction, the Advisory Committee Notes state that the decision to sanction is left to the virtually absolute discretion of the trial judge, discretion without recourse to appeal rising to the level of almost pure prerogative. *See infra* note 205. While the Notes make reference to factors to be considered by the courts in reaching this decision, once more there is no attempt to compare and contrast the 1983 and 1993 amendments on this point. *See supra* note 6. With regard to the third element of a Rule 11 decision, fashioning a sanction, the rule focuses on the "deterrent" versus the "compensatory" goals of the rule as the primary standard to be used in guiding the court's exercise of discretion. *Id.* The Notes comment on the prior abuse of the rule, but there is no explicit analysis of the scope of discretion under the 1983 and 1993 rules—other than to say that the revisions expand the "responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule." FED. R. CIV. P. 11 advisory committee's note.

75. The Advisory Committee is most guilty of reductive thinking about judicial discretion at this point, equating the scope of the court's procedural pragmatism and managerial discretion with all decisional discretion. *See* Fletcher, *supra* note 19, at 277-81 (discussing the need to distinguish between discretion as a function of adjudication associated with the merits of the claim and discretion associated with the court's managerial authority). The managerial discretion of the courts is given full play in such rules of procedure as Rule 16 regarding pre-trial conferences, *see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 405-06 (1982), and cannot be equated to the discretion inherent in a decision to grant summary judgment or a motion to dismiss, *see* Fletcher, *supra* note 19, at 280-81; *Yablon*, *supra* note 66, at 275.

76. The pall of reductive thinking casts its shadow here as well. The issue of indeterminacy, a term that has developed its own meaning and commentary, varies depending upon the context and the dimension of judicial discretion called into play. *See infra* note 84 (discussing indeterminacy). Thus, indeterminacy in the purely procedural and managerial context reflects the perception that flexibility in decision making is an institutional necessity and that an effort to more tightly regulate the decision making would be counterproductive. *See* Fletcher, *supra* note 19, at 283-86 (discussing the difference between an application of substantive law impacting rights and outcomes in litigation, and decisions essentially managerial in nature); Mengler, *supra* note 66, at 460-61 (discussing the decision to inject so much discretion into the structure of the Federal Rules of Evidence). This sphere of "nonsubstantive" discretionary decisions is distinguishable from the legal or substantive decisions by virtue of the fact that their indeterminacy does not raise much comment, there is little concern with developing a record, the decision maker's reliance upon their own judgment—internal reference—is nonproblematic, there is little scope for appeal, and there is little precedential value in light of the idiosyncratic nature of the decision. *See* Fletcher, *supra* note 19, at 283-86; Mengler, *supra* note 66, at 460-61; Maureen N. Armour, Public Policy Making and the Courts: Procedural Pragmatism in an Era of Reform (Oct. 1994) (unpublished manuscript, on file with the author); *cf.* Chambers v. Nasco, Inc., 501 U.S. 32 (1991) (discussing the scope of the court's inherent power to manage their litigation and docket).

77. The lack of influence of an indeterminate rule is exactly the opposite concern of the commentators and much of the research on Rule 11. The concern is not that indetermi-

a greater injustice associated with a relatively indeterminate rule that gives rise to punitive consequences.[78] Indeterminacy can also increase "occasional" injustice, particularly when sanctions reflect a bad relationship between the court and an attorney or litigant. This potential personal bias has been addressed in the commentary.[79] Having said this, however, the Advisory Committee Notes encourage judges to use their personal knowledge of the attorney in making the determination of whether or not to sanction.[80]

Is the existing law of sanctions too determinate or too indeterminate? Is there data or experience to support either conclusion?[81] One measure

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nacy renders Rule 11 ineffective, but rather that it renders it too effective by threatening to over-deter zealous litigation. *See* Nelken, *supra* note 38, at 1339-47.

78. It is important to note that the Advisory Committee's Call for Comment treats the potential misapplication of the rule as an "injustice"—as a result of "over inclusive" or biased application—that threatens the very legitimacy of the system. Yet the Committee never specifically addresses or references this improper application as a guide in the redrafting of the rule. This is a different perspective from those commentators who argue that some "misapplication" is simply the price we pay for effective use of the rule. *See* Louis, *supra* note 8, at 1054-56. This perspective also differs from the "empirical" perspective which attempts to equate "justice" with a quantifiable number of cases deterred, see *infra* note 81, balancing "efficiency" and "deterrence" in a seemingly objective or neutral calculation.

79. *See* Martinez, *supra* note 4, at 613 (looking at the dominant mindset of judges and how that mindset can impact their use of seemingly neutral criteria); Resnik, *supra* note 75, at 424-31 (discussing the increasingly personal relationships of lawyers and judges, and the growing conflict of interest on behalf of a court system "biased" in favor of efficiency and dispute resolution when confronted with a case they do not like).

80. *See* FED. R. CIV. P. 11 advisory committee's note. This practice, what could be called "going outside the record," poses interesting problems for the advocate since they are not likely to be accorded an opportunity to cross-examine or challenge the court's perceptions of them (they can't cross-examine the judge on his opinion based on prior conduct), yet the court will be given great discretion to make reference to these "facts" in its opinion. *See, e.g.*, Armour, *supra* note 76, at 108-09 (discussing Markwell v. County of Bexar, 878 F.2d 899, 903 (5th Cir. 1989), in which the trial judge was aware of the "background of [a] long-running dispute" and was justified in considering the motions as "harassing and unprofessional conduct" filed for an improper purpose).

81. The Advisory Committee called for the production of empirical evidence to address the problem of indeterminacy and its "impact"—inconsistency, over-deterrence, or improper sanctions. FED. R. CIV. P. 11 advisory committee's note. It is important to note that the call for hard data was not requested on the "pragmatic" dimension of Rule 11 and its goal of court reform. No data was requested on how much "frivolous litigation" had been deterred, how much docket reduction had occurred, and how the administration of the courts had improved. Most of the empirical studies of Rule 11 do not purport to measure increased efficiency or even attempt to measure the direct impact of the measure on the court's dockets themselves. The assumption that the litigation explosion and the slowdown of the courts was due to the filing of frivolous litigation has never been empirically documented, either at the outset of the procedural reforms initiated in 1983 or at this latter stage. *See* Vairo, *supra* note 5, at 481 n.37. In turning to an "empirical model" to evaluate the rule, the Advisory Committee's sole concern was with the court's role as a principled decision maker—whether the rule has adversely impacted the filing of cases that fall within some vaguely defined protected zone of meritless, yet worthwhile, litigation. The call for data was an attempt to measure empirically the scope of the rule's indeterminacy. The Advisory Committee conjures up the tool of empiricism to refute, or substantiate, the critiques of indeterminacy, overdeterrence, and illegitimacy "typically fueled by either personal anecdotal experience with the Rule or by reaction to a few published opinions." Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 944 (1992) (The authors critique the applicability of legal analysis to the problem of Rule 11, with its reli-

of indeterminacy would be a very high degree of difference among the individual district judges in the frequency of the application of sanctions.[82] On the other hand, such differences among individual judges have been closely observed by many lawyers for many decades, and the system has accommodated them in large measure.[83]

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ance on anecdotal data and judicial opinions, in favor of a more traditional public policy or social science impact analysis which relies upon the development of "systematic empirical data." Law as public policymaking is clearly the model of these researchers, and public policymaking, that is, lawmaking, should be based on data.).

The "empirical methodology" of the Rule 11 research which purports to rectify the bias of "anecdote," personal experience, and over reliance upon individual judicial decisions is itself experientially-grounded opinion survey research, surveys which pull together the personal experiences of many people by asking them how they perceive the rule and its impact on them. *See id.* at 949-51 (The survey attempted to document through self reporting behaviors associated with Rule 11, including personal assessments of whether or not the subjects had modified their behavior in response to Rule 11. The survey lacked baseline data and attempted to measure a "change" in behavior due to Rule 11 by asking attorneys to report the "impact, if any, of the sanctioning provisions."); *see also* STEPHEN B. BURBANK, AMERICAN JUDICATURE SOCIETY, *in* RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989) (This report attempted to develop a descriptive profile of the Rule 11 activity in the Third Circuit by looking at sanction motions and surveying the judiciary. It also looked at the impact on attorneys by using attorney surveys or interviews relying on self-reported Rule 11 related behavior.); NEW YORK STATE BAR ASSOCIATION, *supra* note 45 (relying extensively upon self-reporting of personal opinions regarding the impact and utility of Rule 11); THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, THE RULE 11 SANCTIONING PROCESS 967 (1988) (The "threat of sanctions has caused lawyers to raise their threshold requirements for handling close cases: they now demand a higher probability of success, limiting access to the courts for more marginal claims." Willging's study used a combined data base of judicial opinions and interviews, but in measuring the positive impact of Rule 11, he also relied primarily upon "self-reported" changes in behavior from judges and attorneys. Willging notes that a "major assumption underlying the adoption of amended Rule 11 is that there is a vast amount of abusive behavior that would be sanctionable under the rule." But he notes that a "full study of [such] sanctionable behavior would require expert judgments on a representative sample of lawyer behavior, a massive undertaking." As a result, "there is no quantitative baseline information documenting the need for Rule 11 sanctions."). The methodological difficulties associated with a study to "quantify" the rule's actual impact have been prohibitory. Such a study requires empirical analysis of actual dockets, blind graders looking at suits filed to determine if they are frivolous and blind graders who would evaluate the pool of suits not filed to determine if the decision not to pursue the suit was well grounded or reflected a "chill." The method of "opinion survey" does not directly refute the empirical reality of the "cosmic anecdote," it merely accumulates and statistically refines it. A more interesting observation is the court's use of traditional opinion survey research methods in the face of a political crisis. How many people really didn't like Rule 11 and how many really didn't mind?

82. The assumption that inconsistency is the measure of indeterminacy fails to recognize the thrust of Professor Martinez's analysis, Martinez, *supra* note 4, as well as Rule 11 commentators, *see, e.g.*, Tobias, *supra* note 34, that consistency in the face of indeterminacy may reflect, not reasoned legal analysis, but rather potential institutional biases—an insidious dimension of legal indeterminacy.

83. The Advisory Committee treats "variability" in the same reductive manner they treat discretion. Variability has its own unique dimensions. *See generally* Robert S. Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's Wobble, or the Death of Error*, 59 S. CAL. L. REV. 424 (1986) (discussing categories of variability ranging from the acceptable to the unacceptable). Certain types of decisional variability, for example those associated with the determination of "facts," have long been tolerated. *See supra* note 55. Variability or inconsistency is narrowly tolerated for decisions characterized as "legal," *see* Lea Brilmayer, *Wobble or the Death of Error*, 59 S. CAL. L. REV. 363 (1986), and the results are still out on the issues characterized as the

Can the indeterminacy of the rule be diminished?[84] The Committee

application of law to facts by the judge sitting not as a fact finder, but as a legal arbiter. *See* Christie, *supra* note 70; Martin B. Louis, *Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733 (1990). The Committee fails to clarify where the questionable variability in the application of the substantive standards of the rule has occurred. Is it in the determination of the adequacy of a prefiling investigation, the determination that the claim is legally frivolous, or factually frivolous, or is it in the construction of the sanctions? We can infer that the prefiling investigation standard posed few problems since it remains unaltered. The redrafting of the substantive standards would seem to indicate a problem, yet there is no comment explaining these changes in detail or what dimension of variability they were intended to address. The reenacted discretion to sanction is virtually unguided and the discretion to devise sanctions is now limited by the institutional goal of deterrence. *See infra* notes 201-10.

84. Indeterminacy is a fact of life. In the sphere of judicial management, indeterminant legal standards have long been tolerated as reflecting the need for institutional flexibility and judicial control. *See* Fletcher, *supra* note 19; Mengler, *supra* note 66; Linda S. Mullenix, *User Friendly Civil Procedure: Pragmatic Proceduralism Slouching away from Process Theory*, 56 FORDHAM L. REV. 1023 (1988) (reviewing DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (1987)). On the other hand, the problem of indeterminate substantive standards is precisely what gives rise to doctrinal development and the dynamic of the common law. *See* BARAK, *supra* note 66; Yablon, *supra* note 66. Indeterminacy, as a problem, is not merely a drafting issue; it implies inadequate legal guidance or constraints and stands as a challenge to the legitimacy of the decision making process. In the Rule 11 arena, the issue of indeterminacy is tied to the issue of fairness and consistency in the development and application of the rule's standards. *See* Vairo, *supra* note 5 (critiquing the Supreme Court's adoption of the deferential abuse of discretion appellate standard as giving undue deference to discussions to sanction and thus failing to address the problem of indeterminacy). The critique of indeterminacy—the development of scholars "building on the work of legal realists[—] [has] developed an extensive array of arguments concluding that law is radically indeterminate, incoherent, and contradictory. Law is indeterminate to the extent that legal questions lack single right answers." Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 283 (1989). Kress also argues that "indeterminacy is a much less serious defect in the law than it is often thought to be. In particular . . . moderate indeterminacy does not undermine the law's legitimacy." *Id. Cf.* Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113 (1990); Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513, 514, 531 (1989) ("[L]egal theory is inherently incapable of identifying which party should win any given case." Outcomes are a function of the interpretive community within which we live—not the law.); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 150 (1990) (concluding that the indeterminacy debate is "the key issue in legal scholarship today" and evidences a significant "paradigm shift in the way we think about law"); Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 146 (1990) ("radical indeterminacy" jeopardized the "legitimacy of the legal systems"). *But see* Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439, 1440 (1992); Richard Lempert, *Error Behind the Plate and in the Law*, 59 S. CAL. L. REV. 407 (1986); Rachel F. Moran, *Reflections on the Enigma of Indeterminacy in Child-Advocacy*, 74 CAL. L. REV. 603 (1986) (discussing judicial strategies in child advocacy settings to deal with indeterminacy, including the development of highly fact specific specialized hearings designed to generate a highly individualized solution); Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372, 375 (1986) (finding that the court's decision making model includes both express principles and a "carefully staked out element of indeterminacy"); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 439 (1990) ("To the more pragmatic lawyer or scholar, on the other hand, a certain degree of indeterminacy does not necessarily threaten the basic legitimacy of the legal system; indeed, it may provide desirable flexibility within which a fact-responsive equity has room to operate." Smith challenges the "association posed between indeterminacy and illegitimacy."); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54

would welcome suggestions to make the sanctions rules more explicit in order to enable the judges to be more predictable and even-handed in their application, if this can be done without causing other perhaps more arbitrary results. At the same time, the Committee is aware of its own inherent limitations; the Committee will admit that efforts to be more explicit than the subject matter of the rule are likely to be counterproductive.[85]

The Call for Comment makes it clear that the Advisory Committee does not view the judicial discretion in Rule 11 as a mere by-product of the drafting process, but rather as a favored means to achieve procedural goals.[86] Here, judicial discretion is treated as one of the conceptual building blocks of the Federal Rules of Civil Procedure and Rule 11. It is not merely the residue, what's left over after the drafters have done their best to determine the legal parameters of the decision, the goals to be achieved, the standards to be applied, and the policies, principles, and

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U. CHI. L. REV. 462, 462-63 (1987); Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 790 (1992) (arguing that the indeterminacy critique ignores the meaningfulness of the written law).

The Committee implicitly rejects the argument that if more drafting determinacy is not possible, perhaps a less inclusive bright line approach to the problem of defining sanctionable litigation should be adopted. But, they do not make it clear where the guidance will come from since they also acknowledge that the linguistic indeterminacy of the rule may simply reflect the regulatory difficulty inherent in identifying and then defining "frivolous" or "sanctionable" litigation. *See infra* notes 186-96 (discussing the lack of consensus regarding the "grey area of judicial discretion" created by Rule 11).

85. All the data in the world cannot answer the most difficult Rule 11 question: "[H]ave the benefits of amended Rule 11 been worth the costs? While the data reported here provide important information, they do not answer the ultimate normative question about the value of the Rule." Marshall et al., *supra* note 81, at 986. How should the courts value the "chilled case"? Is there a simple quantification formula available—a 20% decrease in docket congestion is worth a 10% increase in Rule 11 satellite litigation and the deterrence of 5 "worthy claims"? Vairo, *supra* note 5, at 486 (The data do not "help develop criteria for determining whether Rule 11 is worth its costs. The Rule 11 debate implicates the fundamental tenets of the federal system of civil procedure . . . . Indeed, drastic changes in the judicial climate over the last ten years parallel the issues raised by Rule 11.").

Nor does the Advisory Committee's empiricism address the heuristic bias of the law. While anecdotal or personal experience and isolated judicial opinions may not be an accurate systemic picture of how Rule 11 is being used throughout the courts, it is the basis for most lawyer's and judge's judgments. *See supra* note 6. This empirical and systemic approach to the analysis of Rule 11 may reflect a level of generality and accuracy regarding the institutional and social functions of the rule, but it ignores the fact that litigants, lawyers, and judges do not experience the courts or interact with its lawmaking functions on that level. It is precisely through the resolution of individual cases that the common law grows and practitioners interact with the judiciary. Within this institutional paradigm it is difficult to denigrate or predict the impact one decision or one case might have. The courts rely upon the accumulation of judicial opinions to discharge one of their key functions—making the law. To say these opinions statistically distort the reality of what the court does seems to ignore the reality of how the judicial system functions. *See* Martinez, *supra* note 4 (discussing patterns in judicial decisions reflecting racial biases as illustrative of the "indeterminacy" and problematic variability in the application of legal standards); Vairo, *supra* note 5, at 482-85 (discussing the amendment process of Rule 11 and the statistical profiles of judicial opinions which document anti-plaintiff patterns in the decision making, particularly civil rights plaintiffs).

86. CALL FOR COMMENT, *supra* note 6.

norms used to guide the court's decision.[87] Judicial discretion stands at the core of the rule, yet the Advisory Committee gives no content to this discretion other than to point to its existence as necessary and inevitable.[88] The Committee's reductive approach to judicial discretion is unwarranted in the face of a rich legal literature which attempts to address the problem of discretion from a number of perspectives. But the Committee's reductivism is so grounded in the theory of procedural pragmatism that has colored the judicial reforms of the past fifteen years, that it is not surprising the Committee's analysis promised so much but delivered so little.

B. Reforming the Courts: Intercepting Doubtful Litigation—Changing Judicial Roles and Mindsets

The 1983 amendments to Rule 11 were treated as a call to sanction and an express effort to shift the court's discretionary bias from one reluctant to sanction, grounded in legitimating institutional policies favoring zealous advocacy and an open court system, as well as professional reluctance to sanction fellow attorneys,[89] to one favoring aggressive protection by the court's of their limited judicial resources.[90] The 1993 amendments to Rule 11 acknowledge the problems inherent in linking a broad mandate to sanction to "indeterminate" substantive standards,[91] but there has been no backing away from the emphasis on sanctions that characterized the original movement to reform the rule in 1983.[92]

The 1983 amendment of Rule 11 represented a significant shift in the scope of the court's discretion to sanction frivolous litigation by deleting the bad faith limitation on the court's sanction powers.[93] At the time,

87. Discretion as an independent decisional element, one that must be explicitly addressed by the courts in their decision making, is looked at by few commentators. *See* Barak, *supra* note 52; Martinez, *supra* note 4; Yablon, *supra* note 66.

88. *See infra* part II.C.

89. The reasons for the lack of sanctions under the original rule are never empirically established and yet the "reformers" of Rule 11 make several interesting assumptions in their efforts to "jump start" the sanction effort. *See* Fed. R. Civ. P. 11 advisory committee's note (discussing the lack of sanctions as due to the court's reluctance to sanction other members of the profession). The Comment cites Risinger, *supra* note 36, on this point. It is true Risinger's article poses the problem of the subjective standard of bad faith as a sanctions roadblock, but it offers no doctrinal or empirical justification for this conclusion. Nor is there any analysis which links the lack of sanction case law under the original rule to the apparent overlap between the rule and the court's inherent powers to sanction and the case law generated under those powers. Why use one if the other one will do?

90. *Cf.* Willging, *supra* note 81 (arguing that there is no empirical justification for the court's assumption that frivolous litigation makes up a substantial portion of their docket or causes more problems than other litigation).

91. *See supra* part II.A. (discussing the Call for Comment).

92. *See* Fed. R. Civ. P. 11 advisory committee's note.

93. The removal of the bad faith requirement from Rule 11 was commented on briefly at the time, *see* Burbank, *supra* note 5, but has merited little consideration since then. The bad faith requirement of the court's inherent powers doctrine functions to create a distinction between a prohibited fee shift under the American Rule and the use of fee shifts as sanctions. *See infra* notes 186-228 and accompanying text. There has been no comparable analysis in the Rule 11 arena exploring the function of a bad faith standard as providing a regulatory bright line precisely because more determinate substantive standards were not

there was little written about the potential impact deleting the "bright line" of bad faith might have on the function the bad faith standard performed in limiting the court's discretion to sanction.[94] There remains little explicit jurisprudential or doctrinal development in the Rule 11 arena to address this shift in emphasis in light of the legal norms and institutional policies which previously acted to restrain the court's sanction powers.[95] Even commentators favoring the expansive application of Rule 11 are critical of this gap.[96] But there has been little effort on the part of the drafters, commentators, or judiciary to respond to the challenge posed by the older, more conservative sanction doctrines which operated to limit the court's discretion to sanction meritless litigation[97] and guide the exercise of that judicial discretion in a close case.[98]

Rather than developing a doctrinally-based justification for the change in judicial practice which weighs the competing institutional interests at issue in a sanctions decision—efficient, pragmatic dispute resolution versus an open court system, principled decision making, and full adjudication on the merits—there is simply a gap that fails to mention the "countervailing considerations that formerly commanded the opposite result" in a sanctions decision.[99] As described by one commentator:

> This new, more balanced [sanctions] doctrine, however, often amounts to little more than a set of new, countervailing cliches from which the judges may pick and choose. Such flexibility, which amounts to a discretionary license or its functional equivalent, is sometimes desirable, but here it involves judicial power to resolve the merits.[100]

Historically, interception systems designed to deter or terminate litigation prior to a full trial on the merits have "err[ed] on the side of, or give[n] the benefit of the doubt to, the party opposing interception" in order to avoid their over-inclusive application and the potential erosion of such institutional values as an open court system, resolution of disputes through neutral adjudication, and the litigant's right to adversarial zeal.[101] Yet there is nothing in the rule or accompanying notes that ad-

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feasible. Burbank, *supra* note 5 (finding that Congress has refused to enact broad fee shifting provisions and continues to rely upon bad faith as providing a regulatory bright line to protect against over-inclusive sanctions).

94. *See* Burbank, *supra* note 5.

95. *See* Louis, *supra* note 8, at 1035 (criticizing the lack of development of a jurisprudential basis for expanding the scope of the court's discretion to sanction areas previously off limits).

96. *See id.* at 1036.

97. *Id.* at 1029.

98. *Cf. id.* at 1036 (noting the extent to which countervailing considerations under the older doctrines disposed the courts to err on the side of no sanctions in a close case).

99. *Id.*

100. *Id.*

101. *Id.* at 1051. Professor Louis opines that the over-inclusive application, an inevitable result of removing the bad faith standard from the rule, and the resulting chill, is justified:

> Inevitably some judges will exceed these limits, appeals will become necessary and sometimes fail, injustice will be done, legitimate advocacy will be

dresses the problem of balancing these competing institutional policies expressly in a Rule 11 decision. If anything, the assumption is often made that the balance has been determined and courts, when in doubt, should err on the side of sanctions.[102] The advocates of judicial reform who take this position argue that the federal courts are being crushed by an onslaught of litigation, including doubtful litigation, which warrants the over-inclusive application of Rule 11: the chilling of bona fide claims is the price of an effective court system.[103] However, if there is to be a shift

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> chilled and access to the courts will be denied. The question is not whether such evils will occur but how often. Thus far their incidence has been very small, *small enough to make them, for the time being, an acceptable cost of eliminating other, greater evils from the system.* This is not to deny that access to the courts and the right to advance factual and legal contentions are fundamental goals of our legal system. Without some control on these goals, however, the system almost failed.

