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## Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard

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# DISCRETION, RULES, AND LAW: CHILD CUSTODY AND THE UMDA'S BEST-INTEREST STANDARD

*Carl E. Schneider\**

*Arbitrary decision, wilful and lawless, is the enemy of liberty; but discretionary judgement is its essential servant.*

— William Letwin<sup>1</sup>

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1. *Policy-Making, Discretionary Judgement, and Liberty*, in *LIVES, LIBERTIES AND THE PUBLIC GOOD: NEW ESSAYS IN POLITICAL THEORY FOR MAURICE CRANSTON* 185, 185 (G. Feaver & F. Rosen eds. 1987).

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## I. INTRODUCTION

### A. *Purposes of the Piece*

One barrier facing any attempt to devise a uniform law for diverse jurisdictions is the occasional — perhaps even frequent — difficulty of writing rules that will accurately guide judges. The law's ordinary solution to that difficulty is to give judges some measure of discretion. This article inquires into the nature and legitimacy of that technique. It does so by analyzing a particularly controversial provision of the Uniform Marriage and Divorce Act (UMDA).<sup>2</sup> Section 402 of that Act states: "The court shall determine custody in accordance with the best interest of the child." It then instructs the court to "consider all relevant factors," including the parents' wishes, the child's wishes, the child's relationships with the significant people in his life, the child's "adjustment to his home, school, and community," and "the mental and physical health of all individuals involved."

In choosing the "best-interest" standard, the UMDA was, like most uniform statutes and model codes, a "barometer of enlightened legal opinion."<sup>3</sup> Although the UMDA has not been widely adopted, its child custody provisions reflected, and to an important degree continues to reflect, standard American law. In recent years, however, a phalanx of family law's most distinguished scholars has attacked the discretionary quality of the best-interest standard. In this article, I will scrutinize those criticisms and investigate the tension between discretion and rules in child custody disputes between private citizens.<sup>4</sup>

2. UNIF. MARRIAGE AND DIVORCE ACT (1974).

3. Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252, 292 (1978).

4. That is, I will exclude child custody cases in which the government has brought an action charging parents with abuse or neglect or an action seeking to terminate parental rights. I will also exclude any real discussion of whether alternatives to litigation might be devised that would take custody disputes out of the courts altogether. For what it is worth, I doubt that such a goal is likely to be satisfactorily achieved in the foreseeable future. As Professor Mnookin writes of one such alternative, "existing evidence on 'conciliation courts' should caution against a view of mediation as a bold and heroic scheme destined to solve most of the custody disputes adjudicated

In doing so, I hope to contribute to several current discussions. The first such discussion is the one to which this volume so notably contributes — the consideration of the role and capacity of uniform laws in a large and diverse federal system. Second, I want to comment on the present controversy over the underlying substantive question — of the standard to be used in deciding child custody cases. Third, I wish to say something about the less noticed but still consequential debate over the value of discretionary standards in family law. Finally, I would like to add to the large-scale and long-standing inquiry into the tension between rules and discretion in law generally.

In a modern society, the law regulates the complex behavior of millions of people. To do this efficiently, to do this at all, it must use broadly applicable rules. Yet such rules are bound to be incomplete, to be ambiguous, to fail in some cases, to be unfair in others. Some of these failures can be ameliorated by according discretion to the administrators and judges who apply the rules. Yet doing so dilutes the advantages of rules and spawns the risks discretion is heir to. Working out the proper balance between rules and discretion is thus both necessary and perplexing in every area of law.

Scholars, lawyers, and judges are hardly unaware of these problems. Yet discussion of them has been oddly truncated, since they tend to be considered only obliquely, as a by-product of inquiries either into the content of narrowly specific areas of law or into the deepest nature of law and rules. The scholars who have most directly analyzed discretion fall primarily into two groups. The first group includes those — principally sociologists<sup>5</sup> and political scientists, but also some lawyers<sup>6</sup> — who examine discretionary authority and ways of controlling discretionary decisions in various bureaucratic contexts (most extensively the police). The second group comprises the legal philosophers who have for decades if not centuries asked, “Do judges

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today.” Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 289. I find my doubts well expressed in Teitelbaum & DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093 (1988).

5. For a particularly fine example of a sociological study of discretion, one uncommonly self-conscious about the systematic issues the tension between discretion and rules raises, see Lempert, *Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board*, in THE USES OF DISCRETION (K. Hawkins ed.) (forthcoming). This paper also contains helpful citations to the social science literature on discretion.

6. See generally Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990). Professor Yablon observes, “[D]iscretion has . . . been a major theme in legal proceduralist writing, which examines decisionmaking of public officials in specific institutional contexts.” *Id.* at 234. He notes that much of that writing deals with administrative law and civil and criminal procedure and that it often attempts “to determine the appropriate degree of discretion to exercise in particular decisions such as sentencing, arrest, or granting injunctions.” *Id.*

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?"<sup>7</sup> The former group thus considers quite context-specific questions, the latter quite abstract questions.

I do not myself pretend to offer here a full-scale systematic analysis of the discretion problem. I too approach the problem in the context of a specific substantive issue. I do, however, hope to use that substantive issue to take a step toward thinking more consciously, carefully, and completely about discretion in what might be thought of as an intermediate mode. That is, I propose to talk about some of the general characteristics of discretion, but not to enter in any full-scale way the jurisprudential debate about the nature of law.

Family law specially invites an inquiry into the problem of discretion, since the problem is as acute there as anywhere in the law. Family law tries to regulate people in the most complex, most emotional, most mysterious, most individual, most personal, most idiosyncratic of realms. It is absurdly difficult to write rules of conduct for such an area that are clear, just, and effective. The history of family law is the history of attempts to solve this problem, and family law lives in a tension between according officials discretion to make decisions and limiting that discretion by requiring them to follow rules. And perhaps nowhere in family law has discretion been so richly controverted as in the debates over what standard to use in settling disputes over the custody of children.

My disquisition on discretion and the best-interest standard will take the following form. I will set the stage by surveying the recent criticisms of that standard. I will then argue that discretion pervades American law more fully than we tend to suppose and that this pervasiveness indicates that the reasons for discretion run deep and wide. Next, I will review the advantages and disadvantages of rules and of discretion. This review will suggest that the advantages and disadvantages of both are considerable and complexly interrelated, and therefore that simple choices between rules and discretion are likely to be rare. I will then catalog the ways discretion is commonly constrained. This catalog will reveal that those ways are numerous and telling and that discretion is therefore often less unfettered and menacing than it initially appears. I will then use the best-interest principle as a case study. I will argue that no easy choices are available in thinking about custody disputes, that wholeheartedly rejecting discretion is certainly

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7. Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 365 (1975).

not such a choice, and that a motley mix of discretion, guidelines, and rules may be the best we can do. I will confirm that argument by examining the critics' alternatives to the best-interest principle, alternatives which on inspection seem satisfactory neither on the critics' own terms nor in terms of the complexity of custody disputes. To put the point rather differently, rules probably cannot wholly or perhaps even largely replace discretion in the law of child custody.

The conclusion I draw from these arguments is that both a purely discretionary and a purely rule-based system would have intolerable drawbacks. I will therefore end the article by searching for ways of securing the advantages of both discretion and rules while reducing as far as possible the disadvantages of each. I doubt that a stable set of rules and procedures can be devised that will self-evidently accomplish those ends. I will, however, urge that legislatures and courts can work their way to a *via media* between rules and discretion by looking for patterns of cases for which rules might be written and accepting the desirability of judicial discretion where no such patterns appear. In other words, I hope for a way of deriving rules from discretion, for developing a common law for custody.

### B. *The Critics of the Best-Interest Principle*

In the law of child custody, the debate over the tension between rules and discretion has centered around the best-interest standard. The modal jurisdiction requires courts to decide custody disputes in the way that serves the best interests of the child. Sometimes the jurisdiction provides a list of factors that ought to be noticed or presumptions that ought to be heeded in deciphering the child's best interests. As the example of the UMDA suggests, the factors typically require courts to consider the parents' wishes, the child's wishes, the child's relationship with the people and institutions around him, and the mental and physical health of everyone involved.<sup>8</sup> The presumptions have included the now formally rejected tender-years presumption (the principle that a fit mother ought generally to have custody of her young children), the primary-caretaker presumption, and a presumption in favor of joint custody.

In recent years, however, the best-interest standard has been widely and vehemently attacked, essentially on the grounds that it is too little a rule and too much an award of discretion. My purpose here is to evaluate those criticisms. I will therefore begin by briefly surveying some of the most prominent recent examples of them.

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8. These are the criteria listed in § 402 of the Uniform Marriage and Divorce Act.

Among the most influential, fair-minded, and incisive of the critics has been Robert H. Mnookin.<sup>9</sup> His magisterial article was written to “expose the inherent indeterminacy of the best-interests standard.”<sup>10</sup> That indeterminacy has three sources. First, to make a decision, a judge needs a “set of values” to guide him in deciding what is generally in the best interest of children.<sup>11</sup> In other words, he needs to know whether to look at a child’s long-term or short-term interests, whether to prefer happiness to virtue, and so on. However, “the custody statutes do not themselves give content or relative weights to the pertinent values.”<sup>12</sup> And “our society today lacks any clear-cut consensus about the values to be used in determining what is ‘best.’”<sup>13</sup>

Second, even if a judge knew what kind of person to aim for, he would still need a theory that would tell him what child-rearing practices would produce that kind of person. Unfortunately, social science provides “no reliable guide for predictions about what is likely to happen to a particular child,”<sup>14</sup> and society provides no “clear consensus as to the best child-rearing strategies.”<sup>15</sup> Third, even if a judge had a reliable theory of child development, he would need masses of precise information about the child and the child’s parents to apply that theory to. But often “a judge lacks adequate information about even the most rudimentary aspects of a child’s life with his parents . . . .”<sup>16</sup> In sum, “the determination of what is ‘best’ or ‘least detrimental’ for a particular child is usually indeterminate and speculative.”<sup>17</sup> And “[b]ecause what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes.”<sup>18</sup>

Like his lucidly argued criticism of the indeterminacy of the best-interest standard, Professor Mnookin’s treatment of alternatives to it is measured and complex. While he finds merit in “intermediate premises or rules”<sup>19</sup> that might more precisely guide judicial decisions, he also sees that such standards have their own costs and that we may

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9. Mnookin, *supra* note 4.

10. *Id.* at 256.

11. *Id.* at 260.

12. *Id.* at 260.

13. *Id.* at 229.

14. *Id.* at 258-59.

15. *Id.* at 261.

16. *Id.* at 257.

17. *Id.* at 229.

18. *Id.* at 230.

19. *Id.* at 262.

fail to identify any such standards that would correctly resolve any substantial proportion of custody disputes.

In an intelligent, illuminating, and imposing study of the law and social science of child custody, David L. Chambers acknowledges that the best-interest standard offers "the important virtues of flexibility and adaptability."<sup>20</sup> However, he too criticizes "statutes that direct judges to place a child where her interests or welfare will be best served without the guidance of any rule creating a presumption for, or placing a burden of proof on, either party."<sup>21</sup> And he writes that "[d]ecisions reached under open and flexible standards . . . are often regarded as arbitrary or overreaching."<sup>22</sup> He sees "two critical problems. The first is that . . . legislatures have failed to convey a collective social judgment about the right values" to be used in custody decisions.<sup>23</sup> The other is that "[r]egardless of what values judges apply, they do not obtain, and perhaps can never routinely obtain, reliable information about the child and the parents, and thus they cannot make sensible predictions or choices."<sup>24</sup>

More specifically, Professor Chambers argues that "[t]he concept of 'children's best interests,' unlike such concepts as distance or mass, has no objective content."<sup>25</sup> Ordinarily, we expect parents to decide what is in a child's best interests, but of course that choice is barred in custody disputes, since the parents disagree. Consulting a "state-prescribed view of children's interests" is unsatisfactory, since it is not "possible to develop a state-prescribed view of children's interests that does not mindlessly refer to the majority's (or the judge's) preferences."<sup>26</sup>

Professor Chambers does, however, see some merit in looking to "the child's stated view of her own interests . . . as the appropriate basis for resolving disputes over custody."<sup>27</sup> Where the child cannot state such a view, the judge should choose the placement that most children "in comparable positions experience more positively, now and in hindsight. . . . This approach recognizes that each child has a unique set of preferences and possibilities that are not fully knowable, but tries nonetheless to lure the judge into looking at the possible

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20. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984).

21. *Id.* at 479.

22. *Id.* at 481.

23. *Id.* at 481-82.

24. *Id.* at 482.

25. *Id.* at 488.

26. *Id.* at 491.

27. *Id.* at 490.



placements through the eyes of a child.”<sup>28</sup> Professor Chambers believes his approach “gives judges an understandable, if difficult, question to pose to themselves . . . .”<sup>29</sup> On the other hand, he acknowledges, judges would still have difficulties acquiring information on which to base their judgments, and they might still be unable to find one parent preferable to the other.

Mary Ann Glendon has also criticized the indeterminacy of the best-interest standard. She concludes that it

is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge or other third party. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself.<sup>30</sup>

In a characteristically thoughtful and sensible article which I can summarize only too briefly, Professor Glendon concludes that some “automatic rule,” like the primary-caretaker presumption, can go “far toward eliminating that cloud of uncertainty that [hangs] over the process of divorce negotiations” and toward reducing the volume of custody litigation.<sup>31</sup>

Robert A. Burt has written one the most vociferous criticisms of the best-interest test.<sup>32</sup> He states:

The real question is whether any third party, judge or expert can identify truly important differences between [the father and the mother] regarding child care capacities and whether this identification of differences is possible in the overheated context of a divorce custody dispute. I believe that the attempt to determine which parent is the better child custodian depends on such fine-grained distinctions as to make this, in the context of a custody dispute, a choice between two essentially indistinguishable alternatives, between Tweedle-Dee and Tweedle-Dum.<sup>33</sup>

Professor Burt would apply “one basic criterion . . . to the legal system: that is, ‘To what extent do the legal rules fan rather than dampen the dispute?’ ”<sup>34</sup> He argues that, in light of this criterion, “automatic rules are preferable to the current legal regime that depends on highly discretionary case-by-case adjudication supposedly based on the ‘indi-

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28. *Id.* at 494.

29. *Id.* at 495.

30. Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 *TUL. L. REV.* 1165, 1181 (1986).

31. *Id.* at 1182.

32. Burt, *Experts, Custody Disputes, & Legal Fantasies*, 14 *PSYCHIATRIC HOSP.* 140 (1983).

33. *Id.* at 141.

34. *Id.*

vidual merits' of each case."<sup>35</sup> Professor Burt has in mind "a rule [like the tender-years presumption] that provides a clear-cut end to the dispute on some basis that is known in advance and is capable of automatic application."<sup>36</sup>

Where disagreements arise after divorce over visitation, Professor Burt believes "it is a good idea for a third party with behavioral expertise to have some participatory role in the dispute, but . . . this third party should not have the force of law available to impose his judgment on these disputing parties . . ."<sup>37</sup> The only "force of law" available to that third party would be in the form of an order to the parties to appear before the therapist. "If the parties do not follow that order, then they can be telephoned and asked why they failed to appear. . . . The telephone call can be an immensely effective instrument. It gives the therapist an opening to approach the parties."<sup>38</sup>

Professor Burt concludes that "[t]alk is the key in . . . all aspects of these custody disputes . . ."<sup>39</sup> However,

[t]he legal system currently conspires with the warring parties to shut off the possibility of . . . real talk by permitting a third party . . . to impose a solution and thereby supposedly to have the last word in the dispute. In my view, designing some scheme of automatically applicable rules would have the effect of showing the warring parents that unless they can reach some accommodation between themselves, neither has any hope of persuading some third party that one or the other is the better parent and deserves to win this no-win battle. An automatic rule would settle the dispute, to be sure, but without any pointing of blame or approbation. . . . Thus an incentive for custody battles would be removed.<sup>40</sup>

Finally, Jon Elster, an eminent political scientist, has also assailed the best-interest standard.<sup>41</sup> He argues that "there usually is no rational basis for preferring one parent over another."<sup>42</sup> He presents a number of "arguments against the principle that the best interest of the child ought to be the sole, main, or first and paramount consideration in custody decisions."<sup>43</sup> He suggests that

in any decision problem, a determinate answer will in general require the following conditions to be satisfied:

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35. *Id.* at 142.

36. *Id.*

37. *Id.* at 143.

38. *Id.* at 144.

39. *Id.*

40. *Id.*

41. Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

42. *Id.* at 2.

43. *Id.* at 11.

- (1) all the options must be known;
- (2) all the possible outcomes of each option must be known;
- (3) the probabilities of each outcome must be known;
- (4) the value attached to each outcome must be known.<sup>44</sup>

Following Professor Mnookin, Professor Elster contends that in child custody decisions, the only one of these answers we know is the first. There is a virtually infinite and therefore unknowable set of possible outcomes of each option (although Professor Elster acknowledges that a judge "is justified in fixing her attention on a small number of things that plausibly might happen").<sup>45</sup> And there is, Professor Elster seems to say, no way to state the probability of each outcome.

Nor does Professor Elster see a satisfactory way of attaching values to each outcome, since children are too young to formulate their own preferences adequately, and a judge making a decision on behalf of a child "would have to add some preferences of her own" and would "have to engage in morally objectionable paternalism."<sup>46</sup> Professor Elster is most attracted to the principle of seeking "to achieve the more formal goal of protecting the child's opportunity and ability to make choices. On this view, children should be allowed, as far as possible, to reach maturity with a maximum of potentialities and the autonomy needed to choose which of them to develop."<sup>47</sup> However, Professor Elster believes that "[i]n most cases, this liberal, pluralist criterion will not yield a determinate preference for one parent," although he does believe it can "serve to exclude some parents as unfit."<sup>48</sup> Professor Elster concludes "that the best interest principle is usually indeterminate when both parents pass the threshold of absolute fitness."<sup>49</sup>

Professor Elster also argues that, "[b]y virtue of its finely tuned character, the [best-interest] principle invites protracted litigation,"<sup>50</sup> to the detriment of the child:

The best interest principle increases costs to children in two ways. First, more cases will be brought than if there existed a strong presumption rule or an automatic decision procedure because both parties may persuade themselves that they stand a chance of getting custody. Second, for any given case that is brought, the legal process will be more protracted since it is not simply a case of deciding whether one parent is

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44. *Id.* at 12 (footnote omitted).

45. *Id.* at 13.

46. *Id.* at 14.

47. *Id.* at 14-15.