Id. at 1055 (emphasis added). The rule has not been "too successful" and the costs are justified. *Id.* at 1056. His real concern is with those cases that are marginal—questionable, but not sanctionable, under Rule 11. These, he argues, can only be addressed through substantive reform or the adoption of a merits-based fee shift. *Id.* at 1059.

102. *Id.* at 1055. The incidents of injustice, Louis argues, have been small and are an "acceptable cost of eliminating other, greater evils from the system." *Id.*

103. *See* Louis, *supra* note 8, at 1059-60. These purveyors of the "ideology of crisis" have little empirical data to support their claims, *see* WILLGING, *supra* note 81, yet they are extremely critical of those who argue Rule 11 overly chills litigation, claiming there is meager data to support such claims. The proponents of Rule 11 rely upon the anecdotal evidence of sanction "opinions" to allay fears the rule is being misapplied. Louis, *supra* note 8, at 1055. There is obviously an alternative perspective and commentators have looked critically at the ideology of court reform to see whether or not the response to the alleged "crisis" is justified in light of the countervailing values favoring more restrictive sanctions doctrines. *See* William P. McLauchlan, *Courts and Caseloads, in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 395 (John B. Gates & Charles A. Johnson eds., 1991) (McLauchlan discusses the range of empirical work that has looked at caseload as the variable of concern and the lack of understanding of what has caused the increase in case filings leading to larger court caseloads. He points out that not all cases require an equal amount of court resources and thus pure numbers are distorting—some cases are routinely handled, while others require more idiosyncratic attention. Thus, even with frivolous litigation, there is nothing to indicate its drain on the court warrants the expenditure of resources under Rule 11. But, bottom line, any such analysis is currently hampered by a lack of data.); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 322-29 (1986) (Elliot focuses on the gap between the standards for summary judgment and the "essentially standardless procedures of managerial judging" used to narrow the issues prior to trial. The article argues that critiques of managerial judging have focused on problems of procedural fairness without looking at the quality of substantive justice that may follow.); Howard H. Hiatt, M.D. et al., *A Study of Medical Injury and Medical Malpractice: An Overview*, 321 NEW ENG. J. MED. 480 (1989) (discussing the results of the Harvard Medical Practice Study, including an analysis of adverse medical events that lead to claims and suits to see whether the current flow of litigation fairly reflects the incidence of the problem in the population); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 545-46 (1986) (There are growing critiques of the adjudicative model and lawyer-based adversarialism as justifications giving rise to an increasing reluctance to rely upon formal adjudication as the primary means of dispute resolution and a rethinking of the role of the courts. Professor Resnik expresses her concern that the shift in focus has resulted in expanded judicial authority with few constraints and that this undermining of procedural restraint poses its own set of problems.); Resnik, *supra* note 75, at 379-431 (There is a movement of the judiciary away from the neutral arbiter (the triadic role) into that of active case manager, motivated in part by their concern to husband scarce judicial resources resulting in the broad discretion exercised by the "managerial judge." However, Resnik argues that current data fails to

in the balance between the competing institutional norms, policies, principles, and values brought into play in a Rule 11 sanction decision, a movement in favor of the managerial judge's pragmatic thumb on the sanction scale, this shift should be articulated and developed as part of the Rule 11 jurisprudence. Waving the wand of discretion over the decision simply does not suffice.

C. The Advisory Committee's Reductive View of Judicial Discretion—Ignoring Context

Most of the critical commentary on Rule 11 has focused on the problem of discretion, a problem measured in large part by the lack of predictable or uniform results.[104] The Advisory Committee's policy of relying upon judicial discretion to fine tune and fill in the gaps in the rule makes sense in the face of the Committee's stated inability to develop a more precise principled approach to Rule 11.[105] But the Committee's adoption of a drafting strategy that explicitly relies upon judicial discretion as part of the structure of the rule[106] is an intriguing response to the problem in light of the onslaught of criticism and political pressure to revise the rule to address the issues of legal indeterminacy, judicial discretion, and decisional variability.

In spite of these criticisms, the Committee is extremely deferential toward the court's exercise of judicial discretion in the sanctions arena, viewing judicial discretion as the solution to the problems that plague Rule 11. But the Advisory Committee's approach to the problem of judicial discretion in the Rule 11 context is flawed in one important aspect: the revisions and commentary to the rule are unfailingly reductive. The Advisory Committee treats the discretionary component of Rule 11 as

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substantiate claims that management efforts have improved efficiency, while eroding traditional due process safeguards, by creating power without guidelines, erode traditional judicial impartiality both with regard to individual attorneys and the outcomes of any given case (the court's interest in moving the case off of the docket).); Resnik, *supra* note 52, at 852-59, 1015-16 (Resnik discusses the values inherent in traditional court procedures, in particular, rationality and norm enforcement, and consistency and differentiation among different cases. Judicial reform vesting broad discretionary powers in the trial courts overrides these traditional institutional values in favor of efficiency.); Book Note, *The Legal Process: The Politics of Judicial Reform*, 81 MICH. L. REV. 774, 774-75 (1983) (Court reform is not merely a process of modernization, but involves organizational and procedural changes that redistribute power within and without the court system. Changes aimed at restricting access to the courts or undermining the legitimating triad of a neutral judge applying law to facts and publicly explaining the outcomes in favor of informal dispute resolution or early interception challenge the ideology of legitimacy which is seen to undergird the court system in a democracy.).

104. *See supra* notes 18-27; *infra* part IV.B.

105. *See supra* part II.A.

106. In addition to the discretion built into the rule, the Advisory Committee reaffirms the applicability of the deferential standard of review, "abuse of discretion," adopted by the Supreme Court in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). *See supra* part II.A. This standard broadens the scope of the trial court's exercise of discretion and its incorporation by reference into the structure of the redrafted rule sends a clear message to the courts that their discretion, broadly and reductively defined, is subject to few formal limits. *See* FED. R. CIV. P. 11 advisory committee's note.

though it were, by its very nature, both a self-implementing and self-limiting dimension of the sanction decision.[107] In part, this assumption is correct, but not to the extent assumed. This is particularly true where, as

107. While Rule 11 sets forth the criteria to guide the court's attempt to determine when a violation has occurred, and the criteria to be used if a sanction is to be imposed, the ultimate decision to sanction is in effect "unguided" or unrestrained under the amended formal structure of the rule. The 1983 amendments provided that the court was mandated to impose a sanction if a pleading was signed in violation of the rule. The 1983 rule used the nonpermissive "shall" when defining the court's duty in this regard. The discretionary code word "may" now appears in a significant amendment to this provision. The 1993 amendments to Rule 11 provide that upon making the determination that there has been a violation of subsection (b) of Rule 11, "the court may, subject to the conditions stated below [regarding the nature of the sanction to be imposed], impose an appropriate sanction." FED. R. CIV. P. 11. There are no guidelines in the rule to address the issue of when the court should sanction and when it should not—even if there appears to be an obvious violation of the rule. If, however, the court decides to sanction, there are extensive procedural and substantive guidelines with which it must comply. *Id.* RULE 11(c)(1)-(3). For example, the court must prepare a written order describing the "conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." *Id.* RULE 11(c)(3). There is no comparable requirement for a decision not to sanction: no order is required, effectively negating the creation of a record for appellate review. This is a significant about face. Under the 1983 amendments' mandate to sanction, decisions finding no violation, or no violation sufficient to warrant sanctions, were scrupulously reviewed and often reversed and remanded on appeal to justify the denial of the sanction. *See* Knight v. Sharif, 875 F.2d 516 (5th Cir. 1989); Corpus Christi Taxpayer's Ass'n v. City of Corpus Christi, 858 F.2d 973 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); MAUREEN ARMOUR, SANCTIONS: RULE 11 AND OTHER POWERS 99, 104-05 (Melissa L. Nelken et al. eds., 1992) (discussing Fifth Circuit decisions reversing and remanding trial court orders denying sanctions for more development and justification).

After the 1993 amendments to Rule 11, the trial court retains virtually unlimited discretion to refuse to sanction: There are no specific guidelines for refusal and there is effectively no appeal from a denial of sanctions. But how should this discretion be used given the context within which the grant of discretion is given and the emphasis upon the aggressive use of Rule 11 as a tool to streamline court administration and dockets and deter the filing of frivolous litigation? More importantly, how should the permissive "may" be treated as an express modification of the prior mandatory "shall" with regard to the court's decision to sanction? *See supra* note 6 (discussing the Advisory Committee Notes to the 1983 and 1993 amendments to Rule 11 outlining the purpose and use of Rule 11); *see also* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1099-1105 (1985). Professor Waltz, discussing the concept of "guided and unguided" discretion, makes the telling point that in attempting to define the scope of judicial discretion, "we should pay attention to context." *Id.* at 1099. Noting that "[t]he phrase 'judicial discretion' is used but almost never defined in statutes and rule codifications," it has become a term used by courts to "shore up verdict-salvaging opinions, but [without] formulat[ing] a definition, a setting of metes and bounds." *Id.* at 1101. Waltz is critical of the lack of analysis of this dimension of judicial decision making and attempts to extricate the commentary from what he sees as a "definitional quagmire" by offering his analytic categories of "guided" and "unguided" discretion. *Id.* at 1103. Unguided discretion is "unhedged by any formal constraints or guidelines" and the court need not fear appeal or reversal. *Id.* "*Guided* discretion, on the other hand, identifies areas in which a judge has some flexibility and choice in decisionmaking but is restrained by more or less specific standards or guidelines to which he visibly must adhere." *Id.* (emphasis added). Critical of the abuse of discretion standard, Professor Waltz notes that it does little more than signal those instances in which the courts appear to conclude that existing guidelines were not properly applied or "the decision was plainly against the logic and effect of the facts before the court." *Id.* at 1104. Waltz further illustrates that "may" is "the most common code-verb of discretion." *Id.* at 1117. Using Waltz's typology—Rule 11 is a mix of guided and unguided discretion with the decision not to sanction, the exercise of the discretion expressly granted, virtually unreviewable and thus unguided.

here, the courts are told to exercise their discretion without undue concern for the limits inherent in the "legal paradigm": variability is accepted, appellate review is limited, and the court's idiosyncratic managerial skill and expertise are viewed as the primary normative guides in determining whether or not to sanction.[108]

Numerous commentators' attempts to grapple with judicial discretion should serve as a warning to anyone undertaking that task. The term judicial discretion is used in so many different ways by courts and commentators alike that it is easy to understand the attraction of a simple, reductive approach.[109] The implicit ambiguity in the term discretion, and the fact that its specific meaning or scope is subject to change depending upon the context, makes its use subject to confusion.[110] Confusion, however, is not always inadvertent: "[C]ertain confusions about that concept [(discretion)], and in particular a failure to discriminate different senses in which it is used, account for the popularity of the doctrine of discretion."[111] While a few commentators have attempted to pull together a variety of perspectives on the topic of judicial discretion in an attempt at analytic coherence,[112] the general field is still wide open. This Article does not to attempt to synthesize or even analyze this body of work, but rather focuses on what appear to be elements of consistency in the conceptualization of judicial discretion gleaned from a wide variety of writings. The goal is to use this analytic body of work to address the problem of defining the scope and limits of judicial discretion in the Rule 11 context.[113] Any effort of this type is subject to the criticism of oversimplifica-

108. Armour, *supra* note 12, at 744-45.

109. For example the term judicial discretion can mean "(1) discretion as wisdom; (2) discretion as managerial authority; (3) discretion as personal input; (4) discretion as power." Fletcher, *supra* note 19, at 276. However, "[i]t would be a mistake to think these four senses are somehow inherent in the nature of the subject matter. The diverse criteria for ascribing discretion respond to the diversity of our motivations in adapting the language to our purposes." *Id.* at 277. Thus, we can talk about discretion as "inevitable," we can talk about discretion as the absence of "governing rules" or we can talk about it as "managerial authority." *Id.* at 278. "It is only the breakdown of our capacity to appreciate distinctions" that results in our inability to understand the different ways in which we are using the term and its implications. *Id.* at 279.

110. Dworkin, *Rules*, *supra* note 66, at 32-40.

111. *Id.* at 31.

112. *See* BARAK, *supra* note 52; Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, *in* THE USES OF DISCRETION 1, 46 (Keith Hawkins ed., 1992); Fletcher, *supra* note 19; Yablon, *supra* note 66.

113. Historically, the "Legal Realists" were among the first to expressly address the judge's role in judicial decision making. "Since the Realists, a major project of American jurisprudential thought has been providing a coherent and accurate account of judicial decisionmaking that recognizes the discretionary character of the process yet provides a rational basis for evaluating or justifying decisions." Yablon, *supra* note 66, at 233. Yablon's categories for these works include the jurisprudentialists whose concern is abstract and philosophical, the proceduralists who look at discretion from an institutional context, the formalist or the "indeterminists" who evidence skepticism concerning the utility of rules, and the nihilists. *Id.*; *see also* BARAK, *supra* note 52, at 1. Barak states that "modern society is founded in essence on a mixture of rules and principles, precedent and discretion. The central question, of course, addresses the proper balance between the two. What is the appropriate level of discretion and of rules without discretion?" *Id.* at 263. Barak's stated purpose in addressing the issue of judicial discretion was to address the need

tion or distortion, and it is inevitable that there will be losses in the nuance and subtlety of the concepts when they are pulled together in this fashion. But this risk is warranted if the effort to merge the theoretical perspective on judicial discretion with the practical concerns for its exercise is successful.

As stated above, discretion is often formulated as a range of tolerable, but variable outcomes. Numerous theorists conceptualize the limits of that judicial discretion by reference to the restraints imposed by the operative legal norms:[114] "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'"[115]

Many theorists look at discretion as what is left after the explicitly articulated rules have been applied,[116] while others look at discretion as what is left, not only after the "black letter" of the law has been applied, but also after any other applicable guides or norms as well.[117] For these latter theorists, discretion lies in large part in the court's ability to pick and choose the "other" gap-filling norms or to reach a "principled" decision, one in which all of the applicable legal norms are articulated.[118] Regardless of the view adopted, it is logical to treat this discretion as a conscious dimension of judicial decision making, just as the courts do when discussing the close or hard case.[119] This is especially true in a context in which the decision is denoted as highly discretionary, as is the case with Rule 11.

This section looks at the legal guidelines that guide the court's exercise of discretion, what dimension of the sanction decision they attempt to control, and what is left to decide when they have been considered or exhausted.[120] With due deference to the subtleties of numerous writers' works, it is possible to develop a simplified typology of these guidelines representing a continuum of judicial discretion.[121] Three general norma-

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of trial judge's to have developed a normative framework for handling the "hard cases." *Id.* at ix-xiv.

114. *See* BARAK, *supra* note 52; Martinez, *supra* note 4; Mengler, *supra* note 66; Richard Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

115. Dworkin, *Rules*, *supra* note 66, at 32.

116. *Id.*

117. *See* Brilmayer, *supra* note 83; Martinez, *supra* note 4.

118. *See* Greenawalt, *Discretion*, *supra* note 66.

119. *See* BARAK, *supra* note 52, at 113-91 (discussing the hard or close case as a decisional problem).

120. *See* Burbank, *supra* note 5 (discussing the lack of uniformity and predictability in the Rule 11 sanction case law); Louis, *supra* note 8 (discussing the inability of Rule 11 standards standing alone to generate a predictable sanction decision); William W. Schwarzer, *Rule 11: Entailing a New Era*, 28 LOY L.A. L. REV. 7 (1994) (discussing the lack of consistency in the sanction decisions).

121. Examples of such typologies abound. *Cf.* KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 55-64 (1969) (developing a typology of types of discretion reflecting the level of institutional deference they are given); Dworkin, *Rules*, *supra* note 66, at 23-27 (Dworkin attempted to generate a typology of different types of legal norms: rules, policies, and principles. Rules are legal standards that apply in an "all or

tive dimensions of such a continuum have been identified, each defined largely in terms of its context.[122] The first dimension defines the traditional "legal context" of the decision—the legal infrastructure of the rule, its express doctrinal formulation, and the penumbra of policies, principals, values, and goals which guide its application.[123] When a judge identifies a case as a close case, she is explicitly identifying it as a case in which the legitimate alternatives generated by the legal infrastructure of the rule represent different outcomes. Deciding between the alternatives requires the application of norms other than those explicitly incorporated in the rule.

The second dimension includes the rules, principles, policies, and norms that help define the parameters of the decision in its institutional context where a judge applies a rule of law. This dimension includes the norms that are selected or used to construct the "judicial paradigm," defining how a sitting judge should approach a decision. Once more, a perspective that views law as a normative whole, self-defining and self-refining, but one which at least acknowledges the institutional context. These norms are not derived from the specific legal policies of the "rule of law" under consideration. Rather, this dimension of discretion reflects the explicit and implicit decisional policies of the judiciary that guide the jurist in selecting among the legal alternatives available.[124] Their significance "lies in [the court's] awareness of [their] freedom of choice and the weighing of normative, institutional and interinstitutional factors in the selection among the alternatives."[125] This institutional context also includes the institutional guidelines, policies, goals, and values, both substantive and procedural, that underlie legitimate judicial decision making and define the larger social role of the courts.[126] Both of these types of institutional norms reflect the limits inherent in the specialized institutional context within which the legal decision must be made.[127] Balanc-

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nothing fashion." Policies represent goals to be reached and principles some requirement of justice. Dworkin distinguishes these norms in numerous ways; one reflects different outcomes if there are conflicts. With conflicting rules, one rule is treated as invalid; but when two principles conflict the court must weigh their relative importance and how they will be used in guiding the final outcome. In fact, it is the intersection of rules and principles that yields many of the legal standards the courts deal with on a daily basis. It is the resolution of their conflict that generates law.); Fletcher, *supra* note 19, at 271-86 (developing a typology of discretion ranging from managerial to adjudicative discretion reflecting the nexus with the merits and invocation of the legal paradigm); Rosenberg, *supra* note 66, at 636-50; Yablon, *supra* note 66, at 261-68 (developing a typology of discretion based on the judicial skill needed to reach a decision).

122. The role of context in legal decisions is explored throughout the literature. *See* Maureen Armour, *Nursing Home's Good Faith Duty "To" Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 ST. LOUIS U. L.J. 217 (1994).

123. *See* Christie, *supra* note 66; Dworkin, *Rules*, *supra* note 66; Mengler, *supra* note 66.

124. *See* BARAK, *supra* note 52; Schneider, *supra* note 52; Dworkin, *Rules*, *supra* note 66.

125. BARAK, *supra* note 52.

126. *See* Atiyah, *supra* note 51; Martinez, *supra* note 4; Posner, *supra* note 114.

127. *See supra* note 66 (reflecting concerns of the legal realists, institutionalists, and pragmatists with judicial discretion as an inevitable characteristic of the judicial system which must be dealt with explicitly).

ing the competing norms, values, policies, or goals that occupy this dimension may ultimately require the decision maker to select one goal over another[128] or to give a particular institutional policy more credence than other competing policies.[129] There is nothing within the legal infrastructure of the rule which can simply resolve these institutional debates; they represent the conscious overlay of legal norms to guide and restrain the adjudicative process.

The third dimension of the sanctions decision includes the extra legal context, the unarticulated assumptions, values, biases, and norms that inevitably impact judicial decisions.[130] In a sense this extra legal dimension of judicial decisions represents the point at which social, political, personal, and cultural views impinge upon the judicial process—the aperture of judicial discretion. This dimension of judicial discretion is extra legal in the sense that it is often unarticulated and may include decisional norms that are not sanctioned or are not acceptable within the traditional legal paradigm. As our understanding of the adjudicative process expands, however, so will our definition of what is to be deemed "external" to that process.[131] While much of the critical commentary on Rule 11 has focused on decisional inconsistency as the primary measure of judicial decision making uncontrolled by legal norms, decisional consistencies provide equally important insights into the adjudicative process, especially when they appear to reflect control by "external" norms.[132] In this context, consistency, while seeming to meet the legal process values of certainty, predictability, and lack of variability, may in fact reflect control of the decision by normative biases buried within this dimension of discretion.[133] This final dimension of the continuum reflects the imbeddedness of the courts within a larger social and political milieu and identifies the potential impact this larger social context has on the adjudicative process.

There is disagreement among theoreticians as to whether these different dimensions of discretion represent a continuum of control emanating

128. For example, efficient dispute resolution over full adjudication.

129. For example, the policy of an open court system versus the policy of sanctioning frivolous litigation.

130. *See* Martinez, *supra* note 4; Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

131. *See* Armour, *supra* note 122 (discussing the role of context in legal analysis).

132. *See* Martinez, *supra* note 4.

133. Rule 11 decisions, given their discretionary nature, are highly susceptible to these biases. For example, a particular judge who is personally tired of litigious plaintiffs, or who finds a particular practitioner offensive, may be inclined to invoke a philosophy of judicial activism when dealing with Rule 11 cases, thus valuing institutional efficiency over the more subtle values associated with an open court system. This same judge might apply the legal standards of Rule 11 in an extremely punitive fashion, interpreting them as expansively as possible to sanction and deter as much potentially meritless litigation as she can. Another more plaintiff-oriented judge might take a much more narrow approach to sanctions, viewing them as warranted in only a limited set of cases where attorneys can be said to have behaved egregiously and abused the system by bringing a case that they should have known lacked merit. *See infra* notes 162-85 and accompanying text (discussing the bias and variability inherent in the close sanction case).

from the center[134] or whether they should be treated as simultaneously acting upon the decision maker, each having its own unique impact on the final decision. Some see these dimensions of discretion as representing a value hierarchy of legal standards or norms, a hierarchy based both on the specificity of the norm and the amount of control it "should" have over the outcome.[135] For these theoreticians, the different dimensions of judicial discretion represent a series of decisional defaults, and the judge only moves on to the next more general set of standards when the others fail to generate a clear decision. That is, norms outside the legal infrastructure of the rule become relevant only in the hard or close case.[136] Other theoreticians argue that there are in fact few "easy" cases, in which the facts fit the narrow decisional rule so neatly that no discretion is needed.[137] Nor do decisions follow a neat continuum or hierarchy of norms once the decision maker is forced to look beyond black letter law.[138]

Regardless of which view is adopted, the result is clear. A Rule 11 determination cannot be derived from the simple application of black letter law to the facts of any given case. All aspects of the sanction decision, the threshold question of the prefiling investigation, the determination of the factual and legal sufficiency of the claim, and the decision to sanction, call into play norms other than those explicitly set forth in the rule. This Article focuses on the second dimension of legal norms, the institutional norms.[139]

The following section shows that Rule 11 provides no principled way to decide between the relative weights to be accorded to the competing institutional norms. Some of these competing norms include: flexibility and specialized skill application; predictability, objectivity and uniformity in the application of the rule; efficient dispute resolution; and an open, accessible court system. How should the courts weigh these competing norms in reaching sanction decisions?

III. THE INSTITUTIONAL CONTEXT OF DISCRETION: THE PROBLEM OF PRAGMATISM

The theory of judicial discretion that has shaped Rule 11 is grounded in the court's procedural pragmatism. This pragmatism has received little direct comment in the literature on discretion and adjudication simply

134. *Cf.* John Dickinson, *Legal Rules: Their Application and Elaboration*, 79 U. PA. L. REV. 1052, 1085 (1931) (concluding that rules have a "central core of habitually established content surrounded by a penumbra of doubtful border-line cases"); Dworkin, *Rules*, *supra* note 66, at 22-29 (rules operate mechanistically and only if they do not determine the result do you turn to policies and principles).

135. *See* Dworkin, *Rules*, *supra* note 66.

136. *See* Greenawalt, *Policy*, *supra* note 66.