48. *Id.* at 15.

49. *Id.* at 16.

50. *Id.* at 24.

unfit.<sup>51</sup>

Professor Elster reasons that, were there an automatic maternal preference, all children who should be put with their mother would be put with their mother, all children who should be put with their father but who would be best off spared litigation would benefit, and only children who should be with their father despite the costs of litigation would be disadvantaged by the preference. Professor Elster implies that the size of the third category would be small and says that, in any event,

intellectual honesty should force one to recognize that there is a great deal of uncertainty surrounding the assessment of degrees of fitness, whereas the damage done to children by litigation is hardly open to doubt. Against the conjectural long-term effects on the child of being with the mother or the father, one must set the certain short-term pain and damage created by the custody dispute. If it is *often* the case that the court can say *with high probability* that the benefit for the child from being with one parent rather than the other is *substantially greater* than the pain created by litigation, fine-tuning may be justified. But . . . the ability of courts to make such judgments is not great.<sup>52</sup>

My summary of all these criticisms necessarily simplifies the critics' arguments about the best-interest standard and necessarily omits the numerous and notable other points about custody law they make. My summary obscures the fact that the work of several of the critics is informed, thoughtful, complex, and nuanced. But it should suffice to establish that there is a weighty body of opinion (of which the critics I have listed are only the most prominent proponents) that argues in various ways and for various reasons that the best-interest standard confides too much to the discretion of judges and that rules of some description should supplement or supplant it.

In what follows, I will not argue that these critics are wholly wrong. I do not think they are. They may even be right about how custody law ought to be written. But I do believe that the matter of discretion in custody decisions is more complex than the critics generally think and that the relationship between discretion and rules is more complex than is often realized. What I want to do, then, is to try to explore some of those complexities. I hope to reveal something about the substance of custody law, but I will make no elaborate proposals either about it or about the optimal combination of discretion and rules in it. I also hope to suggest something about how the problem of discretion ought generally be approached, but I will offer no

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51. *Id.* at 24.

52. *Id.* at 25-26.

theory of discretion. My task is to identify complexity, not yet to resolve it.

Before we begin, two words of caution. As I have said, I see virtue in both rules and discretion in custody law, and I look for ways of enjoying the advantages of both. I will, however, spend more energy in defense of discretion than of rules. The critics of the best-interest standard have built so thorough a case against discretion and for rules that I need expend relatively little time restating it but do need to show its weaknesses. Ultimately, however, I wish to promote a more temperate, complex, and perplexed view both of the conflict between discretion and rules and of the standard to be used in custody disputes.

My second word of caution is that, in criticizing their views, I will treat the critics almost as an undifferentiated mass. This is regrettable, since the critics differ on a number of substantive points and in the sophistication, subtlety, and sagacity of their views on discretion. But while I regret ignoring those differences, I yearn to keep an already long story decently short.

### C. *Some Working Definitions*

Before we begin, we need some working definitions of our terms. These definitions must be very rough ideal types, since part of my point will be that there is rarely such a thing as a pure rule or pure discretion and that most cases are decided through a tangled web of rules and discretion. For our purposes, then, the ideal type of a "rule" is an authoritative, mandatory, binding, specific, and precise direction to a judge that instructs him how to decide a case or resolve a legal issue.<sup>53</sup> And for our purposes, discretion describes those "cases as to which a judge, who has consulted all relevant legal materials, is left free by the law to decide one way or another."<sup>54</sup>

On the continuum between rules and discretion lie a number of intermediate categories. Some of these can be derived from the work of Ronald Dworkin. For instance, he calls "a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . ."<sup>55</sup> He calls "a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness

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53. I am drawing here on F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (forthcoming from Oxford Univ. Press, Sept. 1991).

54. Greenawalt, *supra* note 7, at 364-65.

55. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

or some other dimension of morality.”<sup>56</sup> He distinguishes policies and principles from rules: “Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.”<sup>57</sup> Policies and principles, on the other hand, “do not set out legal consequences that follow automatically when the conditions provided are met.”<sup>58</sup> Policies and principles, then, can be thought of as less directive and definite rules.

There are also more directive versions of discretion. Professor Dworkin calls our working definition the “strong” form of discretion. But he also remarks two “weak” forms of discretion: “Sometimes we use ‘discretion’ in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment.”<sup>59</sup> The other weak sense refers to occasions when “some official has final authority to make a decision and cannot be reviewed and reversed by any other official.”<sup>60</sup>

It will also be helpful to speak of two kinds of discretion — discretion to make rules and discretion to find facts and interpret them in terms of “the law.” In American law, the former kind of discretion generally is formally and ultimately allotted to legislatures, but in many areas of law American courts are a primary source of rules (even though they must yield to any assertion of legislative authority) and in many other areas they provide interstitial rules and clarify legislative rules. The latter kind of discretion we might for convenience loosely call discretion to decide cases. In America, this kind of discretion is primarily exercised by courts and administrative agencies. The distinction between discretion to write rules and discretion to decide cases can obscure the large blurred area between the two categories in which judges create rules in the process of finding facts and applying the law. Nevertheless, the distinction is analytically helpful, and it reminds us that when lawyers think about the problem of discretion, their paradigmatic question is how legislatures can write rules so as to limit the discretion of courts to decide cases. It also reminds us that judges deciding custody cases are often exercising both kinds of discretion and that critics of the best-interest principle have been concerned with both kinds.

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56. *Id.*

57. *Id.* at 24.

58. *Id.* at 25.

59. *Id.* at 31.

60. *Id.* at 32.

## II. DISCRETION IN CONTEXT

Most lawyers have pledged their faith to the concept of rules and to the doctrine of due process; correspondingly, they are dubious about discretion, which they see as the negation of rules and an impediment to due process. The critics of the best-interest test draw on that faith and those doubts. They seek to show that custody litigation is unduly discretionary by suggesting, at various levels of explicitness, that the best-interest principle accords much more discretion to judges than American law generally countenances. The view that American law generally discountenances discretion is in fact widely held. As Dean Teitelbaum writes in an illuminating discussion,

discretion is formally considered deviant. American sociology of law, which has largely devoted itself to discovering the operation of discretion at all levels of the justice system, typically draws a distinction between legal norms ("legal ideals") and the conduct of individuals and groups whose behavior should be governed by those norms ("legal reality"). Where a "gap" between theoretical expectations about the operation of legal norms and observed behavior is observed, it is ordinarily interpreted from the perspective of a regime of rules: as a failure in statutory formulation or a failure to comply with the legal norm. Thus, for example, the significance of observed police behavior is often said to lie in its nonconformity with what we suppose legal rules to require of policemen, which should be remedied either by clarifying the law or by reforming police behavior.<sup>61</sup>

In this section, I will propose that discretion plays a larger, richer part in the American legal system than the critics of the best-interest principle tend to credit and than we sometimes unreflectively assume. In other words, I want to take a first step toward domesticating discretion by suggesting how broad, how commonplace, how established the role of discretion in American law is. Less tendentiously, I want to place the discretion exercised in child custody decisions in a larger legal context and to provide some materials for evaluating it.

### A. *Discretion in Family Law*

We begin our attempt to put discretion in context by looking at its use in family law. Most of the critics of the best-interest standard are students of family law. This may have something to do with their distrust of judicial discretion. If we look at family law as an isolated field, we may indeed feel that there is something unusual and thus alarming about discretion. As I said earlier, discretion has been a cen-

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61. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351, 355.

tral and troublesome feature of that field, so much so that the field's story almost seems a ceaseless ebb and flow of rules and discretion.

Seen from some angles, family law might now seem to be moving away from discretion toward rules. In the law of spouse abuse, for instance, policies have been widely urged and increasingly adopted that require police to make arrests whenever they have a certain level of confidence that an assault has occurred and that require prosecutors to prosecute whenever their evidence meets a certain standard of proof. These policies are intended to deprive police and prosecutors (and sometimes even abused spouses) of discretion to decide whether to arrest or prosecute. The law of child abuse and neglect has moved in similar ways: many people now believe that that law has confided too great a discretion in administrators and judges to remove children from their homes, and attempts have now been instituted to describe in more precise and extensive detail just what circumstances justify such intervention.<sup>62</sup> The feeling (also now common) that children have too often been left unprotected has also inspired attempts to limit discretion, as by laws requiring a wide range of people to report suspected instances of abuse and requiring authorities to record and respond to those reports.

These are not the only examples of family law's apparently growing distrust of discretion. Historically, assessing child support was essentially left to judicial discretion, and enforcing awards was largely left to the discretion of the obligee and the court. Dissatisfaction with the results of this allocation of tasks has helped lead to guidelines that substitute rules for discretion in setting amounts and to procedures that substitute automatic mechanisms for discretion in collecting support. And the movement from discretion to rules can be seen on a yet grander scale. The shift to no-fault divorce represents in part a preference for a bright-line rule making divorce universally available rather than for letting courts decide case by case in a discretionary way whether a divorce is proper.

Nevertheless, an opposite movement from rules to discretion characterizes other areas of family law. The history of Anglo-American marital property law may be described as a struggle between, on one hand, the desire to write simple, clear rules that give crystalline directions to both couples and courts and, on the other hand, the desire to cope with the cacophony of circumstances in which marital property

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62. For a particularly vivid example of such an attempt by another of family law's model statutes, see JUVENILE JUSTICE STANDARDS PROJECT, INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO ABUSE AND NEGLECT (1981).



cases present themselves and the demands of justice in cases that escape anticipated patterns. For years, both common law and community property systems generated ever more baroque rules to try to accommodate the latter interest while still serving the former. With the present popularity of "equitable distribution" systems, the latter interest has, for the nonce, won preeminence. Even though such systems sometimes use presumptions (for example, a presumption in favor of an equal division of assets), their thrust is to allow courts greater discretion than their more rule-bound predecessors.

The recent expansion of the domain of marital contracts has also expanded the scope of discretion in family law. Contracts between fiancés or spouses were once thought incompatible with the idea of marriage and open to abuse. Contract's incompatibility with marriage has been increasingly doubted, but the fear that such contracts are open to abuse has not vanished. Thus, while marital contracts are increasingly permitted, courts have felt obliged to evaluate both the substantive and procedural fairness of those contracts, an enterprise that calls abundantly on judicial discretion.

In some jurisdictions, the principle of *Marvin v. Marvin*,<sup>63</sup> which allows unmarried cohabitants to arrange their financial affairs contractually, has opened an even wider door for judicial discretion. *Marvin* not only instructs courts to enforce express contracts and thus to exercise the discretion implicit in interpretation. It also permits them to undertake the highly discretionary enterprises of enforcing contracts implied in fact and contracts implied in law by deploying a battery of equitable remedies.

It might also be said that we are moving away from rules toward discretion in defining "family." Earlier law essentially held that a family is a unit formed either by marriage or by (particularly close) blood relation. The tendency of the law is now toward greater judicial discretion in deciding what a family is, discretion courts have sometimes exercised by defining as a family what they take to be the functional equivalents of traditional families. The *Marvin* doctrine, for instance, can be understood in those terms, as can *Braschi v. Stahl Associates Co.*<sup>64</sup> and *Moore v. City of East Cleveland.*<sup>65</sup> Similarly, it might be said that the meaning of "parent" has become more discre-

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63. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

64. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). *Braschi* held that a homosexual couple could be a "family" within the meaning of the New York City Rent and Eviction Regulations.

65. 431 U.S. 494 (1977). *Moore* held that a grandmother living with a son and two grandchildren, one of whom was not the child of the son, were a "family" for purposes of a constitutional challenge to a zoning ordinance.

tionary (or at least has become uncertain enough that it has to be defined by courts and legislatures). Courts are increasingly inclined, for example, to treat people other than natural parents (stepparents, for instance) as plausible contenders for custody, and scientific ingenuity has compelled courts and legislators to identify the parents of children produced through artificial insemination, *in vitro* fertilization, and surrogate mother contracts.

This review of discretion in family law confirms that the role of discretion has long been at the center of many controversies and reforms. But that review does not, I think, make a case that discretion has proved inappropriate to family law. On the contrary, if anything, it suggests that discretion has regularly shown itself necessary in the kind of decisions family law involves. It reveals that in many of the field's most central parts some of the most basic decisions are presently made in a highly discretionary way. And within the last several decades, that statement might reasonably have been applied to virtually every other basic area of family law. In short, this review suggests that attempts to escape from discretion are abandoned with telling and discouraging regularity.

Nor is it clear that whatever partial and temporary movement there may be away from discretionary authority is actually driven by distrust of discretion. Family law has recently undergone a transformation whose scope is broad and whose causes are numerous.<sup>66</sup> Since some of its major areas have seen an increase in discretion while others have seen a decrease, I suspect that the driving force often has not been so much a distrust of discretion as a dissatisfaction with some specific results that courts have been reaching and a desire to alter those results by whatever method comes most easily to hand.<sup>67</sup>

### B. *The Ubiquity of Discretion*

In this section, I will try to demonstrate the ubiquity of discretion, to show how commonplace it is, to show how domesticated it has become. I will do so not by continuing to examine individual subjects of legal regulation, but rather by surveying legal institutions to see where discretion is exercised.

Although we rarely notice it, the most imposing allocation of discretion in our system is to the government from "the people." That

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66. See Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND THE FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

67. For a helpful study of the law's tendency to alternate between crystalline rules and muddy discretion, see Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

allocation is phrased in the broadest and haziest terms, if it is phrased at all. It is, within constitutional bounds, an award of plenary authority. Although elected officials are in a sense "instructed" by the voters at elections, and although they may consult public opinion polls and other less systematic expressions of constituent opinion, those instructions and that information are obscure and intermittent guides. We do not even agree as to whether an official is elected simply to reflect his constituents' views or rather to make the best decisions he can.

Of course, a principal part of the people's delegation of discretion to the government is specifically accorded to the legislature. And, of course, the legislature principally exercises that discretion in making laws. But it also commonly channels great rivers of discretion to administrative agencies. Sometimes this is discretion to make rules, as is memorialized by acres of trees that died so that the C.F.R. might live. Sometimes it is discretion to adjudicate claims against the government and disputes among citizens, as the Social Security Administration, the Veterans Administration, and the National Labor Relations Board, among many others, daily show.

The executive branch acquires its own oceans of discretion as its share of the people's grant of authority. Part of that discretion is spent participating in legislating. But discretion is also wielded in the ordinary process of administering the government and enforcing laws. In the sociological literature, the police exemplify this kind of discretion. A brief look at the problem of discretion in police departments should help us appreciate the scope of discretion exercised at all levels of an administrative agency.

Police-agency discretion begins at the highest level. For example, police administrators have considerable discretion in setting basic policy, as when they decide whether their department should be proactive or reactive. Less grandly, they have great scope to decide how the department should be organized and run day to day. But police commissioners and senior officials do not monopolize police discretion: individual police officers inescapably have substantial discretion in doing their work. (Indeed, one might say that a primary constraint on administrative discretion is the discretion police officers exercise.) As Professor Reiss notes,

Although police departments are organised around a centralised command and control where subordinates must follow orders, the bulk of police officers are dispersed in field assignments. . . . Most police officers work most of the time without direct supervision. Their discretionary decisions, thus, are not generally open to review by superiors. . . . Even when evidence of activity is submitted, such as in an arrest report, the capacity to review discretion is limited. There is no simple way to deter-

mine the facts in police encounters with citizens, the alternatives available to make choices, and their behaviour.<sup>68</sup>

Individual officers exercise this kind of discretion where they are in principle most strictly constrained by procedural regulations: "[I]n practice, when enforcing the law, the police exercise enormous discretion to arrest. Field observation studies of police decisions to arrest demonstrate this point: in one such study, the police released roughly one half of the persons they suspected of committing crimes . . . ."<sup>69</sup> Nor is police authority or discretion limited to enforcing the law. Police have "discretion in performing a variety of services. These include intervention in conflicts between members of families, landlords and tenants, and employers and employees, as well as assistance in sickness, in tracing missing persons, and in dealing with the plight of animals or hazardous situations."<sup>70</sup>

Controlling administrative discretion is a familiar legal problem. Administrative law is centrally concerned with devising rules that allow governmental agencies the leeway they need for doing their work while preventing them from abusing the discretion that leeway gives them. The law of police procedure, for example, has been constitutionalized in the hope that through such doctrines as the *Miranda* rule and the principle that illegally seized evidence may not be used in court the discretion of police departments and officers can be checked.

Nevertheless, it is the discretion exercised in the judicial branch with which lawyers are traditionally most familiar and concerned. As we have already seen, judges possess notable discretion in various kinds of lawmaking. For instance, many common law substantive areas are presumptively confided to the courts, sometimes so much so that it is the legislature, not the judiciary, which acts interstitially. And courts often acquire considerable discretionary powers even in areas where the legislature is the prime mover. As Professor Chayes observes: "Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. . . . [T]he result is to leave a wide measure of discretion to the judicial delegate. The corrective power of Congress is also stringently limited in practice."<sup>71</sup>

A particularly vivid example is the Sherman Antitrust Act.<sup>72</sup> It contains two key provisions. The first prohibits "[e]very contract,

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68. Reiss, *Discretionary Justice in the United States*, 2 INTL. J. CRIMINOLOGY & PENOLOGY 181, 190-91 (1974) (citation omitted).

69. *Id.* at 191.

70. *Id.* at 186.

71. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976).

72. Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1988).

combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”<sup>73</sup> The second makes it illegal to “monopolize or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several states.”<sup>74</sup> The meaning of these Delphic commands was left to the discretion of courts (and the executive) to supply.

Of course, judges also exercise enviable discretion in factfinding, especially when there is no jury. Further, judges exercise (along with juries) a generous discretion in “law application” — that vast borderland between “fact” and “law” that is created by doctrines like the “reasonable man” standard in torts or the “rule of reason” in antitrust law. Finally, considerable discretion is confided to judges in some kinds of remedy-giving. For example, both the decision to grant injunctive relief and the shape of injunctive relief are highly discretionary. Since an injunction can attempt to regulate the relations of the parties in the future in some detail and since the role of injunctive relief has greatly expanded in recent years, this source of discretion can be potent indeed.