137. *See* BARAK, *supra* note 52.

138. *See, e.g.*, BARAK, *supra* note 52; Dworkin, *Rules*, *supra* note 66; Mengler, *supra* note 66.

139. The first level norms have been discussed at length in the literature, and the larger contextual norms, while touched on in the literature, are beyond the scope of this Article.

because few commentators look to the enactment of procedural rules under the Rules Enabling Act as declarative of a theory of adjudication, much less a theory that conflicts with traditional adjudicative norms.[140] The court's two adjudicative roles, its managerial and formal adjudicative roles, are assumed to peacefully coexist, each operative within its appropriate sphere. When not addressing the core adjudicative tasks of the court, the development and interpretation of the operative legal facts, and the application of the law to those facts, the procedural pragmatism of the Federal Rules of Civil Procedure presumes a stance of normative neutrality in the development of the litigation vis-à-vis the substantive underlying claim. The court's procedural adjudicative role also assumes the inevitable, and justified, reliance upon the pragmatic skills of the judge in making "neutral" procedurally authorized or mandated decisions that shape the nature of the dispute.[141]

Yet these seemingly neutral procedural decision points[142] invoke a complex array of institutional and judicial norms, without which the procedural mandates could not be met.[143] Commentators attempting to develop a theory of adjudication have focused primarily upon the

140. Judicial pragmatism in the procedural arena is based on the assumption that the court has the innate ability to separate the substance of the claim from the procedural issues, and that the substantive claims are subject to an accurate and unbiased analysis using neutral procedural schemes designed to develop the law and the facts, and ultimately an adjudication of the merits of the claim through pretrial procedures, such as summary judgment, or at trial. In this context, judicial discretion is a fact of life for the proceduralist. *See* Mullenix, *supra* note 84. Professor Mullenix discusses the ideology of "progressive proceduralism," a process and instrumentally oriented conceptualization of procedure that views it as a value free inquiry, and that appears to have captured the discourse of an academic discipline with an avowedly practical orientation. *Id.* at 1028. Procedural pragmatism focuses on the traditional legal schema of law, fact, and the application of law to fact in the resolution of the dispute. More importantly, it focuses on the perceived need and concomitant skill of the court to manage the case development and make these decisions with little oversight on a case-by-case basis. *Cf.* Armour, *supra* note 76; Atiyah, *supra* note 51; Fletcher, *supra* note 19.

141. The assumption that the Federal Rules of Civil Procedure are normatively neutral was derived from the prescriptive mandate that the rules be neutral vis-à-vis the underlying substantive claims, the principle of transubstantive procedure. *See* Burbank, *supra* note 5. However, the adoption of such a goal cannot eradicate the necessary normative dimensions of the discretion granted to the courts under the rules. When that discretion intersects with or has an impact on the determination of the merits of the claim, the courts are expected to adhere to the traditional adjudicative model of decision making. *But see infra* note 149 (discussing the impact of the court's growing pragmatism on the expanding "managerial" role of the court in deciding summary judgments). However, to the extent the rules are deemed to address managerial concerns, the discretion granted to the court is viewed broadly and pragmatically. *See* Armour, *supra* note 12.

142. For example, whether there has been adequate disclosure under Rule 26, or whether a claim under Rule 11 is frivolous, and if it is frivolous, whether it should be sanctioned.

143. These values are discussed throughout this Article, but it is useful to focus on those most often relied upon: judicial activism in the aggressive management of the court and case litigation versus the norm of judicial restraint; predictability and uniformity in the application of legal standards versus the accepted variability inherent in the court's managerial decisions; a restrictive view of the court's skills in resolving key legal or factual questions versus tremendous deference to the court's interpretation and application of procedural mandates. *See supra* note 37 and *infra* notes 145, 161-84.

traditional and formal adjudicative tasks associated with a merits-based determination. Yet any theory of adjudication, even one implicit in the procedural structure of the federal rules, must grapple with the core problem of adjudication: the descriptive and normative definition of the limits of the court's discretion.[144]

Pragmatism, as both a descriptive and normative theory of formal adjudication, emphasizes the impact of context and the position of the decision maker upon their decision. Used in this way, pragmatism has enriched our understanding of adjudication by looking at the judicial norms and values developed to fill in the interstices of the substantive law, both favorably and critically.[145] Yet in the procedural arena, pragmatism has not yielded similar insights despite the fact that the court's adherence to a theory of procedural pragmatism has been a driving force in the redefinition of the dominant institutional role of the courts as purveyors of "efficient dispute resolution" rather than neutral arbiters of the law. This redefinition of the role of the courts[146] is reflected in the court's response to the normative concerns of adjudication: how are the gaps in the procedural scheme to be filled?

The answer is that they are to be filled by the court's expertise and experience in developing and managing litigation.[147] The court's procedural pragmatism views the sitting jurist as a repository of the skills needed to implement and enforce the procedural scheme. In this sense, the limits of the court's managerial discretion are grounded in the very skills assumed inherent in the judicial actor to meet these adjudicative goals.[148] In redefining the role of the courts, commentators and judicial

144. *See* Michael S. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988 (1984). "A theory of adjudication answers the questions of how judges decide cases and how they ought to decide cases." *Id.* at 1003. Moore illustrates that any theory of adjudication must contain a "theory of value," since adjudication can never be value-free. *Id.* at 990. While Moore focuses on adjudication as a merits-linked judicial endeavor, his definition of adjudication clearly encompasses any theory, whether normative or descriptive, addressed to substantive or procedural concerns of judicial decision making.

145. Thus pragmatism has been used to focus on the extra legal dimension of decisions involving race and gender. *See* Martinez, *supra* note 4; Ruth A. Putnam, *Justice in Context*, 63 S. CAL. L. REV. 1797 (1990); Radin, *supra* note 130; Marion Smiley, *Pragmatism as a Political Theory*, 63 S. CAL. L. REV. 1843 (1990).

146. *See* Atiyah, *supra* note 51 (discussing the shifting role of the courts).

147. Armour, *supra* note 12.

148. *See* Armour, *supra* note 76 (discussing the court's pragmatism and reliance upon assumptions of judicial competence in developing a theory of adjudication grounded in the court's managerial discretion). The manuscript develops a model of managerial adjudication distinct from the traditional adjudicative theories which attempt to describe and direct the court's merits-based decisions. As described in the manuscript, managerial discretion is characterized by express delegation to the court to act in areas essential to the court's operation and the management of the litigation; this delegation is accompanied by few procedural restraints and the minimal provision of broad, open standards. The delegation is perceived by the appellate courts to require a policy of "institutional deference" that reflects, at its core, the perceived lack of any direct nexus between the court's exercise of its managerial discretion and the determination of the parties' substantive rights. The delegation is further accompanied by an expectation that there will be extreme variability in outcomes because of the need to address the unique aspects of each case. The delegation

actors alike increasingly rely upon adjudicative pragmatism as a normative and descriptive theory of the court's purpose and, in the procedural arena, as a way to justify their ever-expanding power.[149]

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is grounded in a doctrine of judicial competence and discretion that is peculiarly self-referring, that is, it values the personal, subjective perspective of the trial court and expects the judge to refer to those experiences when making a managerial decision. Thus, the court's exercise of managerial discretion is characterized by a peculiarly "internal point of view" that does not look for external, objective standards and that often sees courts justifying their actions based on their discretion. The nexus between judicial discretion and competence, that is, skill, is discussed by other commentators as well. *See* Fletcher, *supra* note 19; Yablon, *supra* note 66.

149. A prime example of the impact procedural pragmatism as an adjudicative theory has had in changing the role of the courts is the change in summary judgment standards over the past 10 years. In the face of tremendous pressure for judicial reform, grounded in part in allegations of a litigation explosion and the need to expand pretrial intervention procedures, the United States Supreme Court decided a series of cases that altered the nature of the summary judgment procedure by expanding the court's decisional role in deference to their perceived competence to make certain fact-based decisions and in the face of an alleged need to encourage pretrial resolution of substantive disputes. *See* Stempel, *supra* note 29. Professor Stempel links the change in summary judgment procedures to court reform and the resulting change in the court's role in deciding summary judgment to fundamental changes in the assumptions that underpin the theory of adjudication in the federal rules. Stempel articulates the pragmatic incentives to implement substantial change in a summary judgment adjudication; the administrative and managerial concerns that directly conflicted with the preexisting normative bias favoring judicial restraint in such motions; and the doctrinal expansion of the court's role as a "fact finder" with its emphasis on the need for and reasonableness of relying upon the court's skill in this arena. Stempel criticizes this pragmatic restructuring of summary judgment on the grounds that it departs from the "generally accepted understanding of the proper role of both summary judgment and directed verdict." *Id.* at 99. Furthermore, he critiques the expanded fact finding role of the court on the grounds that the normative dimension of factual determinations is best addressed by a jury, not a judge. *Id.* at 104, 166. Stempel also criticizes the Supreme Court's tendency to insulate judicial decisions from appellate review by adopting a position of extreme deference on questions involving the application of the law to facts.

Stempel questions the court's ability to characterize the analytic core of the adjudicative decision in a way that insulates judicial intervention, particularly in novel or difficult cases, from appellate supervision. *Id.* at 168. Stempel is concerned that enlarging summary judgment in this way, while potentially increasing the efficient operation of the courts in terms of docket management, encourages courts to exercise their institutional bias and "trim weak or otherwise disfavored cases from the trial docket. The observed and coming change in summary judgment jurisprudence bodes ill for certain classes of litigants, persons interested in the accuracy of judicial decision making, and the system as a whole." *Id.* at 159. While acknowledging the "realpolitik" of these decisions, Stempel questions whether the pragmatic justification for expanding the court's role is in fact susceptible to empirical verification, and whether the claimed increase in efficiency can be quantified and weighed against the "reduced accuracy and justice to some claimants" threatened by the change in procedures. *Id.* at 171. These criticisms parallel those raised in the Rule 11 context and reflect the same pragmatic bias. *See, e.g.*, Alan R. Kamp, *Federal Adjudication of Facts: The New Regime*, 12 AM. J. TRIAL ADVOC. 437 (1989) (critiquing judicially created procedures that seek pretrial adjudication); Brian L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 DICK. L. REV. 25, 58 (1989) (noting the attraction of summary judgment to trial judges in light of the Supreme Court's direction to them, not merely to determine if there is a "live, factual dispute that should be settled at trial," but "to dispose of cases that judges perceive to be one-sided"); Jane L. Dolkart, *Summary Judgment in the Federal Courts After the Supreme Court Trilogy*, BARRISTER MAG., Summer 1991, at 48; *cf.* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 411 (1990) (Smith discusses pragmatism as "forward-looking instrumentalism" and as hostile "to abstract theory, formalism, and foundationalism." More importantly, he characterizes pragmatism as a "kind of exhortation about theorizing; its function

These two different perspectives on judicial discretion define the conflict inherent in a Rule 11 adjudication: To what extent is a Rule 11 decision to be guided by a theory of pragmatic adjudication and to what extent do the decisions appear to be appropriately addressed by the more traditional model of formal legal adjudication? The tension between judicial discretion viewed as pragmatic decision making, with its focus on the context and factual uniqueness of the adjudication, and the more traditional or formal theories of judicial discretion and adjudication, focusing on the legal parameters and restraints which operate in the judicial sphere, drives much of the critical Rule 11 commentary. The challenge has been to balance or reconcile these competing models of discretion and adjudication in the drafting and implementation of Rule 11.

Rule 11 aptly illustrates this tension. Commentators advocating procedural pragmatism argue that institutional considerations, such as a litigation backlog and the filing of frivolous litigation, warrant an aggressive and inclusive application of Rule 11 despite its chill of legitimate advocacy.[150] This body of commentary acknowledges the pragmatic considerations that drive both the rule and its implementation. They argue that the rule should be restructured to be consistent with this pragmatic orientation. They also recommend that the rule should not focus on the legal infrastructure of the underlying claim, the legal and factual core of the traditional merits-based adjudication, since that is not amenable to resolution by reference to the normative values inherent in procedural pragmatism.[151] According to this body of commentary, the rule, consistent with the pragmatic considerations that drive it, should deal primarily with the attorney's prefiling investigation treated as part of the "conduct" of the litigation, an arena traditionally delegated to the court's managerial discretion, and avoid consideration of the legal product or the attorney's legal judgments.[152] This restructuring of the rule would make it consistent with the implicit demarcation between the court's managerial discretion and their exercise of core adjudicative powers.

Another body of critical commentary rejects the proposal that the two theories of adjudication should be bifurcated in the Rule 11 arena and argues that the traditional adjudicative values of uniformity, predictability, and the development of binding, explanatory precedent are applicable to a Rule 11 adjudication. This critique implicitly brings to bear upon the question of the proper scope and exercise of judicial discretion under Rule 11, a theory of adjudication grounded in the formal legal paradigm and traditional legal values, including judicial restraint, and a view of the institutional role of the courts distinct from the pragmatists' "realpoli-

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is . . . to remind lawyers and judges of what they already believe but often fail to practice.").

150. *Supra* notes 89-103 and accompanying text.

151. As discussed above, pragmatism in the procedural arena values efficient dispute resolution, context driven solutions to legal problems, and reliance upon the experience and expertise of the court to reach those goals. *See supra* notes 145-49.

152. *See* BURBANK, *supra* note 81; Schwarzer, *supra* note 120.

tick" of efficient dispute resolution.[153] This body of commentary views the overlap between Rule 11 and the merits-based determination to which it is inextricably linked as generating a decision that cannot be viewed as fully delegated to the court's managerial discretion.

The conflict between these competing theories of adjudication, pragmatism, and formalism can be seen most clearly in those instances in which the courts rely upon essentially pragmatic justifications to defend a move away from principled decision making. This is seen in both procedural and formal adjudications: in the court's emphasis on the importance of the personal context of the decision maker in reaching "fact" sensitive decisions and in the need to defer to the decision maker's special expertise, perspective, and experience in reaching decisions.[154]

The Supreme Court's adjudicative pragmatism in the procedural arena is seen most clearly in its reliance upon the importance of individual context and judicial skill in rendering an acceptable Rule 11 decision, a decision grounded in the trial court's experience and expertise in managing litigation.[155] The Supreme Court's willingness to apply this pragmatic approach to adjudication across the board in a Rule 11 decision, even to those decisions involving a merits-based inquiry, is indicative of its willingness to consciously reshape the adjudicative role of the courts.[156] The resolution of the conflict between that pragmatism (the need to get these

153. *See* Fletcher, *supra* note 19; Nelken, *supra* note 43; Vairo, *supra* note 5.

154. *See supra* notes 74-87 (discussing the Supreme Court's reliance on the doctrine of judicial competence to support its decision to defer trial court decisions). *But see supra* note 55 and accompanying text (discussing the fallacy of the law-fact distinction as grounded in distinct adjudicative skills). *See also supra* note 149 (discussing the impact of pragmatism on the developing jurisprudence of summary judgment in the federal courts).

155. Armour, *supra* note 12. *Contra* Rosenberg, *supra* note 66, at 659-65. Professor Rosenberg critiques the practice of delegating discretion, either primary or secondary, without "set[ting] any limits or offer[ing] any indicia for the guidance of either the trial court's exercise of the discretion or the appellate court's review of it." Rosenberg, *supra* note 66, at 659. He points out that appellate review under the "abuse of discretion" standard fails to fill in the gap—"[i]t is a form of ill-tempered appellate grunting and should be dispensed with." *Id.* A trial judge with both types of discretion wields extraordinary power and should be held accountable. *Id.* at 665.

> To play fair, a trial judge relying upon discretionary power should place on record the circumstances and factors that were crucial to his determination. He should spell out his reasons as well as he can so that counsel and the reviewing court will know and be in a position to evaluate the soundness of his decision. If the appellate court concludes that he considered inappropriate factors or that the range of his discretionary authority should be partially fenced by legal bounds, it will be in a position to do this intelligently.

Id. at 665-66. Conferring discretion, be it primary or secondary, is "not a casual matter, since it insulates judicial rulings from ordinary appellate review." *Id.* at 667. Guidelines should be developed as soon as "experience makes these perceptible." *Id.* "[A]ppellate courts should not invoke the abracadabra of either 'discretion' or 'abuse of discretion' [(primary or secondary discretion)] to avoid close analysis of hard problems. They too should state reasons and offer guidelines whenever they perceive them." *Id.* Professor Rosenberg ultimately points to the need to ensure that judges "are aware of their power, aware of their duties," and acting to ensure that the law is administered fairly. *Id.*

156. *See* Atiyah, *supra* note 51. While Atiyah looks at the changing role of the court as an institutional process, perusal of the Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.* reveals the Court's pragmatism as a way in which the Court is involved in actively altering its adjudicative role.

issues resolved by relying on the judicial actor best situated to solve the problem) and the call to principle (the need for appellate review to ensure uniformity and predictability in the decisional process)[157] has been resolved in favor of the former in the Rule 11 context.[158]

157. *See* Atiyah, *supra* note 51, at 1270-72; *cf.* Rosenberg, *supra* note 66. The challenge of appellate review and the need to ensure uniformity in decision making, balanced with the need for judicial flexibility and husbanding of scarce resources, is not a problem that provides easy resolution. Writers in the area have focused on the difficulty of linking different standards of appellate review to simple classification systems, that is, law versus fact questions, on grounds that any such classification system does not yield uniform results. The classifications themselves are often difficult to define and apply, and there is no necessary analytic link between the institutional posture, the standard of review, and any given classification. *See, e.g.*, George C. Christie, *Judicial Review of Findings of Fact*, 87 Nw. U. L. REV. 14, 14 (1992) (Christie looks at the controversy surrounding the "permissible scope of judicial review of findings of fact." He critiques the "questions of fact, questions of law, and questions of law and fact" paradigm as failing to provide a principled approach to appellate intrusion in the trial level decisions. He suggests that looking at the analytic process underlying the decision would be a better basis for classification.); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-98, 1038 (1986) [hereinafter Louis, *Allocating Adjudicative Decision Making*] (Louis notes that appellate review is usually linked to the "familiar distinction between fact and law." "[F]act-finding is the special province of the trial level, law declaration is the special province of the appellate level, and the distinction between fact and law is the primary means by which the trial and appellate levels divide decisional power between them." Professor Louis notes that having found historical facts and declared the law, the next step is one of application to determine the ultimate facts. These ultimate facts do not fit neatly within these categorizations—the courts force them into one category or the other, sometimes they are treated as essentially "factual" in nature, and other times essentially "legal." The courts use this method of characterization as a way to take these "fact" questions away from the fact finders. Professor Louis makes the point that the appellate court's ability to "classify" questions in this fashion gives them power over much of the trial court's activities and that there has been a historical shift in favor of treating these mixed questions as questions of fact to be reviewed deferentially as an institutional response to the "litigation explosion." Professor Louis further illustrates that in the procedural arena, mixed questions are called "law" when freely reviewed, and "discretionary" when treated as fact based, without any consistent methodological or doctrinal basis for the distinctions.); Martin B. Louis, *Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733, 745-48 (1990) (Professor Louis critiques efforts to link the Rule 11 standard of review to distinctions between law based versus fact intensive decisions, the latter treated as highly discretionary. He also critiques efforts to link the trial court's discretion to its knowledge of local lawyering practice, and notes that advocates of the broad delegation of discretion under Rule 11 also advocate a "conduct" based approach rather than the "product" approach currently enshrined in the rule. Yet, Professor Louis poses the question whether any standard other than deferential review "will be worth the marginal improvement in the overall quality of rule 11 practice." He questions whether Rule 11 decisions are as discretionary as touted and points out the weaknesses inherent in any argument that relies upon the "discretionary" nature of the decisions as justifying a deferential standard of review—are they really that discretionary and if discretion begets deference wouldn't all types of decisions call for this result?). The point is simply that the Supreme Court in *Cooter & Gell* relied, with little analysis, on a distinction that has been challenged in the commentary. If the "classification" is viewed as an institutional response—the desire to avoid intrusion—it makes sense. As a principled response, the Court's position is questionable.

158. *Cooter & Gell*, 496 U.S. at 384; *see also supra* notes 89-103 (discussing the Supreme Court's reliance on a doctrinally flawed analysis in justifying its adoption of the abuse of discretion standard for Rule 11).

The Supreme Court's pragmatism does not expressly reject principled decision making, but, as a theory of adjudication, its approach to Rule 11 is to focus the adjudicative process on the body of experience under Rule 11 as it accumulates on a case-by-case basis.[159] In this way, the declarative function of the courts is reduced to finding similarities in past experience; it has lost its hortatory and clarifying dimension. While sometimes it is "more efficient to draw distinctions after events have occurred than it is to attempt to do this in advance," the trend in pragmatism toward "individualized justice" goes beyond this "marginal adjustment" and reflects changes of a "more structural character" in the role of the courts.[160]

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159. This approach is questioned by Atiyah, *supra* note 51, at 1270.

160. *Id.*; *cf.* Rosenberg, *supra* note 66. It is important to note that the "mixed" or "application" issues when tied to intervention in the role of the judge or jury sitting as a fact finder necessitate deference to their fact finding role without any implication of a broad application of the resulting verdict. Simply stated, a jury verdict has little precedence and is not treated as "shaping the law." This is not true in other "application" situations in which the application of law to fact and fact to law are viewed as a comment on the law, its scope, and application, creating a dialectic in which the law grows or changes shape in its effort to accommodate and fit paradigmatic fact patterns. *See, e.g.*, Louis, *Allocating Adjudicative Decision Making*, *supra* note 157, at 996 n.19. For example, a grant of summary judgment creates precedent regarding the legal sufficiency of certain types of evidence, whereas an adverse jury verdict would not. Thus, deference to a trial court's fact findings is just that, by characterizing them as "factual" in nature they are separated from and treated as having little impact on the law—there is no dialectic at work—the law is not being defined or refined in its application. If, however, a decision is used to adapt a particular fact paradigm as a "comment" on the law, as illustrative of a particular application and result, and thus the determination of ultimate facts adds to the law and is to be treated as precedent, the decision should be treated as "legal" in nature and subject to review as a "declaration of the law." *See* Christie, *supra* note 157, at 31-35. Christie questions whether a distinction based on "norm" elaboration versus mere "norm" application is workable. He argues that it makes more sense to look at how the question is answered: direct observation, or reflection and judgment requiring evaluation and characterization. Thus, one may have a situation in which a certain fact pattern, even if established, is deemed insufficient as a matter of law to meet the requirements of the legal standard; a fact paradigm which could or could not meet the legal requirements depending upon the fact finder's evaluation; and a fact paradigm that must always be treated as meeting the legal requirements, that is, there is no discretion for the fact finder to find the fact and not apply the law in a certain way. Thus, in the Rule 11 context, to the extent that reported decisions are treated as precedent or commentary on the meaning of the rule, its application and boundaries, they are more than mere "fact findings"—they add to the understanding of the rule and begin to circumscribe its application. How the appellate court reviews a decision should reflect, at least in part, the institutional role to be played by the decision: if it is to be used to guide and limit the application of the rule in the future, it should be treated as a question of law, not merely the trial court's discharge of its fact finding function. *Cf.* Friendly, *supra* note 66, at 756-73 (Judge Friendly discusses the institutional reasons for deference and appellate control of trial court decisions and the resulting variability in the application of the "abuse of discretion" standard. He goes so far as to support development of "broad" and "narrow" "abuse of discretion standards" depending upon the extent to which law must be applied. He also notes that deference must be tempered with the need for rule development or in situations in which a settled practice has developed which needs to be recognized as having placed "a gloss upon the Rule which a judge could no more disregard than if the words had appeared in the Rule itself."); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing the Supreme Court's rejection of the clearly erroneous standard of appellate review when looking at certain trial court findings related to constitutional litigation); Janet S. Thomas, Comment, *Likelihood of Confusion Under the Lanham Act: A Question of Fact, a Ques-*

The challenge of Rule 11 has been to draw a line which separates, or at least highlights, the decisional arena within which the court is free to exercise its procedural pragmatism and the point at which the more restrictive model of adjudicative formalism should come into play with its related institutional values of an open, accessible court system. If a line cannot be drawn, the challenge is to at least acknowledge their overlap and address what role institutional norms associated with the traditional, formal adjudicative role of the court should play.

Commentators and judicial actors favoring court reform and judicial activism take the position that the more restrictive model of traditional adjudication operates restrictively when the court is exercising its core adjudicative powers, that is, up until the court has made the merits-based determination which is the necessary predicate to a sanctions decision. Others argue that the line between the court's determination on the merits and the court's Rule 11 determination is not that clear because the sanction determination is inextricably linked to an evaluation of the legal merits of the claim or work product of the attorney. The overlap between these two decisional arenas, as well as the concern that pragmatism cannot justify a complete end run around certain core values of traditional adjudication (they must coexist), is at the heart of the debate about the scope of judicial discretion in the Rule 11 arena. There is no simple compromise which can accommodate this conflict in the court's institutional roles in the Rule 11 arena. The normative structures of these distinct adjudicative theories require different outcomes in close cases.

"[N]o clear factual pattern has emerged to distinguish sanctionable from nonsanctionable conduct in a close case."[161] At times, the primary indicator of the need for sanctions seems to be the vehemence of the trial court's expression of disgust or dismay at the counsel's conduct.[162] This subjective overlay is a point of concern among commentators.[163] Yet, the court's visceral response seems to be their primary guide to determine whether sanctions are warranted: if its an easy case, sanctions are war-

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tion of Law, or Both?, 73 KY. L.J. 235 (1984-85) (looking at the problem of characterization as impacting the allocation of the decision between judge and jury, as well as how it is handled on appeal); *infra* part IV (discussing the impact of nonbinding precedent on the shape of case law).

161. ARMOUR, *supra* note 107, at 101 (discussing the Fifth Circuit's Rule 11 decisions).

162. *See* Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 346 (5th Cir. 1990) (The district court criticized counsel for filing a brief that "would shame a first year law student" and determined sanctions were warranted in light of the "slipshod and unprofessional work." The Fifth Circuit deferred to the trial court on the issue of the counsel's reasonable belief regarding the state of the law at the time of the filing.); Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870 (5th Cir. 1989) (The court rejected counsel's argument for a change in the law on grounds they had found no precedent to support their attack. Unlike *Smith Int'l*, which had looked at controlling precedent and given counsel the benefit of the doubt, in this close case, the court simply deferred to the trial court's analysis.), *cert. denied*, 496 U.S. 935 (1990); Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1199 (5th Cir. 1988) (refusing to sanction where counsel was "mistaken" as to law if the court thought the mistake reasonable, that is, one they could have made).

163. *See* BURBANK, *supra* note 81; Schwarzer, *supra* note 120.

ranted;[164] if it is hard or close, the sanction decision appears to be determined by the particular institutional policies the court adopts or emphasizes. If the court adopts or emphasizes the "pragmatism" of Rule 11, the need to aggressively deter frivolous litigation, sanctions will follow.[165] If the court supports the institutional policy of adjudicative restraint in the sanctions arena, a policy favoring judicial tolerance and an open court system, sanctions will rarely follow.[166] Often, in a close case, the courts appear swayed primarily by subjective factors, including their willingness to defer to an attorney's good faith mistake or error.[167] But there is no clear analytic or doctrinal link between the facts of these cases and the decisions of the courts to select or give way to one or the other competing institutional perspectives. The resulting analysis seems to be determined more by the outcome, rather than being outcome

164. *See* MacBride v. Caravelle Broadcast Group Consol., Nos. 89-0008-C, 89-0028-C, 1990 U.S. Dist. LEXIS 19619, at *8-9 (W.D. Va. June 4, 1990) (holding Rule 11 does not apply in a close case, rather it "applies where the case is black and white, not where it is a matter of shading and degree").

165. *See* Anderson v. Gibson, Dunn & Crutcher, Nos. 91-55733, 91-56329, 1993 U.S. App. LEXIS 3263, at *14 (9th Cir. Feb. 5, 1993) (The court held that sanctions were warranted in an easy case such as this where the "complaint was factually deficient and legally meritless. It was the model of a frivolous complaint."); Villa Marina Yacht Sales, Inc. v. Hatteras Yachts, 762 F. Supp. 1007, 1008 (D.P.R. 1991) (holding, in a close case, that the appellate court should have deferred to the district court on pragmatic grounds, specifically their knowledge of "relevant facts that do not appear in the appellate record"), *aff'd*, 947 F.2d 529 (1st Cir. 1991), *cert. denied*, 503 U.S. 986 (1992); The Curtis Management Group, Inc. v. Academy of Motion Pictures Arts & Sciences, 717 F. Supp. 1362, 1370 (S.D. Ind. 1989) (holding sanctions were warranted precisely because this was not a close case); International Shipping Co. v. Hydra Offshore, Inc., 675 F. Supp. 146, 149 (S.D.N.Y. 1987) (The court focused on Rule 11 as providing a more "expansive standard for the imposition of sanctions," noting the potential chill if misapplied. The court imposed sanctions with reluctance on the grounds that there was "an egregious example of the violation of the spirit and letter of Rule 11."), *cert. denied sub nom.* Golub v. Hydra Offshore, Inc., 493 U.S. 1003 (1989).

166. *See* Moore v. Pyrotech Corp., No. 90-2178-0, 1992 U.S. Dist. LEXIS 16583, at *5-6 (D. Kan. Sept. 30, 1992) (denying plaintiff's motion to sanction defendants' motion for new trial on the grounds it was "a very close case"); South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 806 (D. Mass.) (denying sanctions in a close case in order to avoid "chilling" zealous advocacy), *aff'd*, 867 F.2d 607 (1st Cir. 1988); Skepton v. County of Bucks, 613 F. Supp. 1013 (E.D. Pa. 1985) (denying sanctions in a close case in deference to the attorney's efforts to create a novel claim).

167. *See* Gottlieb v. Westin Hotel Co., No. 91-C-5184, 1991 U.S. Dist. LEXIS 18410, at *8 (N.D. Ill. Dec. 30, 1991) (holding that "[a]lthough this is a close case for purposes of Rule 11, the court is convinced that the argument was made in good faith based on the facts"); Flag Fables, Inc. v. Jean Ann's Country Flags & Crafts, Inc., 753 F. Supp. 1007, 1019 (D. Mass. 1990) (denying sanctions in a close case where plaintiff's arguments were made in good faith); Loyalsock Beverage v. Stroh Brewery Co., No. 89-0435, 1989 U.S. Dist. LEXIS 15891, at *4-8 (M.D. Pa. Dec. 21, 1989) (holding that in a close case the court should deny sanctions unless it finds the filing of the complaint to be abusive litigation or a misuse of the court process); Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204, 211, 215 (N.D. Ill. 1985) (Citing the policies in favor of an open court system, the court held as follows: "[W]e must conclude that, though this is an extremely close case and our initial inclination is to assess costs and sanctions, defendants' legal theories are not so unreasonable nor the deposition testimony so devoid of their interpretation as to justify sanctions under Rule 11." While the defendant's litigation strategy was close to the line, it had not "clearly transgressed" it.).

determinative.[168]

The lack of a principled basis to enable courts to determine the relative weights to be accorded these competing institutional policies and their related theories of adjudication is addressed in part by the paradigm of the close case. The courts grappling with Rule 11 sanction decisions have grabbed onto the close case as one way to draw the line limiting the court's discretion to sanction and break the normative log jam:

> In many respects this is a close case; the record is scant, the disputes are great, the objective evidence is minimal. Rule 11 has no application in such a case. Sanctions are merited only where a party has not even a glimmer of succeeding, where it is clear to all that the actions taken could serve only improper purposes. Rule 11 applies where the case is black and white, not where it is a matter of shading and degree.[169]

Others use the paradigm of the close case as a way to define the articulable outer limits in an inclusive fashion such that close cases can be sanctioned.[170] The former use is consistent with the method of analysis proposed in this Article, which favors more traditional adjudicative norms and emphasizes the inherent limits of the court's pragmatism. The latter is consistent with the logic of judicial discretion under attack, the variability inherent in a theory of adjudication grounded in the sitting jurist's unique experience, expertise, and perspective, and the institutional concern for individualized justice and efficient case disposition.[171]

These themes run throughout the Rule 11 analysis: the need for enforcement, countered by judicial restraint.[172] However, these policies offer little insight when juxtaposed with the Rule 11 analysis: determining whether or not the lawyer's position, her belief in the merits of the case represented by certification, is reasonable under the circumstances.[173] It

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168. *See* Guzzello v. Venteau, 789 F. Supp. 112, 117-18 (E.D.N.Y. 1992) (denying a motion for sanctions following the granting of defendant's motion for summary judgment after weighing the competing policies, deterrence versus "chill"); Louis, *supra* note 8; Terrestrial Sys., Inc. v. Fenstemaker, 132 F.R.D. 71 (D. Colo. 1990). The *Terrestrial* court held that:

> In fashioning appropriate sanctions under Rule 11 we remain cognizant of maintaining the important balance between employing an effective deterrent to abuse of the litigation process and encouraging zealousness in representation of the client.
>
> . . . .
>
> While this is a close case whether sanctions should be imposed, we exercise our discretion and refrain from imposing sanctions . . . .

Terrestrial, 132 F.R.D. at 76-77.

169. *MacBride*, 1990 U.S. Dist. LEXIS 19619 at *8-9.

170. *See Jennings*, 869 F.2d at 878-79.

171. *See supra* notes 66-87; *infra* notes 192, 220 (discussing the acceptability of variable outcomes in close cases).

172. *See* Naked City, Inc. v. Aregood, 117 F.R.D. 634, 636 (N.D. Ind. 1987) (finding the judge to be a "believer in a policy of judicial restraint with regard to Rule 11 that is perhaps in contrast with the more activist role that is envisioned" by the circuit).

173. *See* Larez v. Holcomb, 16 F.3d 1513, 1522 (9th Cir. 1994) (citing Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986)) (Rule 11 sanctions should be imposed if, "judged by an objective standard, a reasonable basis for the position exists in both law and in fact at the time the position is adopted." The *Larez* court went

is easy to see how the effort to develop a regulatory bright line is frustrated at this point. Courts approaching the problem as one requiring a careful balance between these two competing policies construe the "reasonableness" requirement more broadly in order to avoid the over-inclusive application of the rule exacerbating its potential to chill advocacy.[174] The emphasis in the *Golden Eagle* analysis is a subtle but telling illustration of this point: "[The] theme is that the rule discourages wasteful, costly litigation battles by mandating the imposition of sanctions when a lawyer's position, after reasonable inquiry, will not support a reasonable belief that there is a sound basis in law or in fact for the position taken."[175] Determining the reasonableness of the attorney's conduct in a close case is a conundrum and the analytic force of the rule's standards falls away in the face of a difficult analysis: "There is another risk when mandatory sanctions ride upon close judicial decisions. The danger of arbitrariness increases and the probability of uniform enforcement declines."[176] The court's analysis in *Golden Eagle* shows the problem of imposing upon counsel a role inconsistent with that of an advocate and requiring of the attorney an objective view of the case law such as a sitting jurist would take. *Golden Eagle* also demonstrates that it is "not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client."[177] Thus, the reasonableness of the attorney's position, evaluated in light of institutional policies that value the adversarial paradigm, is based on the reasonableness of the advocate. The reasonableness of the attorney's position, evaluated in light of institutional policies that favor the efficient use of limited judicial resources, is the reasonableness of the "officer of the court," the jurist's colleague. But as *Golden Eagle* indicates, the question is whether a competent advocate "could not have believed in the merit of the position taken," not whether an "officer of the court" could.[178] But the line is not bright. Courts which focus on the deterrent function of Rule 11, and which emphasize the "need" for these controls, construe the "objective" standard of reasonableness to require the attorney to step outside the role of advocate and pull on the mantle of

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further to hold that there is no duty to step into the shoes of opposing counsel to find all potentially contrary authority or to step into the shoes of the judge to decide whether such authority is indeed contrary or distinguishable.); Allen v. Local 313 Int'l Bhd., Nos. 92-35005, 92-35098, 1993 U.S. App. LEXIS 21176, at *17 (9th Cir. Aug. 13, 1993) (citing *Golden Eagle*, 801 F.2d at 1538) (holding that Rule 11 mandates sanctions when "a lawyer's position, after reasonable inquiry, will not support a reasonable belief that there is a sound basis in law or in fact for the position taken"); *Golden Eagle*, 801 F.2d at 1538.

174. *Golden Eagle*, 801 F.2d at 1536-38.

175. *Id.* at 1538.

176. *Id.* at 1541.

177. *Id.* at 1542.

178. Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., 9 F.3d 1263, 1269 (7th Cir. 1993); *cf.* Alfieri, *supra* note 30; Simon, *The Ideology of Advocacy*, *supra* note 30; Underwood, *supra* note 39.

judicial objectivity in evaluating their client's claim.[179]

It is easy to see how the objective standard of reasonableness, even in the face of the demise of the good faith defense, requires consideration of contextual elements in deference to the limits and challenges of a legal practice.[180] While these contextual elements can be treated as creating a paradigm case, allowing for "objective analysis," they inevitably blur the line between objectivity and subjectivity. The more we know about and understand the representational relationship and appreciate the client's concerns, the more likely we are to empathize with the advocate and perceive their actions as reasonable under the circumstances.[181] The more we value that role over the attorney's obligations as an "officer of the court," the more likely we are to create allowances which favor the adversarial paradigm and an open court system. The less willing we are to place the representational relationship in its context and the more we require the attorney to adhere to a narrower paradigm of representation, the objective application of legal and analytic skills, the more likely we are to sanction judgments that threaten the managerial paradigm by creating costly, questionable litigation.[182]

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179. *See Jennings*, 869 F.2d at 878 (discussing the narrow approach taken by the trial court in its analysis).

180. *See* Thomas v. Capital Sec. Servs., 836 F.2d 866, 870 (5th Cir. 1988) (discussing the need to develop a reasonable inquiry standard that looks at the particular circumstances of the attorney).

181. *See* Marion Smiley, *Pragmatism as a Political Theory*, 63 S. CAL. L. REV. 1843, 1845 (1990). "[A]ny construction of context is relative to the social and political norms that we bring to bear on it—[which] helps us reconstruct the context of inquiry." *Id.* Professor Smiley's point is well taken. In a Rule 11 analysis, how deeply are we willing to develop context, including the political contexts of the dispute and the institutional context of the adversarial paradigm and the role of the advocate? If a Rule 11 analysis now treats context as a one dimensional, technical analysis of "facts" and "law" that are treated as clear, analytic categories subject to an agreed paradigm of analysis, then the context has changed. A change in context can impact how the court understands or perceives the reasonableness of the advocate's position. *Cf.* Putnam, *supra* note 145, at 1807 (noting that the situation of a judge will effect their perception and legal analysis). In the Rule 11 context, this simple point needs to be made.

182. *See* Stockler v. City of Detroit, No. 90-1793, 1991 U.S. App. LEXIS 15502, at *16-18 (6th Cir. July 8, 1991). The *Stockler* court denied sanctions in a close case where the prefiling investigation occurred and "to the best of the signer's knowledge" the complaint was well grounded in law and fact. *Stockler*, 1991 U.S. App. LEXIS 15502 at *16. The telling point in the *Stockler* analysis is the court's willingness to look at the context of the litigation from a very personal point of view: "Rather than resulting from an improper purpose to harass, we are convinced the appeal was an effort out of frustration with perceived unfairness in the state system to seek protection in the federal courts." *Id.* at *17. While the parties had initially been sent to state court, when that process bogged down, they came back to federal court. The court considered this in its analysis. Similarly, in *Harlyn Sales Corp.*, 9 F.3d at 1263, the court looked at the advocates' role. "Merely because plaintiffs' case proved to be weak, plaintiffs' counsel should not be reprimanded for trying to protect their clients' interests." *Id.* at 1267. Sanctions were denied, although the defendants' Rule 12(b)(6) motion to dismiss was granted. In analyzing the case, the court makes reference to the "sanctuary" of a reasonable prefiling investigation which protects "aggressive advocacy" and "legal evolution." *Id.* at 1269. Deference to the advocate and the adversarial paradigm results in a restrained application of the rule to sanction conduct that amounts to a "callous disregard for governing law or the procedures of the court." *Id.* (quoting Allison v. Dugan, 951 F.2d 828, 834 (7th Cir. 1992)). Clearly something more than mere negligence is required. *Contra* Burbank, *supra* note 5 (discussing the effort of

The result is the conundrum of the close case: sanctions in furtherance of the court's managerial goals is justified, as is deference in furtherance of the court's traditional institutional goals. The shear mass of case law and commentary is sufficient evidence that courts engaged in Rule 11 sanctions analysis are charting deep and treacherous seas as they attempt to balance these conflicting outcomes. While our familiarity with the rule gives rise to a certain level of comfort, it does not address the issue of the complexity of the analysis and the potential "chill" of its over-inclusive application. The court's efforts to articulate "bright lines" for themselves have come to nought, and the Supreme Court's amendment of the rule merely provides new territory to be explored. How will reasonable attorneys evaluate the inferential link between a piece of evidence and the ultimate fact sought to be proven?[183] How will the complexity of the "application" question be resolved? Could a reasonable attorney have reached the same or similar conclusion regarding the merits of the legal claim?[184] Would a zealous advocate have taken or turned down the case? And more importantly, how will the court exercise its absolute discretion not to sanction in light of these competing institutional and adjudicative norms?

IV. THE CONUNDRUM OF THE CLOSE CASE

The paradigm of the close case is one which tests the workability of a rule precisely because it is in the close case that the decisional standards, the rule's explicit provisions, as well as all applicable norms, principles, and policies, fail to generate a single uniform and predictable outcome.[185]

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the rule's drafters to regulate attorney negligence via Rule 11); Kramer, *supra* note 39 (welcoming the rule as a way to regulate attorney conduct).

183. *See* National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees, 844 F.2d 216, 223-24 (5th Cir. 1988). Here, the court undertook a detailed analysis of the facts introduced in support of the "malice" allegation in a libel action. The court affirmed the verdict in favor of the defendant, but engaged in a detailed analysis of the facts to determine whether the claim was warranted. While it found no evidence of sufficient weight and clarity to support a finding of malice, the appeals panel did find some "inference" in the plaintiff's favor on the issue of whether malice was possible. This inference met the legal requirements of Rule 11 that the suit be well grounded in fact. *See* Tutton v. Garland Indep. Sch. Dist., 733 F. Supp. 1113, 1120 (N.D. Tex. 1990) (holding Rule 11 sanctions not warranted if Title VII plaintiff puts on a prima facie case of discrimination, even if they are unable to rebut the nondiscriminatory reason put forward by the defendant); Armour, *supra* note 76, at 104.

184. *See supra* notes 162-68 and accompanying text.

185. *See Golden Eagle*, 809 F.2d at 585; *see also*, BARAK, *supra* note 52; Brilmayer, *supra* note 83, at 363-75. Professor Brilmayer poses the question, what is legal error, and sets out a model analysis for determining if such error has occurred. There must be determinacy, "a hypothetical result, determined by the relevant decision making inputs, which is inconsistent with the actual result"; and fit, "the actual result *should have* conformed to that hypothetical result." Brilmayer, *supra* note 83, at 363. Accepting the proposition that there can be two right answers for the purposes of her analytic paradigm, the heart of her analysis is the notion of "wobble," the discrepancy that occurs between a decision and inputs. Wobble is distinct from error because it does not create the "misleading appearance that there are objectively right answers." *Id.* at 366. "Wobble is the result of institutional indeterminacy" and can only be observed by posing the "counterfactual assertion—namely that the result *could* have been different." *Id.* 365-66 (emphasis added). The fact

The close case, the case in which the court must choose between conflicting but legitimate outcomes, is the case, or set of cases, that best addresses the contours of acceptable variability and "test[s] the workability of any rule, civil or criminal."[186] Because the close case is a point of conflict, the close case paradigm provides a useful decisional methodology that allows us to explore the dimensions of the court's discretion and the related dimension of acceptable variability in its Rule 11 decisions.

In the developing jurisprudence of Rule 11, the conundrum of the close case has yet to be addressed. Why is the most discretion given to the judge when it is most problematic—in the close case? The paradigm of the close or hard case as developed in the jurisprudential writings on judicial discretion is used to define the acceptable exercise of that discretion in terms of a "decisional zone" within which conflicting judicial outcomes are to be expected and tolerated.[187] Yet, the close case, as an internally

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that there is error or even disagreement about a decision is not evidence of indeterminacy. Indeterminacy exists when the "result is not a unique function of the relevant inputs" resulting in wobble. *Id.* at 365-66. Wobble occurs in those decisions in which numerous factors enter into a decision, factors not controlled by the legal rules or inputs, such as the personalities and biases of the decision makers. *Id.* at 367. Wobble occurs because decision makers have "real choice[s] . . . [the] decision process cannot be broken down into smaller explained elements, either internal or external to the decisionmaker." *Id.* at 368. The point is that law tolerates such wobble. "[T]he legal system acts as though unique right answers do not exist." *Id.* at 370. But Professor Brilmayer's point is that indeterminacy and wobble are not necessarily proof that a single right answer does not exist. It is an institutional decision to live with wobble, and thus to create a decisional environment in which multiple outcomes are tolerated. This is practical, not theoretical, indeterminacy. *Id.* at 373-74. Thus, the legal system tolerates numerous decisions, without scrutinizing their correctness in detail, so long as process values are followed. *Id.* at 375-78. Professor Brilmayer makes the point that "a certain amount of wobble is to be expected" and that this intermediacy is protected for a variety of institutional reasons. *Id.* at 384. Professor Brilmayer's use of the analytic concept of wobble highlights the normative issues raised when legal decision making produces inconsistent results—the normative issues that practical and theoretical indeterminacy raise in any given legal context. To argue that a decision is not error, that is, the institution is willing to live with it, does not address the issue of how practical and theoretical indeterminacy should be addressed by the legal system: practical indeterminacy defining the difficulty of securing the necessary legal inputs and theoretical indeterminacy defining the problem of creating a determinable legal standard. Both dimensions of indeterminacy exist in the Rule 11 context and both pose problems for judicial decision makers. Dworkin, *Rules*, *supra* note 66; Rosenberg, *supra* note 66; Yablon, *supra* note 66. *See, e.g.*, Thompson, *supra* note 83. Thompson makes the point that "decisional inconsistency, while neither abstract error nor necessarily wrong, is also not necessarily always right. There may be decisional inconsistency which carries out goals normatively established, but there may also be decisional inconsistency which does not." *Id.* at 424-25. Thompson's concern is that the adversary system should be "processing information in a fashion that seeks to minimize the extent of avoidable unacceptable inconsistency of decisions." *Id.* at 425. His analysis points out that inconsistency itself can be classified in ways that help us understand the problem of indeterminacy. Accordingly, there is: "(1) inevitable inconsistency; (2) deliberate inconsistency; (3) bias inconsistency; (4) careless inconsistency; and (5) defective information inconsistency." *Id.* at 427. Deliberate inconsistency reflects the "normative conclusion favoring flexibility" over like treatment or other values favoring finality. *Id. See also* Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329 (1986) (discussing the problems of using social science research in analyzing judicial decision making).

186. *Golden Eagle*, 809 F.2d at 585.