But judicial discretion is exercised in other contexts than trials. For instance, judges have wide discretion in what might be called semi-administrative matters. In the criminal justice system, for instance, they have authority to “(1) detain defendants, grant bail or release them on their own recognisance; (2) dismiss matters or bind over at preliminary hearing; (3) accept pleas of guilty or to find guilty or not guilty in bench trials; (4) rule on matters of substance and procedure during trial proceedings; (5) decide the fate of defendants found guilty . . . .”<sup>75</sup>

Nor are judges the only actors in the judicial branch to make discretionary decisions. Juries not only make some of the same kinds of discretionary decisions judges do, but they are effectively less subject to review when they make them. Lawyers too are endowed with significant kinds of discretion. Most prominently, prosecutors exercise discretion in such matters as deciding whether to file or drop charges and plea bargaining. But defense counsel also commonly have discretion in preparing the defense, in conducting the trial, in plea bargaining, and in advising their clients. Similarly, lawyers in civil suits generally have broad leeway in framing and responding to complaints, conducting the trial, and negotiating settlements. They have particu-

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73. Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1988).

74. Sherman Anti-Trust Act § 2, 15 U.S.C. § 2 (1988).

75. Reiss, *supra* note 68, at 197-98. However, the movement toward fixed sentencing standards seeks to curb this last kind of discretion.

larly conspicuous discretion in pretrial proceedings, especially discovery. While ultimately the court can supervise discovery, in practice that supervision is loose and allows lawyers great latitude. The lawyer's discretion in all these respects is, of course, limited by the lawyer's responsibility to the client. But many of these areas of discretion (like the conduct of the trial) are generally regarded (at least by lawyers) as within the special purview of the lawyer, and in many and perhaps most areas the professional expertise will often assure the lawyer noteworthy discretionary authority.

Finally, actors outside the formal legal system exercise discretion in ways that affect the system. For instance, the law has cooperated in making semi-legal institutions of such enterprises as arbitration, mediation, and conciliation, all of which accord a third party considerable authority to resolve disputes. Even ordinary citizens retain a good deal of discretion about the work of the criminal and civil justice systems, since those systems primarily depend for their workload on the initiative of citizens. And insofar as people enter contracts, form associations, unite in partnerships, and create corporations, they exercise their discretion in the creation and conduct of publicly enforced private government.

The significance of discretionary decisions in the American legal world can be put into perspective through a comparison to civil law systems, for, as opposed to such systems, our common law system appears designed to promote the exercise of discretion.<sup>76</sup> For one thing, the common law seems conspicuously concerned with preserving doctrinal flexibility. Dean Levi expressed a standard common law view when he wrote,

The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings. . . . In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.<sup>77</sup>

The consequence of this approach is, of course to give judges an important degree of discretion in writing new doctrine.

Common law decisionmaking seems not just designed to promote doctrinal flexibility. It also seems well adapted to allowing judges to adjust a rule to suit the claims of justice in a particular case. The

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76. I am not, of course, denying that there are many important sources of discretion in civil law systems. Indeed, I try to suggest in this article that there are many kinds of discretion no system can escape and many kinds no system would want to escape.

77. E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4 (1949).

common law decisionmaker's discretion is preserved out of what sometimes seems an almost deliberate preference for making fine distinctions between cases so that justice can be done in each case.

The common law's discretion to do justice in individual cases was enhanced when the common law courts and the courts of equity were combined, since equity was in several ways an importantly discretionary body of law. Equity was designed from the beginning to respond to instances in which common law rules proved too rigid. Equity's standards for decision were magnificently discretionary; early equity judges decided cases as "reason and conscience" demanded. Equity expanded the scope of judicial discretion in order to ensure flexibility in the decision of individual cases and in remedial relief. While, as readers of *Bleak House* cannot forget, equity (particularly in England) itself became sclerotic, its ultimate contribution to the common law has been to broaden judicial discretion.

Discretion is at the heart of the common law system for still more reasons: a jury finds many facts and applies much law. The jury is a lay group that does not consider enough cases to develop its own rules and that operates in a way that cannot be effectively reviewed. It meets in private, its findings of fact are reviewable only under a standard that defers generously to the jury's conclusions, and it ordinarily may not be asked to explain how it understood and applied the law. Consequently, juries can ignore the judge's instructions about the law. While courts hardly encourage jury nullification, they deliberately risk it in the interests of promoting the jury's discretion. That discretion is actively valued, partly because it permits the injection of "community values" into the legal process. As Professor Damaska writes, "[I]t is this openness to ordinary community judgments that may well be more deeply engrained or more canonical in Anglo-American legal culture than the more visible arabesques of pleading, or the exquisite refinements of evidentiary rules."<sup>78</sup>

And when in a common law system factfinding is confided to a judge, he is accorded more discretion than his civil law counterpart. The common law trial judge is essentially expected to decide the facts of the case after a single event — the trial — and that decision may, as I have said, be reversed only if it is egregiously ill-founded. In civil law systems, in contrast, the trial court assembles a factual record that is then passed on to the appellate court, which has the authority to review it *de novo*.

Furthermore, common law judges are less subject than civil law

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78. M. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 42 (1986).

judges to systematic, hierarchical supervision. In civil law systems, the judge is a bureaucrat who hopes to make a career by moving up the hierarchy of judicial jobs. In common law systems, of course, the judge is brought in after achieving some stature in another branch of the legal profession. Once anointed, the judge may not particularly expect a promotion, and promotion often depends on the vagaries of politics. Thus, while the common law system is hierarchical in the sense that a lower court's rulings may be reversed on appeal, it is less hierarchical in career terms, so that the common law judge's discretion is less subject to the psychological and professional pressures that may affect the civil law judge.

Professor Atiyah argues that the discretionary powers of Anglo-American judges are expanding:

It is my thesis that the balance between principle and pragmatism in the judicial process has shifted markedly since the beginning of the last century. In the first half of the nineteenth century, I suggest, the courts were inclined to resolve the conflict by adhering to principle. They were less concerned with doing justice in the particular case and more concerned with the impact of their decision in the future. In modern times, by contrast, I suggest that the courts have become highly pragmatic and a great deal less principled. Nor has the change been carried through by the courts alone. At virtually every point it has been assisted by legislation.<sup>79</sup>

As Professor Atiyah explains, "Rules of procedure and evidence tend increasingly to be subject to discretion rather than fixed rule; and even where there are rules they tend increasingly to be of a *prima facie* nature, rules liable to be displaced where the court feels they may work injustice."<sup>80</sup> Professor Atiyah associates this development with a change in the prominence of two of law's functions. Law "provides a means of settling disputes by fair and peaceful procedures," but "the judicial process is part of a complex set of arrangements designed to provide incentives and disincentives for various types of behaviour."<sup>81</sup> Professor Atiyah suggests that the former function has acquired a new prominence over the latter. And since the latter works through rules and the former through "pragmatism," the scope of discretion has grown correspondingly.

Perhaps inevitably, the burgeoning of discretion is associated with a new attitude toward the authority of rules. Professor Atiyah quotes

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79. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251 (1980).

80. *Id.* at 1255.

81. *Id.* at 1249.



a celebrated passage from Keynes, who, speaking of the friends of his youth, said:

We claimed . . . the right to judge every individual case on its merits, and the wisdom, experience and self-control to do so successfully. This was a very important part of our faith, violently and aggressively held, and for the outer world it was our most dangerous characteristic. We repudiated entirely customary morals, conventions and traditional wisdom. . . . [W]e recognized no moral obligation on us, no inner sanction, to conform or to obey. Before heaven we claimed to be our own judge in our own case.<sup>82</sup>

As Professor Atiyah concludes, "Modern man is unwilling to accept the authority of a principle whose application seems unjust in a particular case, merely because there might be some beneficial long-term consequences which he is unable to identify or even perceive."<sup>83</sup>

Professor Schauer places the growing power of discretion in the context of the history of American legal thought. He detects

a tradition in American law and legal theory that not only connects [Ronald] Dworkin in interesting ways with the work of theorists as diverse as Lon Fuller and Duncan Kennedy, but also has important points of contact with American Legal Realism and the aristotelian conception of equity. The tradition starts with an intuitively appealing goal — getting *this case* just right. But that goal and the tradition embracing it are in tension with the very idea of a rule, for implicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand. In many of the most important areas of American adjudication, the tolerance for the wrong answer has evaporated, often for good reason, and the current paradigm for adjudication in the American legal culture may already have departed from rule-bound decisionmaking. This new paradigm instead stresses the importance not of deciding the case according to the rule, but of tailoring the rule to fit the case. Instead of bowing to the inevitable resistance of rules, the new paradigm exalts reasons without the mediating rigidity of rules, thus avoiding the occasional embarrassment generated by rules. And because this new jurisprudence treats what looks like rules as continuously subject to molding in order best to maintain the purposes behind those rules in the face of a changing world, we can say that what emerges is a jurisprudence not of rules but of reasons.<sup>84</sup>

What, then, should we make of the ubiquity of discretion? By itself, it cannot prove a great deal. But it does, I think, suggest several possibilities. First, discretion may perform indispensable functions. Second, those functions may not readily be performed in other ways.

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82. *Id.* at 1269 (quoting J. KEYNES, *TWO MEMOIRS* 97 (1949)).

83. *Id.* at 1270.

84. Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 847 (1987) (reviewing R. DWORKIN, *LAW'S EMPIRE* (1986)).

Third, there may be ways of limiting the harmful effects of discretion. To put these points somewhat differently, the ubiquity of discretion implies (but, again, does not prove) that discretion is less dangerous and unmanageable and more inevitable and even desirable than some criticisms of the best-interest standard seem to assume. To these propositions we will turn after asking more specifically whether custody litigation falls unacceptably far outside the range of discretionary authority in American law.

### C. *Discretion, Child Custody, and the Forms of Adjudication*

Our examination of the critics' claim that the discretionary best-interest principle is anomalous in American law has proceeded by describing the context of discretion in that law. We will now examine the claim in one of its more concrete forms. Professor Mnookin seeks to show custody litigation is unduly discretionary by drawing several contrasts with "traditional adjudication." First, "[m]ost legal rules require determination of some event and are thus 'act-oriented.'"<sup>85</sup> But custody adjudication "centers on what kind of person each parent is, and what the child is like" and is thus "person-oriented."<sup>86</sup> Second, traditional "[a]djudication usually requires the determination of *past* acts and facts," but custody adjudication requires "a prediction of *future* events."<sup>87</sup> Third, custody adjudication involves "appraisals of future relationships where the 'loser's' future behavior can be an important ingredient,"<sup>88</sup> but most traditional adjudication does not. Fourth, traditional adjudication relies on precedent, but in custody litigation "[t]he result of an earlier case involving different people has limited relevance to a subsequent case requiring individualized evaluations of a particular child and the litigants."<sup>89</sup> Finally, "[n]ormally, parties most obviously affected by a dispute have a right to participate in the adjudicatory process," but children do not truly participate in custody adjudications.<sup>90</sup>

There are two difficulties with Professor Mnookin's contrast between "traditional" and custody adjudication. The first difficulty has

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85. Mnookin, *supra* note 4, at 250.

86. *Id.* at 251.

87. *Id.*

88. *Id.* at 253.

89. *Id.*

90. *Id.* at 254. In fact, in a number of jurisdictions and in a number of circumstances children are at least represented in custody disputes, even if they may not be said to participate. Professor Mnookin does not consider the reasons — particularly including the fact that children are often too young to instruct counsel — that children may be unrepresented in custody disputes.

to do with his description of traditional litigation. To begin with, it is not entirely clear what Mnookin means by "traditional" litigation or that it is as uniform and narrowly focused as he seems to suggest. His description surely does fit some kinds of litigation, particularly criminal prosecutions and some tort actions. But much of what he probably means by traditional adjudication lacks the qualities that he uses to define it, and in many kinds of traditional litigation, one or more of the elements of traditional adjudication is missing. As he acknowledges, for example, courts consider "the 'whole person viewed as a social being' "<sup>91</sup> on a number of important occasions in traditional adjudication: "The standards governing preventive detention, pretrial detention, and sentencing are conspicuous examples."<sup>92</sup>

Or consider how the law of nuisance fits Professor Mnookin's description of traditional adjudication. Nuisance law may not be "person-oriented," but to say that it is "act-oriented" seems imprecise, since nuisance suits inquire into a continuing relationship between two landowners. Nuisance law does require a determination of past acts, but often it also requires a determination of the future effects of various possible remedies. In such determinations, "the 'loser's' future behavior can be an important ingredient."<sup>93</sup> Precedents are of course relevant in nuisance cases, but nuisance law relies so much on ideas about reasonableness and on balancing social goods and costs that "[t]he result of an earlier case involving different people [often] has limited relevance."<sup>94</sup> And many people affected by a nuisance action (like the employees of a booming cement company that might be put out of business by a suit) generally do not participate in the litigation. In short, there are a number of "traditional" areas of law — prominently including the law of contract, covenants and equitable servitudes, bankruptcy, partnership, corporations, important parts of property, and, of course, family law in general — that regulate the continuing relations of people and that thus poorly fit Professor Mnookin's paradigm of traditional adjudication.

The second difficulty with Professor Mnookin's contrast between traditional and custody litigation is that so much modern litigation isn't traditional. Professor Chayes has described the increasing predominance of what he calls "public law" litigation.<sup>95</sup> This litigation

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91. *Id.* at 251 (quoting L. Fuller, *Interaction Between Law and Its Social Context* 9 (item 3 of unbound class material for Sociology of Law, University of California, Berkeley, Summer 1971)).

92. *Id.* at 251-52 (footnotes omitted).

93. *Id.* at 253.

94. *Id.*

95. Chayes, *supra* note 71.

includes “[s]chool desegregation, employment discrimination, and prisoners’ or inmates’ rights cases,” as well as “[a]ntitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, [and] environmental management” cases.<sup>96</sup> Public law litigation significantly resembles Professor Mnookin’s paradigm of custody litigation: it is not “act-oriented”; it looks in major part to future, not past, events; it features interdependent, outcome-affecting factors; it often finds precedent an unhelpful guide to decision; and it regularly excludes affected parties.

Let me fill out these points slightly. Public law litigation may not always be “person-oriented,” but neither is it “act-oriented” in anything like the sense that Professor Mnookin intends by that phrase, and it is often “complex entity-oriented.” In public law adjudication, “[t]he fact inquiry is not historical and adjudicative but predictive and legislative,”<sup>97</sup> and the decree that concludes that litigation often “seeks to adjust future behavior, not to compensate for past wrong.”<sup>98</sup> The public law decree “provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer,”<sup>99</sup> and that regime regulates “an elaborate and organic network of interparty relationships.”<sup>100</sup> In public law, “the judge will not, as in the traditional model, be able to derive his responses directly from the liability determination, since . . . the substantive law will point out only the general direction to be pursued and a few salient landmarks to be sought out or avoided.”<sup>101</sup> And finally, public law remedies “often hav[e] important consequences for many persons including absentees.”<sup>102</sup> (Indeed, a large part of the conventional objection to public law litigation is exactly that the many parties, including the public at large, that have an interest in the litigation are unrepresented in it.)

In sum, even though custody decisions under the best-interest standard are importantly discretionary, they may not be intolerably more discretionary than many decisions we expect judges (to say nothing of bureaucrats) to make routinely. To be sure, this does not prove that discretionary custody decisions are a good thing. But once again it should cause us to ask how dangerous discretionary decisions are and

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96. *Id.* at 1284.

97. *Id.* at 1302.

98. *Id.* at 1298.

99. *Id.*

100. *Id.* at 1299.

101. *Id.* at 1299-300.

102. *Id.* at 1302.

how feasible and desirable it would be to try to banish discretion from the law of child custody. To those questions we will now turn.

### III. THE ADVANTAGES OF DISCRETION

With varying degrees of fervor and hope, the critics of the best-interest standard would like to eliminate or at least largely reduce the discretionary element in custody decisions. How realistic and wise is their goal? That is not an easy question, and we will approach it from several directions. We will start by sketching the attractions and drawbacks of discretion. This initial investigation will be relatively brief and relatively general; we will not try to work out all the ways in which those attractions and drawbacks may interact. Then, we will see that discretion is made less menacing by the availability of a multitude of constraints on its use. We will next examine in detail the tension between rules and discretion in custody decisions. Finally, we will ask whether the critics of discretion have a satisfactory alternative to the best-interest standard and will scrutinize the one they seem to favor.

In canvassing the advantages of discretion, we will first use the device of identifying the various sources of discretion. If we can understand how and why discretionary authority is created, we should better understand its attractions. Many of those sources of discretion lie in a direct and deliberate grant of discretionary authority (of varying levels of completeness) to a decisionmaker. We will identify four ideal types of directly and deliberately created discretionary authority. The first of these is distinguishable from the others by its distance from the ordinary principles of "law" as Western industrialized countries understand it. The rest are distinguishable from each other by the reason for the grant of discretionary authority. They are not, however, mutually exclusive; a grant of discretion may be made for more than one reason.

The first kind of directly and deliberately created discretionary authority is "khadi-discretion." This kind of discretion is the most complete and the most foreign to our legal system. In some places and times it has been believed that decisionmakers can be found who are wise, who understand the principles of justice, and who already know or are well placed to discover the relevant facts of a dispute, sometimes through acquaintance with the parties or through personal inquiry. According such people discretion to decide cases creates what Max Weber called khadi-justice (kadi-justice).<sup>103</sup> As Professor Kronman

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103. M. WEBER, *ECONOMY AND SOCIETY* 845, 976-78 (1968).

describes Weber's understanding of it, khadi-justice is

adjudication of a purely *ad hoc* sort in which cases are decided on an individual basis and in accordance with an indiscriminate mixture of legal, ethical, emotional and political considerations. . . . Khadi-justice is irrational in the sense that it is peculiarly ruleless; it makes no effort to base decisions on general principles, but seeks, instead, to decide each case on its own merits and in light of the unique considerations that distinguish it from every other case. The characterization of khadi-justice as a substantive form of law-making highlights another of its qualities, namely, its failure to distinguish in a principled fashion between legal and extra-legal (ethical or political) grounds for decision. It is the expansiveness of this form of adjudication — its willingness to take into account all sorts of considerations, non-legal as well as legal — which gives it its substantive character; the idea of a limited and self-contained "legal" point of view is foreign to all true khadi-justice.<sup>104</sup>

King Solomon's child custody decision exemplifies khadi-justice.<sup>105</sup> The litigants cite no law to Solomon, and he does not appear to consult any rules, procedural or substantive. The principle of decision he relied on cannot be reliably determined even after the decision: Did he award the child to its natural mother, to the woman who most loved the child, or to the woman with the best moral character? What impressed all Israel about the decision was not that Solomon understood the law, but "that the wisdom of God was in him, to do judgment." Even his technique was apparently a classic khadi technique: "when stories are told of really clever *qadis* they often involve the *qadi* trapping one of the parties in a display of his true character."<sup>106</sup>

The second kind of direct and deliberate grant of discretionary authority is more characteristic of Western legal systems. It may be called "rule-failure" discretion. It is created where it is believed that cases will arise in circumstances so varied, so complex, and so hard to anticipate that no one could write rules that would accurately guide decisionmakers to correct results and only to correct results in a sufficiently large number of cases.