187. *See infra* part IV.B. (discussing the problem of discretion and the close case).

derived decisional norm, a useful rule of thumb developed by the judiciary to guide their own discretion, is used to note the point at which decisional inconsistency is most likely and most problematic.[188] Stated in

188. In *Jennings*, 869 F.2d at 870, the court of appeals posed the Rule 11 conundrum. After allowing the civil rights case challenging the school's use of "sniffer dogs" to go to trial, the district court directed a verdict on behalf of all defendants, save one, the officer who won before the jury. Brought by the American Civil Liberties Union as a challenge to the use of sniffer dogs as an effort to challenge their use as a basis for search warrants, the district court issued sanctions on the grounds that there had been inadequate prefiling investigation to sustain the claims of collusive conduct and that the case law in the circuit was clearly against the plaintiff. In affirming the lower court's decision, the court of appeals stated that:

> Although this is a close case with respect to sanctions, and if we had been sitting as district judges we might have arrived at a different conclusion, given these circumstances we cannot say that it was an abuse of discretion for the district court to conclude that the complaint in this case was filed in violation of Rule 11.

Id. at 879. Thus, reasonable judges might differ regarding the outcome of the case, one would sanction and one would not. Should sanctions be awarded in such a case? What are the implications if they are? In *Harlyn Sales Corp.*, 9 F.3d at 1263, a securities fraud action was dismissed and the defendants moved for Rule 11 sanctions. The motion was denied and the defendants appealed. In reviewing the decision, the court noted that, based on the record in the case, the lower court could have decided either way and stated that:

> [W]hile sanctions *must* be applied in certain situations, when the issue is not free from doubt we should accord great deference to the judgment of the district court. . . . We confirm that considerable discretion is placed in the district court in analyzing the case . . . to determine if the requirements of Rule 11 have been met.

Id. at 1269-70. The district court could have come to a different conclusion and that would also have been upheld. *See, e.g.*, Shain v. Long, 978 F.2d 850, 855 (4th Cir. 1992) (holding that a close case requires greater articulation of the reasons for the decision); Ladner v. Thornton Township, 968 F.2d 1218 (7th Cir. 1992) (concluding that the district court did not abuse its discretion in denying sanctions and deferring to the district court's findings); Stockler v. City of Detroit, No. 90-1793, 1991 U.S. App. LEXIS 15502, at *16 (6th Cir. July 8, 1991) (per curiam), *cert. denied*, 502 U.S. 983 (1991) (holding that "[a]n abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made," and concluding that "while this is a close case, it was improper to award fees"); Stewart v. Lone Star Indus., Inc., No. 90-15937, 1991 U.S. App. LEXIS 16093, at *7 (9th Cir. July 16, 1991) (Kozinsk, J., dissenting) (arguing for caution when there is "an issue as to which reasonable minds might differ"); Hawaiian Engraving & Mfg., Inc. v. Fujikami, No. 90-15997, 1991 U.S. App. LEXIS 26816, at *2 (9th Cir. Nov. 8, 1991) (holding that even though this was not a close case, "the mere fact that a claim is unsuccessful does not mean that it is frivolous"); Evenson v. Osmose Wood Preserving Co. of Am., Inc., 899 F.2d 701, 706 (7th Cir. 1990) (Manion, J., dissenting) (citing Moore v. Tandy Corp., 819 F.2d 820, 823 (7th Cir. 1987)) (deferring in a close case "to the district judge's interpretation of the law in the state in which the judge sits"); United States v. Terzado-Madruga, 897 F.2d 1099, 1119 (11th Cir. 1990) (concluding that the "balance in close cases struck in favor" of admitting potentially harmful evidence to determine "whether its probative value is outweighed by the danger of unfair prejudice"); Markwell v. County of Bexar, 878 F.2d 899, 902 (5th Cir. 1989) ("This circuit is reluctant to visit such a harsh sanction as [dismissal for want of prosecution] upon a party solely because of the sins of his counsel." Therefore, the court held it would "particularly examine the record for proof of aggravating factors: (1) that the plaintiff personally contributed to the delay, (2) that the defendant was prejudiced as a result of the delay, or (3) that the delay was intentional on the plaintiff's part." The court then affirmed the district court's imposition of sanctions for filing the Rule 41(b) motion, and others, as serving no real purpose.); Bass v. Southwestern Bell Tel., Inc., 817 F.2d 44, 47 (8th Cir. 1987) (finding no abuse of discretion for denying Rull 11 sanctions); *Golden Eagle*, 809 F.2d at 585 ("[C]lose cases exist that test the workability of any rule, civil or criminal. They are not a reason for repealing the rule. Here, on the [majority's] own admission, the case was not close."); Independent Prods. Co., Inc., v. Tamor Plastics Corp.,

terms of Rule 11, a close case is one in which after careful application of the rule, its underlying policies, commentary, and "precedent";[189] one judge might decide that sanctions are needed, another might not, and

No. 86-0755-MC-A, 1992 U.S. Dist. LEXIS 17631, at *1 (D. Mass. May 20, 1992) (noting that the underlying litigation "was a close case" and sanctions are not warranted); Moore v. Pyrotech Corp., No. 90-2178-0, 1992 U.S. Dist. LEXIS 16583, at *6 (D. Kan. Sept. 30, 1992) (finding that "although this is a very close case, the court concludes that the conduct of defendants and defense counsel did not violate Rule 11"); Gottlieb v. Westin Hotel Co., No. 91-C-5184, 1991 U.S. Dist. LEXIS 18410, at *8 (N.D. Ill. Dec. 30, 1991) (holding that "[a]lthough this is a close case for purposes of Rule 11, the court is convinced that the argument was made in good faith based on the facts"); Flag Fables, Inc. v. Jean Ann's Country Flags & Crafts, Inc., 753 F. Supp. 1007, 1018 (D. Mass. 1990) (denying costs because the underlying litigation is a close case); Greyhound Exhibitgroup, Inc. v. ELUL Reality Corp., No. CV-88-3039, 1991 U.S. Dist. LEXIS 10437, at *3 (E.D.N.Y. July 29, 1991) (finding that, in a close case, "sound judicial policy favor[s] resolution of disputes on the merits"), *cert. denied*, 506 U.S. 1080 (1993); Rush v. McDonald's Corp., 760 F. Supp. 1349, 1353 (S.D. Ind. 1991) (finding "defendants' argument in opposition to granting leave to amend . . . persuasive"), *aff'd*, 966 F.2d 1104 (7th Cir. 1992); Villa Marina Yacht Sales, Inc. v. Hatteras Yachts, 762 F. Supp. 1008 (D.P.R. 1991) (refusing to "weigh the factors considered by the district court" and deferring to the district court because it "may be privy to relevant facts that do not appear in the appellate record"); Associated Bicycle Serv., Inc. v. Commissioner, 128 B.R. 436, 456 (Bankr. N.D. Ind. 1990) (resolving "the employer-employee vs. principal-independent contractor issue" in favor "of an employer-employee relationship in a close case"); Terrestrial Sys., Inc. v. Fenstemaker, 132 F.R.D. 71, 76-77 (D. Colo. 1990) ("In fashioning appropriate sanctions under Rule 11 we remain cognizant of maintaining the important balance between employing an effective deterrent to abuse of the litigation process and encouraging zealousness in representation of the client." The court held that in imposing sanctions in a close case, "we exercise our discretion and refrain from imposing sanctions personally against counsel for plaintiff."); MacBride v. Caravelle Broadcast Group Consol., Nos. 89-0008-C, 89-0028-C, 1990 U.S. Dist. LEXIS 19619, at *8 (W.D. Va. June 4, 1990) (finding Rule 11 sanctions because "this is a close case; the record is scant, the disputes are great, the objective evidence is minimal"); Wiltfang v. Bonge, No. L88-72 CA5, slip op. at 2 (W.D. Mich. Sept. 20, 1989) (expressing reservations in "giving plaintiff the benefit of a 'very close case'"); South Shore Bank v. Stewart Title Guar. Co., 688 F. Supp. 803, 806 (D. Mass. 1988) (holding that "[a]lthough this is a close case, since plaintiff has made a good faith, albeit incorrect, argument as to the meaning of the endorsement, Rule 11 sanctions are not appropriate"); Skepton v. County of Bucks, 613 F. Supp. 1013, 1022 (E.D. Pa. 1985) (concluding "that this is not an appropriate case for imposition of Rule 11 sanctions" because "plaintiff's complaint was an attempt, albeit unsuccessful, to create a novel cause of action"); Marco Holding Co. v. Lear Siegler, Inc., 606 F. Supp. 204, 211 (N.D. Ill. 1985) (concluding that although "this is an extremely close case and our initial inclination is to assess costs and sanctions, defendants' legal theories are not so unreasonable nor the deposition testimony so devoid of their interpretation as to justify sanctions under Rule 11"); Union Carbide Corp. v. American Can Co., 558 F. Supp. 1154, 1157 (N.D. Ill. 1983) (noting "Seventh Circuit decisions that hold that commercial success and other secondary factors of non-obviousness serve only to tip the scales in favor of patentability in close cases"); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 224 (N.D. Ill. 1975) (concluding "that although the burden of establishing the substantial relationship is on the party seeking to disqualify the opposing attorney, a close case should be resolved in the movant's favor").

189. The impact of case law generated under an "abuse of discretion" appellate standard is discussed at greater length later in the Article. There the question is raised whether courts should in fact treat decisions "tolerated" under an abuse of discretion standard as "precedent." If precedent is designed to shape and guide the future application of the rule, should a decision which is tolerated although explicitly acknowledged to be a close case, establish binding or guiding precedent? Both district and appellate courts recognize the close case as one in which alternative outcomes might be institutionally tolerated even though problematic. If a close sanction case is treated as binding precedent, it ceases to be treated as a close case. It becomes, instead, a decision which excludes alternative outcomes. *See infra* part V.A.

both decisions would stand up on appeal. Neither would be considered "wrong" and, even if directly conflicting, neither reflects an abuse of discretion.[190] So long as these alternative outcomes are equally acceptable, deference to the close case as a rule of inclusion, defining the parameters of the court's discretion to sanction, is no problem.

But, if the alternative outcomes are not equally acceptable, deference to the close case is no longer warranted, and the variability inherent in the analysis no longer falls within tolerable limits. In this way, the paradigm of the close case offers a unique set of perspectives on the very decision that forms the regulatory core of Rule 11. Can the judge articulate for herself that the finding of frivolousness is a close case, or that sanctions are not warranted, because others might disagree with her?[191] The question to be explored in the remainder of this Article is whether the close case can function as an explicit decisional methodology to help the courts and practitioners in this regulatory process—a guide for the exercise of judicial discretion. What the paradigm of the close case highlights is the tension inherent in these types of decisions and the significance of the conflict between their decisional opposites. In the Rule 11 arena, the close case highlights the conflicting institutional and adjudicative norms brought into play: adjudicative formalism and managerial discretion, institutional neutrality versus active dispute management.

The close case is useful because it is an expression of the court's discretion which is based on experience, and which can be developed and used by the courts as an explicit decisional methodology to help them address the discretionary limits of a Rule 11 adjudication. Much of the debate over Rule 11 centers around the tension, within the Rule, between the court's pragmatism and activism, and the concern that traditional legal values associated with the court's exercise of their traditional adjudicative discretion are not adhered to, such as objectivity, uniformity, neutrality, consistency, and predictability.[192] Currently viewed as defining an inclu-

190. *See* ARMOUR, *supra* note 107, at 99, 101-05 (Armour discusses the range of review under the unitary abuse of discretion standard adopted for Rule 11 and notes that the appellate courts still must discharge their duty to "scrutinize the objectively ascertainable facts . . . as well as the inferences and legal conclusions drawn from them in order to make sure the trial court correctly applied the standards of Rule 11." The fact-sensitive inquiry at the trial level gives rise to an "equally detailed fact-sensitive review of that record by the appellate court. The policy of judicial deference implicit in the unitary standard is not always evidence in practice, and *no clear factual pattern has emerged to distinguish sanctionable from nonsanctionable conduct in a close case.*") (emphasis added).

191. *See infra* part V.C.

192. As will be seen below, the use of the close case as an explicit decisional methodology helps address the lack of consensus in the practice community regarding the definition of sanctionable litigation that the recent outcry regarding variability, and the lack of variability, in decisional outcomes leading up to the amendment of the rule reflects. It helps focus the development of interpretive standards and guidelines for Rule 11, while avoiding a body of "nonbinding" precedent that has the potential to adversely impact the rule through the process of synchronization. More importantly, the close case as an adjudicative standard or decisional methodology helps define and develop a buffer zone between an acceptable sanction decision and an unacceptable fee shift, by forcing the courts to clearly distinguish between a merits-based adjudication and the procedurally and analytically linked adjudicative determination that the litigation is legally or factually frivolous

sive, protected zone for sanction decisions, the Rule 11 close case is proposed as a zone of exclusion; a buffer zone which defines the boundary between the court's aggressive procedural pragmatism and managerial discretion, and its more traditional adjudicative role.[193]

The proposal is simple: to consciously change the way the close case is used by the courts and in the case law. The goal is to ground the close case sanction analysis in the traditional adjudicative norm of judicial restraint which values predictability, objectivity, and uniformity. Used in this way, the close case creates the protected zone of tolerated doubtful litigation, thereby achieving what the restructuring of Rule 11 could not.[194]

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and should be sanctioned. It is a way to address the problem of fee awards in close cases which raise the potential for over-deterrence and the problem of fairness. Finally, the development of the close case as an adjudicative guideline incorporates into the court's decisional methodology concerns regarding judicial accountability and the shifting of the risk of error, or unpredictable outcome variability, in the institutional context of the courts. Should the courts be allowed to shift this risk wholesale to litigants? The use of the close case as a decisional guide acknowledges the problem of developing a principled distinction between tolerable, if not in fact necessary and important litigation, albeit litigation ultimately found to lack merit and warranting sanctions.

193. The "doctrine" or norm of judicial restraint is used by the courts in different substantive and procedural contexts as the tie breaker, the norm or standard that forces the court to look at the larger context of the legal decision and its social and institutional impact. Judicial restraint as an adjudicative norm is critical of judicial discretion and to that degree conforms to the liberal ideology of the rule of law. *See* Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, *in* THE USES OF DISCRETION 361 (Keith Hawkins ed., 1992) (discussing the legal paradigm and the liberal ideology of the rule of law). But, more importantly, the doctrine or norm of judicial restraint implicitly rejects the tautology of judicial decision making justified on the grounds that it is discretionary. Within the traditional adjudicative model, discretion does not provide sufficient justification to render a decision "principled" or in conformance with the legal paradigm; discretion is a red flag, not a green light. *See, e.g.*, United States v. Eufrasio, 935 F.2d 553, 572 (3rd Cir.) (commenting on the need for "judicial self-restraint" when a Rule 403 analysis of a trial court is reviewed on appeal), *cert. denied sub nom.* Idone v. United States, 502 U.S. 925 (1991); United States v. Tremble, 933 F.2d 925, 928 (11th Cir.) (citing "the fundamental rule of judicial restraint that cautions us not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"), *cert. denied*, 502 U.S. 928 (1991); Sohoppy v. Hodel, 911 F.2d 1312 (9th Cir. 1990) (holding that judicial restraint favors denying summary judgment and allowing the fact issues to go forward); Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 116 (4th Cir. 1988) (noting the problem that "judicial restraint and judicial economy are frequently antithetical"); John Havlir & Assocs., Inc. v. TACOA, Inc., 810 F. Supp. 752, 759 n.4 (N.D. Tex. 1993) (holding that "principles of judicial restraint counsel the court not to rule more broadly than is warranted"); Searles v. Southwestern Pa. Transp. Auth., Nos. 91-6687, 92-1065, 1992 U.S. Dist. LEXIS 9721, at *16 (E.D. Pa. June 19, 1992) ("The doctrine of judicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground . . . ."), *aff'd*, 990 F.2d 789 (3d Cir. 1993); Naked City, Inc. v. Aregood, 117 F.R.D. 634, 636 (N.D. Ind. 1987) ("This judge is a believer in a policy of judicial restraint with regard to Rule 11 that is perhaps in contrast with the more activist role that is envisioned . . . ."); McCurdy v. Steele, 353 F. Supp. 629, 640 (D. Utah 1973) (holding that judicial restraint called for care in adjudications involving tribal practices and circumstances and the Indian Civil Rights Act).

194. *See* BARAK, *supra* note 52, at 222-33 (After reviewing the fact of judicial discretion in the adjudicative process, Professor Barak concludes his analysis with an argument not dissimilar to Professor Posner's: "Every Judge should consciously formulate for himself a judicial policy for solving the hard cases. This policy involves the basic considerations—normative, institutional, and interinstitutional—that guide the judge in the exercise of his discretion." The appropriate exercise of judicial discretion requires the conscious articula-

tion of that discretion and how the normative choices implicit in adjudication are resolved. Barak argues that the only proper model of adjudication is the "model of limited judicial discretion."); John Bell, *Discretionary Decision-Making: A Jurisprudential View*, *in* THE USES OF DISCRETION 89, 97-111 (Keith Hawkins ed., 1992) (Bell discusses the need for a jurisprudence of discretion more developed than the "hole in the doughnut" conceptualization offered by many of the legal commentators attempting to develop a theory of law. He argues that discretion is not "peripheral to the operation of law" and once this is recognized "then the interaction between law and other schemes of values becomes of central importance."); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1929-33 (1991) (discussing the fact of judicial bias, the role personal preferences and values play in adjudication, and the need for judges to step outside of the confines of their own experience in order to expand their understanding of the context of the legal issues before them and avoid the error of false objectivity); Lacey, *supra* note 193, at 361-62 (Lacey critically examines "the world-view and concerns with which lawyers and legal theorists typically approach the question of discretion." Lacey further critiques the assumptions underlying the legal theorists "law-discretion" dichotomy: assumptions about the existence of distinctly legal methods and techniques that can be applied to control or limit discretionary power and the unwillingness of lawyers and the courts to recognize the limits of traditional legal methods. According to Lacey, the fact of discretion "should make us not only question the way in which we define 'law,' 'legal contexts' and 'legally relevant' issues, but also reflect on the general appropriateness of legal method and on whether 'legal' controls are always effective in 'legally relevant' areas." Discretion is more complex and cannot simply be understood as the gap or play in the normative structure of the law or rules; it is the point of intersection between the legal paradigm and the world.); Posner, *supra* note 114, at 5-8, 10, 19 (Posner discusses the role of judicial activism and judicial restraint as norms that help define the proper limits of adjudication. After noting the "formalist fallacy," he addresses the limits of the legal model of principled decision making: the judge's obligation to be aware of and articulate the norms and values they bring to bear in resolving issues when the law does not yield a determinate outcome. Posner attempts to address the issue of what considerations are acceptable when the legal materials give way by focusing on the judicial norm and adjudicative value of "bias"—the assumption that decisions reflecting the personal preferences of the court or other values viewed as "extraneous" or excluded from the judicial process should not figure in the decision and can be controlled. Posner argues that the principled decision must not only state all grounds for the decision, but it should be consistent. Yet, to argue in favor of principled decision making still leaves unresolved the underlying issue. What personal values, norms, or preferences of the jurist should be brought to bear to fill the formalist gap and how does the court make those decisions on a principled basis? Posner then attempts to develop principled definitions for self-restraint to guide the courts. Judicial self-restraint is offered as a norm that highlights the court's potential exercise of power and focuses on the personal element of adjudication—making it explicit.); *see also* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint?*, 71 N.C. L. REV. 805 (1993) (discussing traditional adjudicative norms favoring judicial restraint in the resolution of disputes about the law as favoring an open, diverse system of law more in keeping with the diversity of today's society than the image of the law as a unitary, monolithic, value-free compendium of rules and standards); Martin Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrines*, 85 COLUM. L. REV. 1378 (1985) (reviewing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)). Concern that the unarticulated normative biases of the judiciary adversely impact legal decision making runs throughout the commentary on adjudication. *See, e.g.*, Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118 (1987); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 (1991); Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209 (1987); Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQ. L. REV. 725 (1992); William W. Justice, *The Two Faces of Judicial Activism*, 59 GEO. WASH. L. REV. 1 (1992); Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385 (1990); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impar-*

A. Merging the Logic of Discretion and the Decision Maker's Perspective

If discretion in a close case can be defined as the articulation of acceptable alternatives or range of possibilities, then a choice from within that zone can be viewed as a consciously self-limiting decision. Such a decision defines the zone of possibilities by posing alternative or opposite outcomes as their primary decisional guidelines.[195] Approaching discretion from this perspective focuses on discretion as a range of conscious judicial action and on the close case as a decisional guideline defining the zone of those possibilities. This approach facilitates the merging of the logic of discretion with the decision maker's perspective in order to create a decisional methodology that is grounded in the reality of adjudication.

B. The Zone of Possibilities

One theoretical model for generating the scope of lawful alternatives within the "zone of possibilities" parallels the explicit criteria used by many judges in deciding Rule 11 cases. This model proposes, as lawful possibilities, those alternatives that would be acceptable to knowledgeable lawyers comprising the relevant legal or interpretative community.[196] While no more precise than some other formulations, this articulation of the close case, and the scope of judicial discretion, is intuitively appealing in the Rule 11 context, given the mandate to the trial courts to develop and enforce acceptable practice norms regarding the handling of marginal litigation within an adversarial system:

> The legal community is the professional outlook of the collectivity of lawyers in a particular state. An option is lawful if the legal community views it as such and if the legal community's reaction to the choice of this option is not one of shock and mistrust. An option is unlawful if the legal community sees it as unlawful and considers it impossible that a knowledgeable lawyer would choose this option. A lawyer who chooses this option would thereby be "uprooting the written word, in effect calling the day night and the night day."[197]

This formulation of the scope of discretion and acceptable alternatives is particularly apt in the Rule 11 context because it focuses on the tension between internalized or self-referring judicial standards for frivolous litigation and the need to develop externalized or objective standards under the rule that avoid an overly idiosyncratic approach by the judiciary to legal practice.[198]

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tiality of Judges and Jurors, 33 Wm. & Mary L. Rev. 1201 (1992); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 Tul. L. Rev. 775 (1991); Patricia A. Cain, Comment, *Good and Bad Bias; A Comment on Feminist Theory and Judging*, 61 S. Cal. L. Rev. 1945 (1988).

195. Delgado & Stefancic, *supra* note 194; *cf.* Barak, *supra* note 52, at 9.

196. Barak, *supra* note 52, at 10-11. *See supra* notes 162-85 and accompanying text.

197. Barak, *supra* note 52, at 11 (quoting Cheshin, J. in H.C. 1/50 Grosman v. The Military Prosecutor, 4 P.D. 63, 70 (citations omitted)).

198. In developing the norms of practice applicable in her court, can the trial judge adopt as idiosyncratic a view of Rule 11 as she does of Rule 16? Can she treat each Rule

This approach to defining the zone of possibilities helps define the grey area of the close case as those sanction cases where reasonable, knowledgeable lawyers, as members of the interpretive community, could disagree. The scope of the disagreement is crucial. On the one hand, the interpretive community might disagree about the application of the substantive standards under the rule.[199] The interpretive community might think that sanctions are not warranted in the close case because they would be tantamount to a substantive fee shift and would violate the prohibitions of the American Rule. The interpretive community might not think sanctions were warranted because they were of the opinion that this is the type of marginal litigation which an open court system should tolerate and that should not be sacrificed to the institutional goals of efficient resource utilization. Finally, the interpretive community might disagree because they think the decision reflects too narrow or idiosyncratic a model for acceptable advocacy on the part of the judge.

The theoretical "interpretive community" that has been transformed into a conscious reference point to be used by the judge in reaching a decision in a close case is not meant to be merely a reification of the actual practice community within which the judge finds herself. The objective of adopting the interpretive community as a decisional guideline in any case, including a Rule 11 decision, is to make the judge aware that he is not merely to give play to his own subjective perceptions in making his decision, but rather "give expression to what appears to him to be the basic conception(s)"[200] concerning acceptable professional practices and judgments.[201] The "interpretive community" forces the trial judge to look beyond her own idiosyncratic world view (in Rule 11 a view of minimally competent "good lawyering") to the interpretive and professional community as an external, objective standard, and not merely the "reification" of the local bar's practice. Used in this way, the "interpretive community" offers a means and method to merge the logic of discretion with the decision maker's perspective, a perspective that is more consistent with the realities of adjudication.