This second kind of grant differs from khadi-justice in several ways. First, the motive for its creation differs. Discretion is accorded the khadi partly because of his special personal qualities and status. While American judges are expected to have a "judicial temperament," discretionary authority is accorded them more because of the difficulty of writing rules than because of those qualities. A judicial

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104. A. KRONMAN, *MAX WEBER* 77 (1983).

105. Following years of law review tradition, I provide citations for even the familiar sources: 1 *Kings* 3:16-28.

106. Rosen, *Equity and Discretion in a Modern Islamic Legal System*, 15 *LAW & SOC. REV.* 217, 231 (1980-1981).

temperament is thought necessary because discretion must be exercised; the judicial temperament does not justify the exercise of discretion. Second, unlike the khadi, the American judge is not expected to consult his own knowledge of the parties and their situation. On the contrary, if he knows the parties, he is expected to recuse himself from the case. Third, while khadi-justice is "peculiarly ruleless," American justice is ordinarily embarrassed to be ruleless. And finally, unlike the khadi, the American judge is generally expected not to consider "extra-legal" factors. Even a judge who has been accorded discretion is expected to consult only "legal" considerations — to look as much as possible to the law as a source of norms and not to rely on his personal preferences or political allegiances.<sup>107</sup>

The best-interest principle in its pure form can be understood as drawing on "rule-failure" reasoning. The UMDA's child custody guidelines (which confide decisions to the court's discretion and provide a list of factors to consider in exercising that discretion) can also be rationalized on these grounds. That is, those guidelines seem to acknowledge the possible desirability of cabining discretion but also the impossibility of doing so in any very confining way. The UMDA's standards confer discretion on judges because rules cannot be written, not because of the personal merits of the judge, and they cannot be construed as an invitation to judges to apply whatever personal standards they prefer.

A direct and deliberate grant of discretionary authority may be made for a third and related reason. What I will call "rule-building discretion" arises where the rulemaker could devise tolerably effective rules, but concludes that better rules would be developed (or that the same rules could be developed more efficiently) if the decisionmaker develops rules for itself as it goes along. The rulemaker might believe that, out of the experience of dealing with individual cases over long periods, a decisionmaker might acquire a better understanding than anyone else could of the generic problems presented and of the concrete circumstances in which they arise. This is, of course, the theory of common law adjudication — that as courts repeatedly immerse themselves in and decide concrete cases, the cases will gradually sort themselves into patterns, and principles for solving them will eventu-

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107. American law is not without its impulses to khadi justice. For example, some of the popular and even scholarly justifications for according the U.S. Supreme Court broadly discretionary authority sometimes seem to draw on elements of the justifications for khadi justice. See Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833 (1991); Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, LAW & CONTEMP. PROBS., Winter 1988, at 79.

ally emerge. The drafters of statutes like the UMDA presumably hope that courts will develop increasingly refined and reliable custody rules as they accumulate experience.

Finally, a direct and deliberate grant of discretionary authority may be made for a fourth reason. I will call this "rule-compromise discretion." Sometimes rulemakers cannot agree on rules or even guidelines, and they therefore deliberately choose to pass responsibility to the decisionmaker. Thus, awarding discretion to courts can be a form of deliberate legislative compromise. Less deliberately, legislative inaction may tacitly give courts authority to decide cases without legislative direction. Child custody law again provides an example, for the longevity of the best-interest standard in the face of so much hostility may be partly explained by the inability of legislators to agree on a replacement for it.

We have been surveying the reasons a rulemaker might adduce for giving a decisionmaker discretion. But discretionary authority may also be created indirectly and undeliberately. It often grows out of the institutional structure of decision. For example, where a decisionmaker is not subject to review, the decisionmaker has discretion in one of Professor Dworkin's "weak" senses.<sup>108</sup> As Justice Jackson famously put it, "We are not final because we are infallible, but we are infallible only because we are final."<sup>109</sup> In any sort of litigation, of course, this kind of discretion will eventually be exercised: someone must make the final decision. It may be exercised particularly early in custody litigation because the parties often cannot afford litigation and because the special deference to trial court decisions probably deters appeals. Also, quick decisions are more urgently needed in child custody cases than in many other kinds of litigation: it is conventionally understood that children need a stable result as soon as possible, and the parents are likely to want that result for the child's sake and their own (even though they may be borne along by other concerns).

But it is not just the last decisionmaker in the hierarchy who acquires considerable discretionary authority from "structural" sources. Indeed, in some ways it is the first decisionmaker who has the greatest discretion (and not just because he is often effectively the last decisionmaker). First, someone must find facts, and factfinding is inevitably discretionary, since it requires making complicated and uncertain judgments. Deciding what actually happened always involves some discretionary choices about what evidence to hear, what evidence to

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108. R. DWORKIN, *supra* note 55, at 32.

109. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).



regard as relevant, and what evidence to regard as reliable, to say nothing about drawing final conclusions about what actually happened. In most hierarchical situations, it is impractical to keep regathering evidence, so that a lot of these discretionary decisions about facts are effectively unreviewable. In custody litigation, this factfinding authority is enhanced by the usual understanding that the trial court's opportunity to see and hear the parties and the witnesses gives its conclusions special reliability.

A second reason the initial decisionmaker often has great discretion is that someone must decide what the relevant rules are, and in the first instance this must effectively be the institution responsible for finding facts. It is, after all, impossible to decide what facts are relevant until the rules to which the facts are relevant have been identified, and efficiency dictates that the trial court do both jobs. While a decision about the law can more easily be reviewed than a decision about the facts, the trial judge's conclusions about the law are in practical effect often important. They can, for instance, help influence the way the parties conceive of and litigate the issues in the case. They can also affect what evidence is collected and what evidence is left unexplored. And since the costs of an appeal and a new trial can often be prohibitive, the trial judge's initial decisions about the law often are effectively irreversible (as to the particular case).

The third source of the initial decisionmaker's structural authority is that someone must decide how to apply the rule to the facts. As Professor Cooper writes, "It is now common to recognize that there is a third category, law application, that has the characteristics of both law-making and fact-finding."<sup>110</sup> Like finding facts and choosing law, this process involves complicated and uncertain decisions that inevitably require the exercise of judgment and hence create more scope for discretion. These decisions require the decisionmaker to exercise all the discretion of both an interpreter of law and a finder of facts. And because they are complicated and because it can be hard to tell whether they are decisions about the law (and therefore reviewable by an appellate court) or about the facts (and therefore reviewable only if the trial court has seriously erred), they are not easily reversed on appeal. This, of course, even further expands the trial court's discretion. And where, as in custody decisions, numerous and uncertain facts must be applied to broadly written rules, the scope for discretion in law application is obviously substantial.

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110. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 658 (1988).

I must briefly note a way in which the argument that discretion is an inherent part of deciding cases may be stated in yet a stronger way. The power to decide what the relevant rules are and then to apply the rule to the facts can be described as the power to interpret law. It is sometimes said that language is so imprecise and interpretation so fluid that even rules cannot cabin discretion.<sup>111</sup> This article is not the place to enter into the jurisprudential debate that assertion raises. However, I do hope that our investigation of discretion in custody cases will suggest something about the forces that cabin as well as the forces that create discretion.

We have been examining the attractions of discretion by searching out the sources of discretion. Some of the lessons of this examination may be restated by observing that many of the attractions of discretion lie in the disadvantages of rules. That is, rules have drawbacks and can malfunction, and discretion is often the most attractive answer to such failures. These failures of rules are of several kinds. Sometimes rulemakers fail to anticipate all the problems a rule is written to solve. Discretion can fill the gaps in rules. Sometimes two or more rules simultaneously apply but dictate conflicting results. Discretion can permit the decisionmaker to resolve the conflict in the way that best accommodates all the interests involved. Sometimes a rule will, applied to a particular case, produce a result that conflicts with the rule's purpose. Discretion can allow the decisionmaker to promote that purpose. Sometimes a rule will, applied to a particular case, produce a result that conflicts with our understanding of what justice requires. Discretion can allow the decisionmaker to do justice. And sometimes the circumstances in which a rule must be applied are so complex that a rule simply cannot be written that works effectively. Discretion frees the decisionmaker to deal with that complexity.