The accepted "logic of discretion" holds that, so long as the alternatives between which the court must select fall within the range of acceptable options (the interpretive community would accept either of them), "it is the judicial decision itself that will determine the lawfulness of these possibilities."[202] This paradigm of judicial discretion identifies the tension within the range of options, the conundrum of the close case that allows judges to disagree, and in the case of Rule 11, to pick opposite alterna-

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11 case differently, giving full sway to their peculiar facts with the great deference given to her evaluation of the acceptable practice?

199. They might think the prefiling investigation was adequate under the circumstances; they might find the purpose behind the filing lawful; they might not agree with the court's characterization of the legal or factual merits of the claim; or they might find the case an appropriate test case or piece of reform litigation.

200. BARAK, *supra* note 52, at 12.

201. *Id.* at 12.

202. *Id.* at 11.

tives, without reversal. It is this logic of discretion which tolerates conflicting outcomes in similar cases.[203] But the logic of discretion is at odds with the decision maker's perspective. The close case is not the easy case, one which the court can treat with confidence as a correct decision regardless of the outcome. In the close case, the court faces the challenge of developing a principled basis for purposes of distinguishing and ultimately selecting between conflicting results. From the decision maker's perspective, this is the ultimate challenge of adjudication—weighing and selecting between alternative, competing outcomes.

1. The Decision Maker's Perspective

The close case is a way to conceptualize this phenomenological dimension of discretion, the "sense that people have of their freedom to act."[204] The theoretical definition of discretion as a quality of rules, the primary concern of the theoreticians, merges with this phenomenological aspect of discretion, the primary concern of the decision maker,[205] in the articulation of the close case and the zone of possibilities.[206] Attempts to develop a single model or theory of discretion which treats judicial discretion as an essentially one dimensional by-product of all judicial decisions[207] blurs important distinctions between different types of judicial decisions and how judges respond: decisions on the merits of the litigation versus decisions concerning the management of the litigation, decisions concerning discovery versus decisions concerning evidentiary

203. *See supra* note 66 (discussing the definition of the scope of discretion).

204. Hawkins, *supra* note 112, at 121 (distinguishing between discretion as a "quality of rules" or as a "quality of behavior" distinct from this "phenomenological aspect").

205. There is a substantial body of commentary which discusses the need for further commentary and development of explicit judicial policies to guide jurists. *See* Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053 (1990); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988); James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570 (1991); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993); Lempert, *supra* note 84; Joel Levin, *The Concept of the Judicial Decision*, 33 CASE W. RES. L. REV. 208 (1983); Willy E. Rice, *Judicial Bias, the Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Court's Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 CATH. U. L. REV. 325 (1992); Jeffrey E. Stake, *Status and Incentive Aspects of Judicial Decisions*, 79 GEO. L.J. 1447 (1991); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993); *see also supra* note 194.

206. Every judge should consciously formulate for himself a judicial policy for solving the hard cases. This policy involves the basic considerations (normative, institutional, and inter-institutional) that guide the judge in the exercise of his discretion. This policy is the sum of the judge's conceptions of how he will exercise his discretion in the hard cases. These are the basic standards for the use of judicial discretion within the range of reasonableness. Judicial policy, therefore, is an organized, conscious notion of how to handle the difficulties of the hard cases, or what Justice Wilkon called "judicial planning," a consciously articulated process of planning for the future development of the law. BARAK, *supra* note 52, at 222.

207. Fletcher, *supra* note 19, at 274.

questions, decisions concerning the legal merits of a claim versus decisions concerning the factual merits of a claim, and the different aspects of judicial discretion they invoke in the mind of the decision maker.[208] The issue is not merely that much of the theoretical writings fail to address these differences in discretion, but that they fail to address the fact that discretion is an independent and conscious dimension of judicial decisions which must be addressed by the decision maker who views discretion differently in different contexts.[209]

These distinct dimensions of discretion are not simply the mental constructs of the theorists and commentators, reified analytic categories without any parallel in the real world. These differences in judicial discretion are recognized and discussed "[w]ithin the language of the law."[210] For example, many of the types of decisions and issues treated generally by commentators or theorists concerned with judicial discretion are never explicitly denominated as discretionary either by the judge rendering the decision, the court reviewing the decision, or those institutional actors justifying or analyzing the decision.[211] The judicial perspective is clearly much more limited than the theorist's perspective when it comes to talking about judicial discretion.

Jurists simply do not treat all indeterminate decisions the same, even though all indeterminate decisions are discretionary as that term is used in its broadest, most reductive sense. But by looking at "what the decisionmakers perceive themselves to be doing"[212] and at "how judges . . . justify their decisions despite the absence of knowable right answers,"[213] it is possible to develop an understanding of this conscious dimension of discretion and the articulable norms that guide its exercise. This approach, adopting the perspective of the decision maker when facing an indeterminate, and therefore discretionary, decision, is useful for three reasons: (1) it avoids the narrow internal perspective of the jurisprudential based theorists who divorce the "decisionmaker from any social or institutional structure," thereby ignoring the context for the discretionary decisions;[214] (2) it examines the decision maker's view of the decision before her, providing both an empirical and jurisprudential perspective on the process of rendering indeterminate decisions;[215] and (3) it provides a means of distinguishing between different types of discretionary decisions.[216] If, at their core, as some commentators argue, all discretionary judicial decisions look alike, why are they to be treated any differently by the trial or appellate courts? And yet they are.[217]

208. *Id.*; *see* Yablon, *supra* note 66.
209. *See* BARAK, *supra* note 52; Armour, *supra* note 76; Hawkins, *supra* note 112.
210. Fletcher, *supra* note 19, at 271.
211. *Id.*
212. Yablon, *supra* note 66, at 258.
213. *Id.* at 259.
214. *Id.* at 255.
215. *Id.* at 255-56.
216. *Id.* at 254.
217. *Id.* at 270.

The conscious perception of the discretionary nature of the decision on the part of the decision maker and how that perception affects her decision making is crucial to an understanding of judicial discretion. The fact that "decisionmakers respond differently when an action is described as 'substantive' or 'procedural,'"[218] legal or discretionary, or managerial or merits-based is evidence that the "rhetorical strategy" of labeling the indeterminate dimension of the decision in this manner "bring[s] about changed attitudes on the part of judges."[219] This phenomenological dimension of discretion, the judicial decision maker's perception of discretion, and the fact that different decisions call for different types of discretion, should not be ignored in the Rule 11 context. What does it mean to the judicial decision maker when the decision before the judge is explicitly denominated discretionary, as is Rule 11?[220] What does it mean to the decision maker when a decision is defined as falling within the court's pragmatic discretion and outside of its traditional adjudicative role as it is with Rule 11?

2. *The Jurist's Perspective*

The utility of the close case as a paradigm or schema used by the courts to define the dimensions of judicial discretion is seen throughout legal literature. The close case provides a perspective on the exercise of judicial discretion in the context of "equitable injunctions,"[221] the award of attorney fees,[222] and the evaluation of key evidence in a trademark

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218. *Id.* at 246; Fletcher, *supra* note 19 (discussing the distinction between the court's pragmatically conceived procedural discretion and its formal adjudicative discretion).

219. Yablon, *supra* note 66, at 246.

220. As discussed at length above, the problem of discretion inherent in applying the substantive standards of the rule evoked the response of more precise drafting. *See supra* note 6 (discussing the 1983 and 1993 Advisory Committee Notes). The problem of when to sanction was left to the court's discretion with simply a nonbinding illustrative listing of potential factors to guide the court. *See supra* note 6. Procedural requirements are more clearly spelled out, in the hope that an emphasis upon "process values" will help address the problem of discretion. Finally, the discretion to structure sanctions is limited by the single principle of deterrence. *See supra* note 6. Ironically, the most discretionary aspect of the new rule, the discretion not to sanction, did not even exist in this or a similar form in the old rule. Can you guess where future variability will originate?

221. *See, e.g.*, Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984). "The traditional approach would be to rely on a presumption in favor of equitable discretion. Nevertheless, in the environmental context, arguments for a presumption against equitable discretion seem stronger. Three reasons exist for deciding close cases in favor of nondiscretionary enforcement." *Id.* at 542 (citations omitted).

222. Janice Toran, *Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68*, 35 AM. U. L. REV. 301 (1986).

> Despite this potential unfairness, courts do not give special treatment to close cases.... There is apparently no flexibility within the English system to alleviate the harsh penalty that a plaintiff may pay in a close case .... A recent proposal would have given the court broad discretion in dealing with the awarding of costs, aimed in part at dealing with the problem of unduly penalizing the successful plaintiff in a close case. The committee reviewing the proposal rejected this idea, fearing that this broad discretion would produce a lack of uniformity, thus creating as many problems as it had set out to solve.

case.[223] Legal scholars recognize that it is precisely in a close case that personal views of the decision maker may sway the most.[224] Because of the problems inherent in the resolution of close cases, varying degrees of scrutiny are applied in the appellate context. Some commentators argue that it is in close cases that the appellate court needs the most room to maneuver,[225] while others argue that strict appellate review of close cases will prove disruptive to the adjudicative process.[226]

The close case, a useful analytic paradigm in a variety of substantive contexts, has enabled the courts to address the problem of developing a coherent decisional theory to guide judicial interpretation[227] and the application of indeterminate legal standards.[228] Much can be learned from writers who have addressed the problem of the close case in contexts not unlike Rule 11. For example, in analyzing the boundaries of contempt in an effort to distinguish between acceptable advocacy and obstruction of justice, the problem of the close case is paramount: "[B]ecause the concept of obstruction of justice is so amorphous, and the need for vigorous advocacy in different circumstances so varied, there is an unavoidable arbitrariness to individual decisions in close cases."[229] Other writers have looked at areas within which the expansive exercise of judicial discretion is the norm, focusing on the presumptions and assumptions which guide

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Id. at 324 (citations omitted). *See also* Claire E. Winold, *Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act—Questions Resolved, Questions Remaining*, 14 FLA. ST. U. L. REV. 925 (1987). "In awarding fees under the new Act, courts will continue to exercise considerable discretion in interpreting its open-ended provisions. It is important that the Act's original intent be carefully considered in close cases." *Id.* at 947.

223. Wayne F. Osoba, Note, *The Legislative Response to Anti-Monopoly: A Missed Opportunity to Clarify the Genericness Doctrine*, 1985 U. ILL. L. REV. 197, 203-07 (1985) (arguing that in a close case the courts should be given more discretion to evaluate evidentiary sources and other uses of the disputed trademark).

224. Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 244 (1987-88) (finding that, in close cases, I.R.S. officials may be swayed instinctively to be lenient in taxing political activities depending upon their own political views).

225. Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 635 (1992) (arguing that an appellate abuse of discretion standard allows the appellate courts some flexibility on appeal to deal with a close case).

226. Louis, *supra* note 157, at 1032 (arguing that allowing an appellate court "[f]ree review of ultimate facts in effect permits an appellate court to seize for itself the power to decide the merits in close cases").

227. David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051, 1076 (1985) ("[T]he search for a coherent theory is ultimately futile if one believes that no theory, however seemingly complete, in fact can eliminate the exercise of discretion in particular cases. No matter what single theory we give allegiance to, the application of that theory simply will not decide close cases predictably and without the exercise of judgment.").

228. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1654-55 (1987) ("Even in close cases, moreover, some objective standards of evaluation are available. In our view, then, 'the tyranny of the judiciary' is neither inherent in all exercises of judicial review nor beyond evaluation in individual cases.").

229. Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 781 (1990).

decisions in a close case.[230] For example, in the evidentiary arena, the articulated policies of the Federal Rules of Evidence favor admissibility, and this overarching policy tips the balance in the close case when, some commentators argue, the prejudicial impact of the evidence needs to be more carefully considered.[231] What all of these writers focus on is the utility of the paradigm of the close case as a way to identify difficult judicial decisions. Furthermore, close cases are precisely those cases in which final outcomes are not predictable, judicial bias has the most play, and the risk of error, which is not remedied through appellate review, is greatest.[232]

The result is that in some legal contexts, the conundrum of the close case is addressed through the development of judicial policies which expressly weigh the decision in favor of either the over- or under-inclusive application of the rule of law as a way to insure consistency in its application by addressing the potential normative conflicts head on.[233] In effect, these decisional policies reflect the court's recognition that the routine over-inclusive, under-inclusive, or variable application of the law in these close cases reflects a dimension of discretion that may not be properly vested with the trial court and that will ultimately have an adverse impact on the development and application of the substantive law.[234] Examples

230. *See, e.g.*, D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH. L. REV. 289, 348 (1989).

231. *Id.* "A balancing test weighted in favor of the admissibility of such evidence in close cases will encourage these errors; indeed, it can be expected to most strongly encourage error in those cases where the price of error is most likely to be the conviction of an innocent." *Id.* Lewis critiques this error on the grounds that the defendant should not bear the risk of a mistake of this type, which is what happens when decisions such as this are scrutinized under the forgiving appellate standards applicable to evidentiary questions.

232. Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815 (1990). "Prediction may be possible in 'easy' cases that clearly fall within the rule established by an earlier, authoritative statute or case. In difficult cases, however, the judge has discretion, and the final outcome is indeterminate." *Id.* at 819.

233. James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1977 (1991) ("Judge Becker correctly implied that some measure of discretion ('the stuff of judging') must operate in close cases to avoid over- and underinclusive results. He left unanswered the question of appropriate boundaries for that discretion . . . .").

234. While there is a growing comfort with the idea that trial judges inevitably legislate when they must make indeterminate or difficult decisions, these decisions are still viewed as constrained by the law as applied to a particular case. So long as the legislating is linked to the factual dimensions of the case and does not purport to "change the law," these decisions fall within the acceptable "legal paradigm." *See* BARAK, *supra* note 52 (discussing judicial lawmaking); Christie, *supra* note 66 (favoring changes in the law as a result of express interpretation rather than patterns of variability reflecting ad hoc decisions). There is always the need within Rule 11 to balance the goal of deterrence with the value of an open court system, both sides of the proposition acknowledging that a single bright line cannot be drafted. If the courts consistently err on the side of sanctions, they have made a legislative decision that is different from merely applying the rules in a complex fact situation. In this same context, the "mindset" of aggressive enforcement of Rule 11 is likely to give rise to its over-inclusive application for precisely this reason. The result is not a fact based variability, but a decisional policy that has broad implications for the development and interpretation of the rule. Alternatively, ad hoc decisional patterns inevitably give rise to substantive limits that are equally troublesome. *See infra* part V.C. The point is simple:

of these types of weighing policies abound, from the denial of plan benefits in an ERISA case,[235] to the admission of evidence at trial,[236] to the imposition of sanctions under the 1983 amendments to Rule 11.[237] These decisional policies, developed as a useful rule of thumb for resolving conflicts between the policies, goals, or values inherent in the particular rule or rules, reflect efforts by the judiciary to produce uniform or predictable results more in line with the overarching policies of the law than simply the logic of discretion. And they all represent efforts to grapple with the substantive impact of the close case on the development of the law. What these efforts reflect is the reality of adjudication, in that a close case, once decided, casts its vote in favor of one alternative over the other, regardless of the logical equipoise deemed to exist at the inception of the decision.

3. *The Practitioner's Perspective—The Intuitive Appeal of the Paradigm of the Close Case*

The other significant decision maker involved in a Rule 11 analysis is the legal practitioner. The close case offers a useful paradigm for the practitioner facing the threat of potential Rule 11 sanctions. As a practitioner, I became interested in the problem of defining the nature and scope of judicial discretion in a close case when confronting the practical problem of distinguishing between an acceptable piece of doubtful litigation and a frivolous lawsuit.[238] As a practicing attorney, the question of

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variability and flexibility at the margins does not persist in the face of judicial intervention. Patterns begin to solidify with important consequences for the substantive dimension of the law.

235. Bradley R. Duncan, Note, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986 (1986). "Broadly speaking, a fiduciary may exercise his discretion to deny a benefit claim in two ways. The first and most obvious way is by interpreting plan eligibility requirements in close cases so as to exclude a claimant from receiving his benefits." *Id.* at 990.

236. *See* Mengler, *supra* note 66.

237. Perhaps erroneously, many judges faced with a close decision often relied upon the statements in the 1983 Advisory Committee's Notes encouraging more aggressive sanctions as a statement of policy favoring sanctions. As a result, we would predict courts erring on the side of sanctions in a close case generating a pattern of precedent that would inherently undervalue the institutional policies of an open system, destroying the limits such a policy poses. *See* Louis, *supra* note 8.

238. In 1989, a sanction decision was issued which caught the attention of numerous practitioners in the area in which I work. What concerned many of us at the time was that we would probably all have taken the case if asked to do so by the A.C.L.U. The Fifth Circuit decided the case, in *Jennings v. Joshua Independent School District*, in which sanctions imposed against an attorney acting on behalf of the American Civil Liberties Union in a lawsuit challenging the circuit's sniffer dog laws was upheld on appeal (although reversed and remanded for recalculation). Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870 (5th Cir. 1990). The sanction was based on the district court's determination that the "facts" in the case could never state a cause of action under existing law and the litigants knew this at the outset. The issue in the case was the use of sniffer dogs to establish probable cause for a search warrant and forcible entry when the defendant school district, which had contracted with a private firm for the use of the dogs, was informed by the firm that the dogs would "over alert," that is, alert to a variety of substances that were not illegal to possess. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 6-8, Jennings v. Joshua Indep. Sch. Dist., 869 F.2d 870 (5th Cir.) (No. 88-

whether to pursue a close case, or any case in which there are compelling reasons to bring the litigation and yet experience tells you that you might not be successful in the trial court, poses a number of difficult judgments.[239] Attorneys and judges, "[w]hen faced with data and the need to make judgments derived from that data, [like] all humans may be charac-

1089), *cert. denied*, 469 U.S. 935 (1990) (on file with author) [hereinafter Petition for Writ of Certiorari]. Such an alert occurred, the school district called the police, and at the behest of the school's officials a search warrant was secured and a search conducted. Suit was brought on behalf of Petitioner Jennings and his minor child claiming the school district had "caused" the unconstitutional search. *Id.* at 8-9. The district court directed verdicts at trial on the ground that the school district had not been the "legal cause" of the police search. *Id.* at 10. Neither the district court nor the court of appeals ever expressly addressed the issue of law reform. Quite the contrary, the district court seemed to find the fact that the case was a "set up" designed to challenge existing laws providing additional evidence warranting sanctions. On appeal, the circuit court upheld the sanction decision despite its own perception that this was a "close case." *Jennings*, 869 F.2d at 879. On appeal to the United States Supreme Court, the A.C.L.U. and Petitioner Jennings once more made it clear that the very doctrines that operated to legally insulate the school district from the consequences of its actions in securing sniffer dogs that over alert, in requiring the police to be called upon the occurrence of such an alert, and seeking the issuance of a search warrant based on such an alert, were at issue in the case. Petition for Writ of Certiorari, *supra*, at 11.

In addition, the petitioners challenged the circuit's use of the abuse of discretion standard for appellate review of the legal merit of the litigant's claims. Petitioners argued that given the circuit's characterization of the legal question of merit which underlay the district court's opinion as a close question, application of a standard of *de novo* review would have led to a different result in the case. *Id.* at 19-25. While this argument in favor of bifurcated appellate standards has been rejected by the Supreme Court, its persistence reflected the perception that a Rule 11 decision involved two distinct types of decisions. A decision addressing the merits of the claim to determine whether or not it is frivolous should be treated as any other substantive, legal, merits-based decision. The other decisions, whether a determination of the facts underlying the allegations concerning the inadequacy of the prefiling investigation or the decisions regarding the type of sanction to be imposed, should be treated as falling within the court's managerial discretion and reviewed under the abuse of discretion standard.

239. *See* Maureen N. Armour, *Litigating the Close Case: The Ethical and Procedural Challenges*, CLE presentation for *Southwest Law Journal* Air Law Symposium (on file with the author) (discussing the attorney's procedural and ethical obligations when filing litigation and the problem of pursuing the close case); *cf.* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 337 (1992) (Bersoff discusses the contribution of cognitive psychology to the understanding of human decision making, in particular the "barriers to accurate judgment that negatively impinge upon the reliability and validity of human decisionmaking generally." He cites and discusses a variety of psychological and legal literature which looks at the problems inherent in legal decision making, particularly the problem of predicting legal outcomes.). *See generally* Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES 463 (Daniel Kahneman et al. eds., 1982); Atmos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristic and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES 3 (Daniel Kahneman et al. eds., 1982) (discussing the way in which individuals use a variety of heuristic principals to help them judge the likelihood of an event occurring). Interestingly enough the issue of prediction and judgment has also been addressed by mathematicians and scientists who express concern that "lay" individuals do not understand the laws of probability and tend to predict, that is, form inferences about the likely occurrences of future events, based on erroneous information. The development of a legal judgment regarding the likelihood of success of a claim, its ability to survive challenges to its legal and factual merits, and the likelihood that the fact finder, be it judge or jury, will be persuaded by the inferential structure constructed by the attorney is an exceedingly complex piece of reasoning. *See* RICHARD NIS-

terized as 'intuitive scientists.' Information is processed through beliefs, theories, propositions, and schemas. These knowledge structures enable us to label and categorize objects rapidly and, in most cases, correctly."[240] Acting as an "intuitive scientist," it seemed to me, as a practicing attorney, that if I could articulate the balance of the factors considered in deciding whether a case had sufficient merit to warrant suit as a "close call" or a "close case," not necessarily equal or balanced, then the "possibility" or even "probability" of failure should not be determinative of the legal and ethical decision to file the litigation.[241] It also seemed that the same conceptual framework should apply to the sitting jurist.

However, as the appellate case law developed in the Rule 11 arena, and the appellate courts began deferring to trial courts on close cases for purposes of Rule 11 sanctions, it appeared that the institutional balance had shifted in a way that undermined the adjudicative role of the courts and lawyers in a Rule 11 decision. While I understood the institutional logic of the Supreme Court in wanting to conserve scarce judicial resources and not "reinvestigate" a close sanction decision, preferring instead to defer to the skill of the trial judge,[242] it seemed that even posing the issue as one involving a close case raised questions about the legitimacy of the sanction itself.[243] If practitioners and jurists could agree that the sanctions call was "close," either because it was a close call on the

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BETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 274-80 (1980).

240. Bersoff, *supra* note 239, at 338 (citations omitted). Some of the traditional analytic schemes used by lawyers, such as the tripartite division of legal analysis into: (1) an analysis of the law; (2) a determination of the facts; and (3) the application of the law to those facts, have been criticized recently. *See supra* part III (challenging the analytic categories of "law-fact" and the appellate jurisprudence which relies on these categories); *supra* notes 52-73 and accompanying text (discussing Yablon's challenge to the one dimensionality of the schema—"judicial discretion"—by pointing out the different "skill" dimensions of the judge involved in different types of "discretionary" decisions).

241. The close case is used in this Article as a "schema" developed by attorneys and judges to reflect the problem of certainty or predictability regarding legal outcomes. *See supra* parts IV.B.3 & V.A. (discussing how trial courts use the close case as a way to articulate the conscious dimensions of their discretion). The problem of "predicting" legal outcomes with any level of certainty or the ability to "quantify" poses one of the most difficult aspects of an attorney's legal judgment. *Cf.* AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135-221 (1992); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 235-37 (1990); DAVID A. BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF 162-89 (1984) (discussing the challenge in developing the legal theory of the case, both its legal and factual basis); KENNY F. HEGLAND, TRIAL AND PRACTICE SKILLS 27 (1994) (discussing the need to bring creativity to the process of case development); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE § 5.2 (1994) (discussing the need for creativity in developing the legal and factual theories of a case in order to discharge the obligation of thorough and zealous representation).

242. *See infra* notes 275-78 and accompanying text (discussing the Supreme Court's decision in *Cooter & Gell*).

243. *See supra* notes 238-57 (posing the alternative as a way to articulate the sanctions analysis—would another jurist or practitioner disagree with me about the sanctionability of this litigation, and consistent with the "reasonable attorney" approach of the case law, while more explicitly focusing on the conundrum of the close case).

adequacy of the prefiling inquiry and analysis, on the merits whether factual or legal, on the purpose in bringing the litigation, or on the need to sanction for deterrent purposes, there should not be sanctions.[244]

When viewed from this perspective, the close case seemed to capture a dimension of uncertainty in the decision to sanction which should be resolved in favor of the litigant. The logic of discretion, accepting competing alternatives that fall within the zone of possibilities, appeared in this context to be the illogic of discretion: accepting a sanction decision in a close case even if the decision not to sanction would have been acceptable.

If, as proposed, the decisional alternatives in a close case can be consciously posed as opposites, what norms should determine the final decision, the selection of one or the other? The paradigm of the close case offers a way, albeit a somewhat intuitive way, to articulate the conflict in institutional and adjudicative norms that come into play at this point: norms seeking to justify the expansive application of the court's sanction powers on pragmatic grounds and norms seeking to ensure adherence to the traditional adjudicative values of the legal paradigm. Use of the close case as a decisional methodology mandates articulation of the judicial decision making, particularly the normative considerations limiting interception and those warranting aggressive sanctions. In this way, the close case by rendering conscious the adjudicative and institutional norms at play in a sanction decision will help fill in the gap in the jurisprudence of Rule 11.[245]

V. THE "ILL" LOGIC OF JUDICIAL DISCRETION— SANCTIONING THE CLOSE CASE UNDER RULE 11

Without a bright line to guide the courts, what results in a close Rule 11 sanctions case is a head-on collision between the institutional and judicial norms discussed above. The court's pragmatism, the institutional and judicial norms of efficient dispute resolution, litigation management, and specialized judicial competence are currently critical of adversarialism and seek to restrict marginal litigation through the expansive use of judicial sanctions. The court's traditional role, grounded in the institutional norm of an open accessible court system and the judicial norm of restraint, favors adjudication, the legal model of dispute resolution, and views adversarialism as essential to that legal process.

How should the balance be struck in a close case? The 1983 amendments to Rule 11, in particular the exhortation in the Advisory Committee Note to the federal judiciary to use sanctions more aggressively,

244. *See infra* notes 258-78 and accompanying text (if the Rule 11 standards are linked to objectively identified and developed standards of "practice," then the relevant proactive community's perception of the reasonableness of the litigation should form the basis of the sanctions analysis).

245. *See* Louis, *supra* note 8 (discussing the need for a Rule 11 jurisprudence that weighs these institutional norms as an explicit part of the adjudicative process in the close case).

coupled with the stated goal of procedural reform to improve the efficiency of the courts, has routinely been cited to tip the balance, in many cases, in favor of sanctions.[246] But the continued pressure of a judge's thumb on the sanction scale is no longer defensible. The sanctions pendulum is swinging back[247] and the problems outlined in the Advisory Committee's Call for Comment, the structure of the 1993 revisions to Rule 11, and the supporting Advisory Committee Note indicate a move away from an aggressive sanctioning policy, appended to indeterminate legal standards. This shift in perspective should help guide the future enforcement of the rule, but it does not necessarily solve the problem of the close case.

As developed in this Article, the close case defines the grey area of the court's discretion to sanction under Rule 11, and in a Rule 11 close case, the court should err on the side of no sanction. The broad rhetorical use of the term in federal case law in general is at least some evidence that the formulation of the close case has intuitive appeal to the judiciary as a way to express their awareness that they are working at the margins of their discretion and, regardless of what they decide, they can consciously pose the opposite as an acceptable alternative. In a Rule 11 case where this level of uncertainty can be articulated and disagreement within the interpretive community predicted or projected—if the trial judge can consciously articulate the proposition that some portion of the professional interpretive community would disagree with the decision to sanction—it cannot be said that the lawyer has violated the acceptable norms of practice in a manner warranting sanctions.[248]

It is not hard to see how tolerance of conflicting outcomes in close cases, a position that has characterized the case law to date, has given rise to an inconsistent body of precedent depending on the institutional and judicial norms given play in the Rule 11 decision. A sitting judge taking a pragmatic approach might look at the question of whether the attorney had reasonably believed a claim was warranted by the law, or a nonfrivolous argument for its change, more restrictively than a judge applying the competing norms of a court system open to a wide range of adversarial conduct and creative, albeit marginal, adjudication.[249] The first judge's reliance on her special competence and expertise in the field of litigation management might make her more inclined to pursue an aggressive sanction policy while the latter judge's seeming reluctance to sanction can as easily be viewed as the appropriate application of the norms of judicial

246. *See supra* notes 74-98 (discussing *Cooter & Gell* and the need to amend the rule to avoid its over-inclusive application).

247. *See* Louis, *supra* note 8 (discussing Resnik, the growing critique of the judicial reforms of the 1980s, and the swing of the pendulum away from managerial concerns and back to more traditional adjudicative concerns).

248. If some portion of the relevant interpretive community can be said to support the attorney, which is exactly what is being said when a case is characterized as a close case, there should not be any sanctions.

249. *See supra* notes 173-82 and accompanying text (discussing the court's application of the reasonable attorney standard in a close case).

restraint. The first judge might find the impact of any given piece of doubtful litigation on the courts more onerous than the latter, since the latter does not view the social impact of the litigation within as narrow an institutional context. The first judge might determine that more punitive sanctions are needed to deter such conduct on the part of this litigant (and others similarly situated) than the latter judge who views the utilization of court resources in this type of adjudication as less deleterious to the overall functioning of the courts.

In this context, it is very difficult to weigh these competing norms without weighing the relative "value" of the litigation,[250] which is precisely why jurists resort to simplistic exhortations of one or the other of the institutional norms to justify their decision. It is also the reason why commentators routinely point to the potential patterns of bias that permeate the Rule 11 case law when arguing in favor of a more restrictive jurisprudence to guide its application. Using the close case as a decisional touchstone in the Rule 11 sanctions arena helps resolve these problems by posing the norms of judicial restraint as the adjudicative and institutional norms likely to generate the most consistent results when coupled with the "logic of discretion," and the norms that should guide the sanction decision.[251] Used in this way, the close case helps avoid the precarious task of valuing particular types of litigation as a way to decide between competing outcomes. This is already a problem of some dimension in the Rule 11 arena.[252] Finally, the close case approach addresses both the "illogic" of a sanction in a close case and the problems associated with that illogic: the problematic relationship between sanctions and the theory of deterrence in the close case; the problem of synchronization—decisional inconsistency generating restrictive precedent in the sanctions arena; and the problem of accountability and allocating the risk of error.

A. Variability and Accountability—Using the Close Case to Reallocate the Risk of Tolerable Error

How do theories of judicial discretion allocate the risk of variability?[253] And who should bear the risk of variability in a close case, a case in which a "no sanction decision" would have been as acceptable as the decision to sanction? The variability in decisional outputs that prompted the revision of Rule 11 would appear to have exceeded the predictable and acceptable "wobble" that reflects the inevitable give and take of the adjudicative

250. *See supra* notes 89 and 93 (discussing the empirical bias of Rule 11).

251. *See supra* note 193 (discussing the norm of judicial restraint).

252. *See* Tobias, *supra* note 44 (discussing the differential impact of Rule 11 on civil rights plaintiffs reflecting an implicit devaluation of such litigation).

253. This issue is seldom raised because of the trap of tautology: a legitimate exercise of discretion generates acceptable variability. There is no error and therefore no risk of error associated with variability that needs to be allocated. *See supra* note 239 (discussing the reductivism of this analysis of variability).

process.[254] The concern of the commentators, profession, and Advisory Committee with the lack of uniformity and predictability in the Rule 11 case law was concern generated by a level of decisional inconsistency[255] that was perceived as unacceptable or problematic because it fell outside of the "zone of possibilities" tolerable within the legal paradigm.[256] Unacceptable decisional inconsistency may have varied causes and may require different strategies, but on this point the Advisory Committee lets us down.[257] In its commentary on the revisions to the rule, the Advisory Committee treats "variability" as reductively as it treats discretion. There is no effort to give it substantive content, or even through the use of examples to define its unacceptable parameters. While the Committee talks about variability, it never identifies the cases that should not have been sanctioned or those that should have. On the one hand, it views the variability in Rule 11 decisions as problematic, but on the other hand, it appears willing to live with that variability to the extent it cannot be eradicated.

Efforts to eradicate inconsistency in the application of a rule of law require careful analysis of patterns and cases in order to identify both the dimensions and the causes of the unacceptable variability. The Committee's reductive analysis of discretion, indeterminacy, and variability undermines any such effort.[258] There is acceptable and unacceptable variability, but the Committee never attempts to distinguish between the two in the Rule 11 context; it certainly provides no decisional guidelines on this point.[259] Instead the Advisory Committee in its Note merely reaffirms the broad delegation of discretion under Rule 11, citing *Cooter & Gell* as on point.[260] Unfortunately, the *Cooter* Court's adoption of the unitary abuse of discretion standard as the appellate standard for all aspects of the Rule 11 decision, accepts variability in outcomes, including competing sanction decisions, defines variability widely to include a lim-

254. *See* Brilmayer, *supra* note 83, at 373-75 (identifying the acceptable wobble or variability in judicial decisions that is not seen as undermining the legitimacy of the "rule of law").

255. *See supra* note 6 (discussing the Call for Comment and the Advisory Committee's expressed, albeit unarticulated, concern about variability); *cf.* Thompson, *supra* note 83, at 425 (describing Brilmayer's wobble as defining decisional inconsistency in an overly reductive manner and thereby failing to distinguish between acceptable and unacceptable variability).

256. *See* Brilmayer, *supra* note 83, at 375 (arguing that the institutional legitimacy of the courts rests on the perception that cases are decided according to legal principles not personal biases or preferences).

257. *See* Thompson, *supra* note 83, at 427-30. Thompson discusses the distinctions between "inevitable inconsistency" and "bias inconsistency." He argues that the first category is not to be equated with judicial error while the latter is unacceptable, that is, error, if avoidable.

258. *See supra* part II.A. (discussing the Call for Comment).

259. *See* Thompson, *supra* note 83, at 427 (discussing variability that is inherent in the process and variability that is unacceptable).

260. *See* FED. R. CIV. P. 11 advisory committee's note.

ited right to be wrong,[261] and then shifts the risk of conflicting outcomes in close cases to the sanctioned litigant. It is the sanctioned party who bears the risk of what the institution has decided is a "tolerable level of error."[262]

In *Pierce v. Underwood*,[263] a case relied upon extensively by the Supreme Court in the *Cooter & Gell* decision, the Court looked at the question of this risk from an institutional perspective. Was it legitimate for the Court to impose this risk of error upon the Government, the party targeted by the disputed fee shift?[264] The Court was concerned that adopting an abuse of discretion standard as the standard for appellate review for an attorney fee shift under the Equal Access to Justice Act (EAJA) would have an adverse impact on the litigants, both the private plaintiff and the governmental defendant.[265] The *Pierce* Court's evaluation of this risk included express consideration of the fact that use of the abuse of discretion standard creates an institutionally protected zone within which the exercise of the trial court's discretion is not closely scrutinized.[266] The Supreme Court acknowledged in *Pierce* that this lack of appellate review in the award of attorney's fees under the EAJA impacts the perceived risk of litigation.[267] It was therefore crucial to the Supreme Court's analysis that the creation of this risk had been expressly addressed by Congress in the legislative process leading up to the adoption of the statutory fee shift. From the Court's perspective, Congress's express consideration of this shift in the risk of error to the government defendant was an essential analytic predicate to their adoption of the "abuse of discretion" standard for appellate review. Under the EAJA, Congress shifted the risk of error, the problem of variability, and the potential over-inclusive application of the fee shift to itself, the government, and so long as this was done explicitly, the Court had no problem adopting the abuse of discretion standard for appellate review.[268] The *Cooter*

261. *See* Rosenberg, *supra* note 66, at 655 (discussing the fact that the abuse of discretion standard tolerates even more variability, and an increased margin of error, than that tolerated under general theories of discretion).

262. Rosenberg, *supra* note 66, at 661-65 (questioning whether the abuse of discretion standard creates a zone of institutionally acceptable error thereby making a "wrong" ruling unassailable); *cf.* Thompson, *supra* note 83, at 425 (discussing the problem of reductive analysis in the treatment of variability).

263. 487 U.S. 552 (1988).

264. *Id.* at 560-68.

265. *Id.* at 563.

266. *Id.* at 561-63.

267. *Id.* at 563.

268. Discretion is neither license nor prerogative; the legitimate exercise of institutional power through judicial discretion cannot exist without accountability. A major attribute of judicial accountability lies, not in the existence of standards that can be applied to the trial court's decision, but in their enforceability. *See* Christie, *supra* note 66, at 753. Accountability mandates that the judge's decision "must be made on the basis of a circumscribed set of criteria" and she can be criticized for how she uses or fails to use the "range of criteria that are available to the decision maker for the making of his choices." *Id.* Without these constraints, judicial decision making is not an exercise of discretion, but rather an exercise of license, prerogative, or legislative action. The institutional tension inherent in the requirement of accountability, the "urge to expand the scope of discretion" countering the

Court's reliance upon *Pierce* in adopting the abuse of discretion standard in Rule 11 cases is an example of the Court's reductive use of the concept of judicial discretion. It is also an example of the Court's misplaced reliance upon the institutional "logic of discretion" on pragmatic grounds—if the decision could go either way, either should be acceptable at the appellate level—without considering its substantive impact.

The fee shifting statute of the EAJA is a merger of both incentive and deterrent fee shifts and is clearly distinguishable from the typical Rule 11 fee shift which is designed primarily as a deterrent provision. The EAJA authorizes plaintiffs to recover their fees in successful litigation against the federal government (an incentive fee shift) only if the government's position is not well founded (the deterrent dimension of the fee shift). The EAJA standard is less generous than the typical incentive fee shift. Winning the litigation is not enough to justify awarding the plaintiff fees, and, in this respect, the EAJA protects the governmental defendant by refusing to impose upon it the duty to pay attorneys, linked simply to a loss on the merits. The government's obligation to pay is structured along the lines of a deterrent fee shift. The duty to pay the successful litigant is linked to a finding that the government posed a questionable defense, a standard less forgiving than the typical "frivolous litigation" standard used in most deterrent fee shifting statutes, but more protective than a pure merits-based fee shift.[269] If the fee shift in the EAJA is viewed as an incentive fee shift, shifting fees to the litigant to encourage the bringing of litigation, Congress's ability to limit a plaintiff's recovery is not problematic. If viewed as a deterrent fee shift statute, Congress's ability to apply an enhanced deterrence standard to itself as the defendant and sole source of attorney's fees is also unquestioned.[270]

The only decisions with a punitive or "chilling" effect under the EAJA are those awarding fees against the government itself; a denial of fees simply leaves the plaintiff in the position they would have been under the American Rule. The Court's concern in *Pierce* was shifting a higher risk of sanctions to the government, and thereby "chilling" their advocacy, because of the expansive range of variability tolerable within the appellate "abuse of discretion" standard. Even after acknowledging Congress's ability to voluntarily assume this risk of variability and the potential over-inclusive application of the fee shift, the *Pierce* Court found comfort in what they perceived to be the limited risk of substantial sanctions associated with such awards.[271] Looking at the available data they determined that most such fee shifts were relatively small and thus did not pose a substantial risk to the government.

"urge to narrow the scope of discretion," leads to a requirement of reviewability, albeit limited. *Id.* at 754-71.

269. *See supra* note 45 and accompanying text (discussing fee shifts).

270. *See* Burbank, *supra* note 5, at 1003-05 (discussing Congress's power to enact a broad range of fee shifting statutes).

271. *Pierce*, 487 U.S. at 563 (finding the amount of potential liability was clearly a consideration "militating against the use of" the abuse of discretion standard).

In the Rule 11 arena, the same risk of error exists and there is the same problematic lack of accountability. In these circumstances, should the courts be able to allocate this risk against private litigants in the same way Congress allocated it against itself? Rule 11 sanction decisions do not fit the *Pierce* analysis and the only justification offered by the Supreme Court in lieu of *Pierce* is the pragmatic one of relying upon the "logic of discretion." The Supreme Court, in *Cooter & Gell*, argued that the perceived marginal utility of appellate intervention in generating a "better" or "correct" Rule 11 decision is not viewed as worth the institutional costs of time, effort, and resources.[272] However, unlike *Pierce*, many of the fee sanctions awarded under Rule 11 are substantial and thus judicial errors, mistakes, or disagreements about the sanctionability of the conduct cannot be dismissed as de minimis. More importantly, Rule 11 errors in the award of attorney's fees are punitive in nature with potentially broad impact over and above the fee itself.[273] Rule 11 is not a substantive fee provision and does not represent enactment of formal legislative policy in which the adverse or "chilling" impact of bad or overly broad sanction decisions was addressed via the political process.[274] It is a creature of the Supreme Court.

The Supreme Court's treatment of Rule 11 is at odds with its own analysis of substantive fee shifting in *Pierce*. In *Cooter & Gell*,[275] the Supreme Court cited *Pierce* as controlling authority for the application of an "abuse of discretion" standard in Rule 11 sanction cases, yet the *Cooter* Court ignored the *Pierce* Court's analysis of the problem of accountability and risk allocation it had deemed central to the resolution of the fee shifting problem in that case.[276] The substantive risks created by a deferential appellate standard were acknowledged by the *Cooter* Court. Such a standard impacts the application of the fee shift leading to its overly broad, or narrow, interpretation and application. But the *Cooter* Court ignored the *Pierce* Court's critical concern: reconciling judicial discretion and principled decision making by defining the scope of variability tolerable within the traditional legal paradigm. The *Pierce* court acknowledged that the appellate abuse of discretion standard removes the restraint of review and anticipates a wider range of decisions than might otherwise be tolerable.[277] That was a concern.

The *Cooter* Court's decision contrasts sharply with *Pierce* on this point. Rather than viewing the "discretionary" play in the rule as necessitating judicial oversight to ensure adherence to the traditional norms of adjudication, *Cooter* treated the broad delegation of discretion to the trial court

272. *See supra* notes 156-59 and accompanying text (discussing *Cooter & Gell*).

273. *See supra* note 38 and accompanying text (discussing the "chilling" impact of Rule 11 sanctions).

274. *See Burbank*, *supra* note 5.

275. *See supra* notes 153-59 and accompanying text.

276. *Cooter & Gell*, 496 U.S. at 403.

277. *See* Rosenberg, *supra* note 66, at 661 (discussing the creation of a category of protected wrong answers using the abuse of discretion standard); *cf. supra* note 55 (discussing the application question).

under Rule 11 as requiring appellate deference to the "real politick" of Rule 11, the trial court's pragmatic adjudication of the sanction decision. The Supreme Court's pragmatism is no where more obvious than on this point when it argues that the trial court's special competence should be given full play in working out the parameters of Rule 11.[278]

The *Cooter* Court's analysis of the trade-off between the marginal utility in terms of more consistent, predictable, and uniform Rule 11 decisions, to be gained by the institution from policing judicial error in this regulatory grey area and the costs associated with that appellate review, assumes the answer to the question—who should bear the risk of judicial variability and error? In such a contest between the individual litigant and the institution, the litigant loses. However, as discussed above, the "illogic" of discretion in the sanctions context argues for just the opposite result. Why aren't the parameters of the rule to be worked out via a policy of deference, crafting boundaries only when it is clear that the standards of Rule 11 have been violated? There should only be sanctions when there is no close case, when the opposite cannot be fairly posed as an alternative outcome with adherents within the interpretive community. The close case helps reallocate the risk of variability and lack of accountability in Rule 11, putting it where it belongs, with the courts not the litigants.

B. The Theory of Deterrence and the Problem of Sanctions in a Close Case

The "problem of fee awards in close cases"[279] has been addressed in other contexts. Such awards have a potential over-deterrent impact in a system in which predictable outcomes do not abound; an impact which undermines the institutional value of access to the courts.[280] Such awards also raise a question of the fairness implicit in shifting the cost of litigation in a close case to the losing litigant.[281]

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278. *Cooter & Gell*, 496 U.S. at 401-05 (discussing the trial court's competence to handle these matters on a case-by-case basis); *see* Armour, *supra* note 12, at 730 nn.261-336.

279. Rowe, *supra* note 45, at 667; *see also* Toran, *supra* note 222, at 324 (Toran discusses the potential unfairness of mandatory attorney fee payments in close cases: "There is apparently no flexibility within the English system to alleviate the harsh penalty that a plaintiff may pay in a close case . . . ." To leave the issue to the court's discretion does not solve the problem because of the potential threat of lack of uniformity in decisions.); Claire E. Winold, *Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act—Questions Resolved, Questions Remaining*, 14 Fla. St. U. L. Rev. 925 (1987). Winold notes that "[i]t is important that the Act's original intent be carefully considered in close cases. Courts deciding whether to award fees to litigants who prevail against the government should consider the original purposes of EAJA: to counterbalance conditions tending to deter private citizens from challenging unjustified governmental actions." Winold, *supra*, at 947. The only solution is to not award fees in a close case; that is the result consistent overall with the structure of the fee shift.

280. *See* Rowe, *supra* note 45, at 669-71.

281. Rationales supporting fee shifts include: (1) the fairness argument which favors indemnification of the injured winner, the fee shift as ensuring full compensation for the winner's legal injury; (2) punitive fee shifts which punish conduct in the transaction giving

The rationale of deterrence justifying fee shifts is undermined in the context of cases where the outcomes are not uniformly predictable, particularly the problematic close or hard case.[282] If the "system's substantive law, procedural practices, and judicial staffing" make litigation results "generally rather predictable," then fee shifts can be justified on grounds that the loser "probably should have known better and should not have imposed on others the costs" of the litigation.[283] But that is not the case in the current federal system[284] where a major defect is the lack of procedures which allow for early identification and resolution of meritless claims.[285] The question has been raised numerous times: if the court cannot determine the merits of a case without a full trial or the substantial investment of resources via pretrial procedures, should it really be allowed to penalize the litigant on grounds they should have had the foresight to predict the legal outcomes with a sufficient degree of certainty that they would have advised their client not to pursue judicial relief?[286] Even then, how can it be clearly said that the case has no other institutional value, justifying the transactional costs to the institution and to the litigants, with reference to the larger political or social context within which such litigation occurs?[287]

The limited deterrent rationale for Rule 11 fee shifts represents a significant change in perspective and warrants a rethinking of the impact of sanctions in a close case. This rationale carries great weight in a context in which social policies and institutional norms disfavor litigation as a means of resolving disputes or of addressing legal issues. Yet less than fifteen years ago commentary on this point rejected the deterrent justification

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rise to the litigation or in the conduct of the litigation itself; and (3) incentive fee shifts both to encourage suits and to equalize litigation power. *See id.* at 653-66.

282. *Id.* at 655-56.

283. *Id.* at 655.

284. *Id.* at 655-56.

285. *See* Louis, *supra* note 8 (discussing the need to chill some dimension of advocacy); *cf.* WILLGING, *supra* note 81, at 1060-61 (discussing the fact that attorneys are raising their threshold requirements for close cases).

286. Amended Rule 11 attempts to link a sanction decision to the interception system, noting that failing to survive a summary judgment raises questions about the claim and surviving summary judgment raises a protective shield. *See* FED. R. CIV. P. 11 advisory committee's note. *Contra supra* notes 140-83 and accompanying text (discussing the role of the advocate and their perspective on close cases).

287. There is very little within the Rule 11 commentary which looks at the social cost dimension of litigation in a positive light. While it is generally conceded that transaction costs associated with litigation are high, merely complaining about those costs fails to address the value of litigation within both the legal and political systems—developing the law and legitimating the judicial process. The point has been made that this bias reflects an increasingly narrow, privatistic view of litigation as merely the inefficient resolution of private disputes, a sign of irrational or dysfunctional behavior, and ignores the social and political function of litigation and the court system. The assumption that such cost-benefit analysis is essentially amoral, carrying within it its own normative justification, simply ignores the inherent tension within the judicial system between these two competing views. *See* Louis, *supra* note 83; Resnik, *supra* note 103. The discussion between Louis and Resnik surrounds the historical swings within the federal system, some favoring limiting access and others more access, the dynamic reflecting the constant adjustment in the tension between these two institutional core values.

for fee shifting as inapplicable to the American context: "[I]f litigation is somewhat frowned upon, then [a fee shift] seems desirable. American attitudes, however, tend to regard litigation as everyone's right and to emphasize the importance of not excessively hindering access to justice."[288]

The Rule 11 sanction, justified as a deterrent to frivolous litigation, not on grounds of compensation or equitable fairness, fits within this general punitive rationale for fee shifts.[289] In this context, it is not litigation per se which is viewed as undesirable, but certain misconduct associated with that litigation.[290] The fee shift may be aimed at either, or both, deterring the aggravated misconduct in the future and compensating the party for the "pecuniary loss in the form of undeserved legal expenses" in the present.[291] But it is difficult to make the misconduct argument and avoid the over-deterrence argument in a close case. In these cases, Rule 11 context cases in which the sanction decision could have gone either way, the call is so close that the deterrence argument simply does not apply:

> Presumably, we often do not want to deter good-faith pressing of tenable but not clear-cut claims and defenses, especially those turning on unresolved points of law or, in many instances, genuinely controverted factual disputes. No blame attaches to such litigation, and it does not call for strong deterrence. Any fee shifting against an unsuccessful party in such a situation should rest on grounds other than punishment or deterrence of litigation.[292]

The problem in the Rule 11 context is that the link between the underlying rationale for a fee shift or sanctions policy and the scope of judicial discretion in the close case is ignored.[293]

> Only if a fee shifting rationale focuses on the party who may be required to pay fees, such as administering punishment for unjustifiable bringing of or resistance to litigation, should there be discomfort in shifting fees generally in close cases. In such a case, these kinds of rationales do not apply: the defendant acted reasonably and, given the closeness of the case, represents neither a desirable target for deterrence nor one likely to be deterred. Consequently, if such

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288. Rowe, *supra* note 45, at 656 (citations omitted).

289. *Id.* at 660-61.

290. *Id.*

291. *Id.* at 660. The most obvious point to be made is that there is no necessary relationship between the need for and formulation of a sanction and tying that sanction to attorney's fees. *Id.* This problem arose in the Rule 11 context and was debated throughout the commentary. What should be the standard for the sanction, compensation or deterrence? The revised rule clearly lands on the side of deterrence, rejecting the argument outright that Rule 11 has any role in compensating litigants for the cost of the litigation. It is inevitable, however, that the sanction will be tied to fees since it is in situations involving misconduct that the rationale of punishment and the rationale of making a party whole coincide. *Id.* at 660-61. Even then, the amount of the adversary's legal fee incurred as a direct result of the misconduct will not provide a measure calculated in terms of maximum deterrence or punishment, assuming the costs of the frivolous litigation extend beyond the parameters of the individual case. *Id.* at 661.

292. *Id.*

293. *Id.* at 670.

> loser-focused rationales are the basis for a fee shifting policy, close cases would be appropriate ones for denial of fee awards.[294]

The solution, as proposed by Professor Rowe, is to avoid attorney fee shifts, even in the guise of sanctions, in the close case as an appropriate exercise of the discretionary norm of judicial restraint and deference to the norms of an open, accessible judicial system.[295]

C. Decisional Inconsistency, Synchronization, and the Problem of Precedent

Using the close case as a potential bright line for affirmatively determining the scope of Rule 11 will assist the routine and necessary development of appellate case law interpreting the rule. To date, the close case has been used as an analytical or rhetorical device of the appellate courts to describe cases in which the trial court decision could have gone either way. The appellate court might disagree with the direction selected by the trial judge, but in this case they would not reverse, preferring to defer to the lower court's judicial competence. This is the logical structure of appellate decisions routinely rendered under the abuse of discretion standard of appellate review, the applicable standard in all Rule 11 cases.

The limited utility of such appellate case law is obvious. A close case, although not reversible, does not represent a fixed limit on the trial court's exercise of its discretion in the future; it merely defines the trial court's decision as falling within the range of permissible decisions. The Rule 11 case law is full of examples of close cases, usually decisions to sanction, with which the appellate court may have disagreed, but which it refused to treat as a mistake or reversible error because of judicial deference.[296] A close case affirmed under the abuse of discretion standard merely tells the next trial court that this particular decision falls within the range of decisions available in a similar case. It does not, however, direct or otherwise limit the future decision, even if that decision is to select the opposite result in a similar case.

A case reversed under the abuse of discretion standard has the opposite import. It represents the appellate court's attempt to carve out or render off-limits a decision that was viewed by the trial court as falling within the range of acceptable alternatives, the scope of the court's discretion. This type of appellate decision is expressly intended to guide and limit future trial court decisions when similar facts and circumstances arise. Yet affirmances and reversals under the abuse of discretion meld

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294. *Id.* at 671. Furthermore, Rowe argues:

> Limiting punitive or deterrent fee shifting to clear-cut cases eases another aspect of the close-case problem—the nagging feeling that we may compound injustice to the loser because of the significant chance that the court was wrong on the merits of the case. To the extent that shifting takes place only in cases involving abuse, the likelihood of its being associated with judicial error declines sharply.

Id. n.97 (citations omitted).

295. *See supra* notes 239-49 and accompanying text.

296. *See supra* notes 162-85 and accompanying text.

into a single amorphous mass of case law, not readily distinguished or distinguishable on this point.

The arguments favoring a deferential attitude toward the trial court's decision to sanction or not to sanction reflect pragmatic institutional concerns. The expressed concern is that any further investment of judicial resources in the form of an extensive appellate review process cannot produce a better answer. The result could not be better because it is the trial court that is in the best position to develop legal standards on a case-by-case basis, giving content to seemingly indeterminate rules. Furthermore, it is the trial court's hands on perspective, its special competence in dealing with the day to day practice of law, which guides the development of this jurisprudence and provides a better institutional perspective on the problem of frivolous litigation. The Supreme Court's derogation of the adjudicative competence of the appellate courts as compared to the trial courts is at the heart of the *Cooter & Gell* decision; their forced reliance on the written record, their enforced distance from the practice of law, and their lack of any special expertise warranting intervention.[297] As between the trial and appellate courts, said the Supreme Court, it makes sense to defer to the trial court's determinations.

The Supreme Court's pragmatic policy of appellate deference, deferring to the special competence of the trial court, poses a direct challenge to the traditional adjudicative paradigm. On the other hand, deference warranted solely on grounds of resource allocation or efficiency accepts the hypothesis that conflicting outcomes in similar cases do not constitute legal error, or at least fall within an acceptable range of legal variability. The Supreme Court could make a comparable decision, but why invest judicial resources to do so? Appellate deference to competing outcomes also rejects the proposition that there is one correct legal answer to the posed sanction problem.[298]

> As usually understood, error requires two things. First, there must be a hypothetical result, determined by the relevant decision making inputs, which is inconsistent with the actual result. This is the requirement of determinacy. Second, it must be the case that the actual result *should have* conformed to that hypothetical result. This is the requirement of direction of fit.
>
> Both of these characteristics present problems for legal systems. The difficulty with determinacy concerns whether there are pre-existing right answers to legal problems. The difficulty with the second concerns the coercive effect of the decision that is actually made. In both cases, however—for determinacy and direction of fit—the primary source of the problem is the legal system's devout respect for process values, or at least for rationalizations based upon process

297. 496 U.S. at 401-05.

298. *See* Brilmayer, *supra* note 83; Lempert, *supra* note 84; Scott, *supra* note 185; Thompson, *supra* note 83; Victor J. Gold, Comment, *Jury Wobble: Judicial Tolerance of Jury Inferential Error*, 59 S. CAL. L. REV. 391 (1986).

values.[299]

The problem in the Rule 11 context is to reconcile the reality of error. Decisions are reversed based on findings that the trial courts have abused their discretion, with the over-arching legal premise that different results can be tolerated based on the same set of facts without either implicating the other as an error.[300] This latter concept has been developed in the theoretical literature on indeterminacy[301] and in the judicially constructed appellate theory of deference in a close case. Both the theoretician and the pragmatist recognize that the reality of the "give and take" of the law is "wobble," the acceptability of different outcomes, none of which are treated as legal error.[302] The problem is that the theory of judicial discretion tied to this conception of legal indeterminacy and acceptable variability in legal outcomes must generate results that fall within an acceptable range if it is not to undermine the legitimacy of the judicial system. An overly reductive view of variability, or legal wobble, fails to acknowledge that some measure or dimension of variability is not tolerable and fails to provide any guidance in determining when it occurs or what it looks like. It is important to keep in mind that the judicial system produces two distinct products. To the extent the system is designed to generate a decision in a given case resolving a particular dispute, variability in outcomes raises questions of fairness in terms of the perceived rights of parties to be treated the same as others. To the extent the system is designed to generate law in the form of precedent according to which individuals can order their future conduct, variability will ultimately result in the over-inclusive application of the rule of law or its more punitive interpretation gaining sway. For example, in a Rule 11 context, consider two similar cases decided by different judges with different outcomes; one results in sanctions, the other doesn't, and both are affirmed on appeal under the abuse of discretion standard. Neither case should be treated as anything other than affirming the court's discretion to act as they did, and a third judge facing the problem is free to decide either way. However, the deterrent impact of the sanction case poses a serious threat, since in the sanction case law, it will be the adverse sanctions cases that begin to define the boundaries of Rule 11 and guide a litigant's behavior. Thus, the two cases are not treated equally in the real world of practice, although the logic of the close case and theory of "appellate deference" argues that they should be.[303]

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299. Brilmayer, *supra* note 83, at 363.

300. *Id.*

301. *See supra* part II.A.

302. "Wobble" is a term developed and used by Professor Brilmayer to reflect the fact of institutional indeterminacy and "means that the result is not a unique function of the relevant inputs." Brilmayer, *supra* note 83, at 365-66. Wobble is used to describe these differences without relying upon the notion of error, that is, objectively right and wrong answers. *Id.*

303. Brilmayer discusses this concept in the context of talking about decisions that are applied to give rise to consistency, and yet the original decision is not a determinate result of the decisional process. *Id.* at 373. The point is that decision makers respond differently

Evaluating precedent of this type is problematic. One of the problems, of course, is to determine whether or not the differences in outcomes of seemingly similar cases reflect patterns and the evaluation of inputs differently, some that should be considered but are ignored, or others that are considered but should be ignored as a basis for judicial decision making.[304] The impact of indeterminacy in legal rules is to render increasingly important the context of the case, with its unique set of facts and circumstances. For example, when the legal standard is "reasonableness" as in Rule 11's "reasonable" prefiling inquiry requirement, the courts are free to look at a range of facts and circumstances that define what the attorney did and why. It is very difficult to derive patterns and precedent from these types of fact-based inquiries. Distinguishing between cases becomes the norm of legal analysis as the courts attempt to clear ground to develop another case-specific solution. Indeterminate standards thus create a legal context in which it is hard to say the court has erred in determining what the law is; the standard is "reasonableness under the circumstances," and yet it is equally difficult to say prior case law represents binding precedent unless there is a case so "on point" as to acknowledge no material factual distinctions. But this practical indeterminacy, while reflecting a certain degree of acceptable give and take in the institutional decision making, eventually begins to give rise to theoretical determinacy in the form of increasing synchronicity in decisions, which reflects the inevitable intra-institutional force of precedent.[305]

It is difficult to conceive of jurists ignoring decisions on the grounds that they merely survived the abuse of discretion standard on review—they could have come out differently, they are fact sensitive in nature, and, thus, they warrant no precedential consideration. In this context, the logic of discretion, which argues for maintaining flexibility within the normative middle ground defined by the "zone of possibilities," will inevitably give way to "precedent" regardless of the case's logical structure or intended impact. Yet the patterns that slowly emerge from this process reflect deference to the case-specific skills of the trial judge, not legal analysis or even the attempt by the appellate court to cull out acceptable patterns from the data of extant case law.

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to different problems, nothing more insightful than a statement that courts are human too. *Id.* The fact of diversity in the decision making is not itself proof that error does not exist or that there is not a correct decision, it merely reflects what Brilmayer calls "practical indeterminacy." *Id.* at 374.

304. *See generally* Martinez, *supra* note 4 (discussing racial bias).

305. Brilmayer discusses the concept of synchronicity and the process whereby indeterminate decisions give rise to controlling precedent. Brilmayer, *supra* note 83, at 374-75. Professor Brilmayer points out that there is an inevitable institutional move toward the use of "pre-existing legal principles" and the reliance upon prior decisions in the search for consistency that undermines the hands-off attitude of the appellate courts. *Id.* at 375. Is it better then to simply rely upon patterns of decisions to emerge over time regardless of their analytic underpinnings, or is it better to consciously construct case law with an eye to the traditional legal paradigm?

The seemingly value-neutral perspective of the court's procedural pragmatism may in fact reflect normative biases left unchallenged in the adjudicative process, biases against certain types of litigants or litigation or simply biases favoring the pragmatic role of the courts and the aggressive use of sanctions as a managerial tool. The result is the ultimate victory of pragmatism: the increasing reliance upon the *ex ante* function of adjudication and a moving away from the norm of principled decision making.[306]

Rethinking the application of the logic of the close case as a conceptual tool at the trial and appellate level can address some of these problems. As proposed, a court looking at a close case should err on the side of no sanction as a way to ensure the fair and consistent application of the logic of discretion, as a way of recognizing the inequitable result of sanctions in a close case, and as a recommitment to the hortatory or forward-looking view of the law, which requires its principled development as a guide to future conduct. Treating the close case as the easy case, the one that requires less effort, not more, is a misperception of the problem it poses. The close case is not the easy case, it is the hard case, the case that tests the rule of law, and it should be treated as such throughout Rule 11 jurisprudence.

VI. CONCLUSION: THE ADJUDICATIVE NORM OF CONSCIOUS DECISION MAKING—ADDRESSING THE PROBLEMS OF JUDICIAL DISCRETION

The adjudicative norm of conscious decision making is offered as a way to resolve the conundrum of sanctions in a close case, and the close case is offered as a way to define the proper scope and application of judicial discretion in the Rule 11 context. As has been seen, judicial discretion as an inherently self-limiting theory of the court's role in implementing the law emphasizes the need for reasonableness in adjudication as a process involving the "conscious intellectual struggle among several lawful possibilities, with the judge applying objective standards."[307] Thus, fairness and objectivity as judicial norms applicable in the context of the Rule 11 close case require the judge to note expressly the points of consensus and disagreement within the interpretive community when considering the lit-

306. *See* Atiyah, *supra* note 51 (discussing the increasing reliance on the *ex ante* function of adjudication—looking back at decisions as the data base from which to craft the law—rather than adhering to the traditional adjudicative paradigm).

307. Judicial discretion is never absolute; there are limits on the explicit procedures that must be followed as well as the less explicit procedures; the process must be impartial, each party must be treated equally, each should have the opportunity to air their arguments, the decision "must be based on the evidence that comes before" him through this process, his decision must be reasoned and he should explain and justify his decision. Issues of civility and propriety also add to the court's burdens. The court must act with propriety and even-handedness. What is important is not merely to be fair, but to appear fair—"justice must appear to have been done." BARAK, *supra* note 52, at 25-26.

igation at issue.[308] In the Rule 11 context, a close case is a case without a sufficient degree of certainty, agreement, or consensus to mandate a sanction. It is not an easy case, and a portion of the relevant interpretive community could disagree with the sanction decision.[309]

As developed in this Article, the close case thus embodies jurist's experience of their own discretion as consciously self-limiting and limited. The legal discourse of judges grappling with the problem of defining the limits of their discretion, in particular the outer limits of the range of acceptable judicial decisions, routinely focuses on the close case. In this discourse, the close case is a useful way of identifying the point at which the core meaning of the law[310] ceases to provide a regulatory bright line and the court must decide between relatively equal alternatives, each supported by and supporting different aspects of the policies, goals, principals, and values that structure the rule and define the institutional context. The Rule 11 commentary and case law is replete with references to what can be called the easy case, cases categorized as falling within the core meaning of the rule, and its analytic counterpart, the close case, cases that fall within the grey area of the court's discretion.

Numerous Rule 11 commentators take great comfort in the fact that, from their perspective, the major Rule 11 cases have been easy cases.[311] The easy case in judicial parlance is a case with a high degree of consensus, and probable certainty, regarding the outcome. The case really has "only one lawful solution,"[312] and to select any other result, to exercise the court's discretion in any other way, would offend the legal community, or at least result in reversal.[313] It can be argued that it is these easy sanction cases that should form the boundaries of the rule and the court's discretion to sanction.[314]

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308. *See supra* notes 162-85 and accompanying text (discussing the analysis of the reasonable attorney standard under Rule 11).

309. The close case is one way to articulate the problem of certainty in legal decision making—how does a judge decide she has reached the right or best decision? *See supra* part V.

310. *See supra* part V.

311. The Supreme Court has not had to confront the challenge of a close case, or at least it has not yet recognized one.

312. BARAK, *supra* note 52, at 37. Intermediate cases differ from easy cases only in the sense that "both sides appear to have legitimate legal arguments" to support their positions, an appearance that disappears after some analysis is done. *Id.* at 39. The interpretive community agrees that, in these cases, there is sufficient consensus among the parties involved to say that there is only one lawful alternative.

313. *Id.* at 38. The best exemplar of the fact that "discretion" must inhere in the legal process is the confusion of the typical first year law student as they grapple with the fact that a certain rule of law may have different applications in different situations, thus there is no single right answer. Perhaps that is why the issue of judicial discretion as a fact of life does not bother lawyers; they start their professional careers being told there is no single right answer. Equally, Dworkin will find many adherents among the ranks of practicing attorneys who take the position that if all of the facts are known, and the principles and policies properly applied, there should only be one right answer—their answer.

314. *See supra* notes 162-85 and accompanying text (discussing the easy case as defining the sanctions boundary).

The close case is proposed as a way to help the court articulate its role in a sanction decision. In order to avoid the unacceptable variability associated with judicial bias as a potential source of decisional inconsistency, particularly in close cases a judge must be "conscious of the fact that he has discretion, of the meaning of discretion, [and] of the various factors that he must weigh in the context of this discretion."[315] These conscious judicial norms reflect core values of the legal paradigm; a judge should be reasonable and[316] rational, not arbitrary.[317] She should use her common sense,[318] be objective in her considerations,[319] and "weigh relevant considerations related to the legal system, both its normative (law) and institutional dimension."[320] One of these considerations is the norm of predictability, the prohibition against decisional inconsistency that undermines the values outlined above. When analyzed in light of these core adjudicative norms, the close case becomes the "hard case," the case that requires the jurist's best efforts to meet these normative goals and avoid decisional inconsistency.

The discrete adjudicative norms outlined above do not purport to completely define the judicial role, nor do they provide a simple formula for selecting among legitimate legal alternatives. They do focus the jurist on the conundrum of the close case, and by doing so, enable the jurist to use the paradigm of the close case as a decisional guide. "Every judge should consciously formulate for himself a judicial policy for solving the hard cases,"[321] and the close case methodology outlined above is one such approach. Within the paradigm of the close case, judicial discretion is perceived, whether viewed theoretically or pragmatically, as self-limiting and self-conscious. Analyzing the theory of judicial discretion as self-limiting in the close case can help rectify the problem of indeterminacy and provide guidance to a sitting judge determining the sanctionability under Rule 11 of a lawyer's conduct or claim. This approach forces the jurist into the explicitly self-conscious position of having to conceptualize the degree of certainty she must experience before she sanctions by acknowledging that she is looking at a close case or potentially close case. To put the point slightly differently, the theory of judicial discretion as inherently self-limiting when applied to a close case in the Rule 11 context requires the jurist, whether expressly or implicitly, to address the proposition that others in the profession, practicing attorneys or judges, as well as lay members of the larger community which provide a context of legitimacy for the court, might disagree with her decision to sanction. It forces the jurist to scrutinize the decision to sanction in order to avoid an overly idiosyncratic, personalized approach to the definition of sanctionable or

315. BARAK, *supra* note 52, at 135.
316. *Id.* at 115.
317. *Id.* at 118.
318. *Id.* at 116.
319. *Id.* at 124-35.
320. *Id.* at 118.
321. *Id.* at 222.

frivolous litigation.[322]

The importance of the close case as a decisional methodology is to encourage judicial dialogue and discourse in those cases in which the judge acknowledges that she is faced with a number of decisional alternatives, the most important being to sanction or not to sanction, and that her choice will by fiat determine what is lawful in the case.[323] The close case analysis, as the self-conscious articulation of the court that it is approaching the limits of its discretion, is the first step toward engaging the courts in a consciously self-limiting examination of the dimensions of their discretion. This approach to judicial discretion, using the paradigm of the close case to create a decisional buffer zone between the court's pragmatism and principled or formal adjudication, and between merit-based fee shifts and sanctions, favors a decisional policy of exclusion which errs in favor of no sanction in a close case.

One problem with placing this emphasis on the hard or close case is that the fall back, the easy case, can easily be expanded to encompass all such decisions. Some commentary argues that the judiciary in fact engages in the very act of redefining a case as an easy case in the decision-writing process, emphasizing certain facts, drawing characterizations, and, in numerous other ways, arguing for the rightness of their decision by presenting the case as determinate in outcome.[324] There are those who argue that the category of the easy case is itself a misnomer and ignores the complexity of all legal analysis.[325] If this is true, the preceding discussion has even more force. If there are jurists who think it is not true, they are still constrained by the acceptable parameters of legal decision making to articulate the ease with which they reached their decision.

The problem of the easy case, however, does not undermine the ultimate utility of the close case analysis that forms the basis of this Article. This analysis is an effective way for the practitioner to home in on the dimensions of the legal discourse leading up to the sanction decision. If one thing is clear from the recent revisions to Rule 11, it is that a sanction motion must now receive full evidentiary consideration and the litigant must be given an opportunity to engage the court in legal discourse on the issue of acceptable practices and sanctions. In the past, it has been difficult for practitioners to talk with the court about the court's discretion, but since this is the essence of a Rule 11 decision, it should be the core of the legal discourse. The Rule 11 jurisprudence is too unformed to rely on any more routinized or pro forma consideration of the issue of sanctions. Additionally, the Supreme Court's opinion in *Cooter & Gell*

322. *See supra* notes 239-99 and accompanying text.

323. *See* BARAK, *supra* note 52, at 40-41; Rosenberg, *supra* note 66 (discussing the court's limited right to be wrong).

324. *See* REYNOLDS, *supra* note 52.

325. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Sanford Levinson, Comment, *What Do Lawyers Know (and What Do They Do With Their Knowledge)?: Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441 (1985); James W. Nickel, Comment, *Uneasiness About Easy Cases*, 58 S. CAL. L. REV. 477 (1985).

can be read to mandate more careful evaluation of the rule during this developmental stage.

If the rule is to have the long-range positive impact sought by its drafters, this discourse on discretion must become second nature to practitioners and jurists alike. In the Rule 11 context, this should certainly be the norm, since it is through this element of dialogue, the legal discourse of the advocate and jurist, that the standards will develop with proper consideration of the relevant practice context and the potential negative impact of the over-inclusive application of Rule 11.