These advantages of discretion can be put more positively. Discretion can lead to better decisions because they can be tailored to the particular circumstances of each case. Discretion gives the decisionmaker flexibility to do justice. It does so not just by allowing a decisionmaker to heed all the individual facts that ought to affect a decision but that could not be listed by rules. It also does so by allowing a decisionmaker to see over time how well a decision worked and to adjust future decisions accordingly. Discretion may also conduce to better decisions by discouraging overly bureaucratic ways of thinking, since they often are born of too rigid an insistence on writing elaborate rules and on following them with too mechanical a regular-

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111. For an admirable treatment of these issues, see F. SCHAUER, *supra* note 53.

ity. Finally, endowing decisionmakers with discretion may make their jobs more interesting and more powerful and thus more attractive to able people.<sup>112</sup>

Discretion has within its fold another, subtler advantage. Discretion sometimes permits the decisionmaker to conceal the basis for his ruling. Where a decision is based on a rule sufficiently detailed actually to guide a decision, however, it is often hard to hide the decision's *raison d'être*. Yet it will sometimes be better to do so. As Professor Wolfe writes,

Ambiguity is a marvelous invention when groups want to avoid situations in which one party's gain is automatically another's loss. . . . It may take great technical skill to design rules so that their application will be as precise as possible, but it also takes great skill, usually more of a social than a technical kind, to fudge precise results in favor of ambiguous applications that make the whole business of living together with others less tense.<sup>113</sup>

In custody decisions, for example, a choice commonly must be made between two parents, both of whom have virtues, both of whom have faults, and both of whom will (or should) continue to see their child. It may unnecessarily damage the loser's feelings (and his feelings for his child) to point out to him his faults and the other parent's virtues.<sup>114</sup> This may be true even where the choice involves no moral judgments about the parties. For instance, a parent might not like to hear detailed all the reasons he was not a child's "psychological parent." The fault of this virtue of discretion, of course, is that the parties may want and be entitled to a full statement of the reasons for so mo-

112. One study of the criminal justice system summarized the advantages of discretion with special passion:

The solace of standardized rules and procedures is largely illusory. Rigid rules tend to ossify individual responsibility and discourage individualistic thinking. Those who would shrink discretion obey the precept: "Treat likes alike." However, the overriding lesson of experience in our criminal justice operation is that every case is different. The major worry is that the people out there dealing with the problems will lose their appreciation of the differences between the cases and will begin reacting to them as repetitive. There is nothing quite like a good set of rules *cum* guidelines to bring common elements to the fore and obscure differences. If nothing else, our experience with mandatory minimums in drug sentencing should have taught the sterility of the reduced factor method of response. The learned fact should be that crimes and criminals emerge from a rich variety of circumstances. Separately and in combination, the variants can never be fully anticipated or assessed; yet they are often critical to forming the just response.

Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, LAW & CONTEMP. PROBS., Autumn 1984, at 15, 32.

113. A. WOLFE, WHOSE KEEPER?: SOCIAL SCIENCE AND MORAL OBLIGATION 231-32 (1989).

114. It is of course true that the loser cannot be protected from the information that he has not been found the preferable guardian and, where the best-interest standard was used, from the information that the court thought it was in the child's best interest to be with the other parent. But this general conclusion may be less distressing than the unpleasantly specific information that a decision based on a much more detailed rule might provide.

mentous a decision. And, as we will shortly see, obliging the decisionmaker to explain a discretionary decision is a useful way of limiting his discretion. That device must be forfeited if this advantage of discretion is to be secured.

In this section, I have observed that discretionary authority may be directly and deliberately created and that it arises inevitably out of the very process of deciding cases. I have also noted that both sources have helped make child custody decisions, particularly those under the best-interest standard, discretionary. In other words, the critics of the best-interest standard are clearly right when they say that decisions under that standard are crucially discretionary. But we still must ask whether they have given full weight to the reasons both courts and legislatures actively seek discretion and to the difficulties of eliminating those kinds of discretion that are not deliberately created.

#### IV. THE DRAWBACKS OF DISCRETION: THE ADVANTAGES OF RULES

To answer the question with which we concluded the previous section, we will next analyze in general terms the costs and benefits of rules and discretion. We will then undertake the same analysis specifically in terms of child custody decisions. We begin by charting the drawbacks of discretion. The most prominent of them hardly need elaboration. Discretion more than rules permits decisionmakers to consult illegitimate considerations, and it does less than rules to keep them from making "mistakes." Less prominently, discretion may harm decisionmakers psychologically. Discretion is a kind of power, and power corrupts. Discretionary power can conduce to an arrogance and carelessness in dealing with other people's lives that judges already have too many incentives to succumb to.

But the drawbacks of discretion can be better phrased in terms of the advantages rules offer. I will consider six of these advantages.

First, rules can contribute to the legitimacy of a decision. To put the point almost schematically, in a democracy, power flows from "the people." The closer a decision is to the people, the more secure its basis in a source of legitimacy. Several factors make it likely that legislative rules will be "closer" than administrative or judicial decisions: all legislators are elected; many judges are not. Legislators campaign on the basis of their views about issues; judges generally do not. It is thought legitimate to vote against a legislator because you dislike his decisions; it is sometimes thought an interference with judicial independence to do so.

The second advantage of rules is that rulemakers can be better sit-

uated than decisionmakers to decide what justice is. Rulemakers typically have more time than decisionmakers to study a problem, so that they can discover more of a problem's elements and think about them more reflectively. Rulemakers may have more resources for gathering information, and legislative rulemakers need not be inhibited by the rules of evidence and procedure which constrain courts. Legislative rulemakers may also be better able to bring together the whole range of social groups interested in a problem and thus to acquire a fuller range of information about it and to secure broader social acquiescence to the chosen solution.

Nor does one always get the best view of a problem by looking at a particular controversy in which the problem arises. This is the point of many criticisms of the common law method of developing rules. For instance, a judge deciding a case may be distracted from a just result by the special but irrelevant circumstances of the particular litigants. Sometimes these can be plainly irrelevant factors, like racial prejudice. But many chance characteristics of the litigants or their circumstances may influence a decision in a way that, on a longer view, we would think wrong. For example, many people believe that the marital misbehavior of a spouse that does not directly and evidently affect a child has too often diverted courts from consulting only the child's best interest in custody disputes.

The third advantage of rules relates to our basic assumption that like cases should be treated alike. One way to try to ensure that they are is employing rules instead of allowing each decisionmaker to decide case by case what principles should be applied to what fact situations and how they should be applied. Rules suppress differences of opinion about what works to serve what purpose, about how to balance factors, and about what justice requires; these differences of opinion could otherwise lead to different results in similar cases. Rules also serve as recordkeeping devices, devices that are more efficient and therefore more likely to be used effectively than an elaborate system of precedent. Similarly, rules help coordinate the decisions of multiple decisionmakers and of one decisionmaker over time.

Fourth, rules serve the planning function better than discretionary decisions. The people and institutions affected by a potential decision need to know in advance how a case will be decided so that they may plan their lives and work in accordance with the law. On the whole, rules give better warning than discretionary decisions because they are likelier to provide clear and complete information about what a court will do. (One reason common law adjudication works is that rules are eventually adduced.)

Fifth, rules can serve some social purposes that discretionary decisions may serve poorly. Rules are often an announcement about how people should behave, an announcement that attempts to affect behavior. Rules frequently (though not inevitably) communicate this information more clearly and emphatically and are more easily recognized as commands than either a direction to a court to exercise its discretion or a series of individual decisions from which general principles have to be drawn.

The sixth and final attraction of rules is that they are, on average, more efficient than discretion, for rules are a way of institutionalizing experience. A rule is ordinarily a distillation of a long process of thinking about how a particular kind of cases should be handled. Decisionmakers exercising discretion, unless they consult some rules, or unless they deal repeatedly with familiar problems (and have thus constructed at least implicit rules), have to go through the entire process for each decision, even though it means duplicating that process each time. Further, rules help the decisionmaker (and the litigants) to distinguish those arguments and facts that will be relevant from the many arguments and facts that will be irrelevant. In short, as Whitehead said,

It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking of what we are doing. The precise opposite is the case. Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle — they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.<sup>115</sup>

Rules, in short, conserve the need for operations of thought.

Our consideration of the advantages of discretion and of rules in one sense endorses the essential point that the critics of the best-interest standard make. That consideration confirms that there are good reasons that law is usually considered a system of rules. We saw that rules have powerful advantages and that discretion's advantage is in large part that it provides an alternative where rules fail. On the other hand, our discussion also suggested that rules may fail so systematically and extensively that an important measure of discretion is needed and is even built into many areas of legal activity.

In any event, I would suppose that most of what I have said about the advantages of rules and discretion is not particularly controversial. Disagreements are most likely to arise not in abstract discussion of

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115. A. WHITEHEAD, AN INTRODUCTION TO MATHEMATICS 61 (1911).

those advantages, but rather in attempts to work out the balance of advantages in any particular area of law, since the number and complexity of the advantages of both rules and discretion make it inevitable that they will interact differently in different areas of law. We will shortly consider how they interact in the law of child custody. First, however, we need to consider one more aspect of discretion in general terms.

#### V. A THOUSAND LIMITATIONS: THE CONSTRAINTS ON DISCRETION

I have argued that discretion is more deeply and widely embedded in American law than the critics of the best-interest principle suggest. I have raised questions about the reasons discretion is so pervasive, whether it can be avoided, and why it seems to be tolerable even in large doses. In this section, I will argue that part of the answer to those questions is that limitations on discretion are as inevitable and abundant as the sources of discretion, that discretionary decisions are rarely as unfettered as they look.

Discretion can be and regularly is constrained in multitudinous ways. "Complete freedom — unfettered and undirected — there never is," Justice Cardozo once reflected. "A thousand limitations — the product some of statute, some of precedent, some of vague tradition or of an immemorial technique, — encompass and hedge us even when we think of ourselves as ranging freely and at large. . . . Narrow at best is any freedom that is allotted to us."<sup>116</sup> We will now survey a few of those thousand limitations.

The first limitation on discretion lies in the power to select the people who will exercise it. That power is commonly used to select people who may be expected to use their authority with restraint or in ways the appointer prefers. Americans are most accustomed to this limitation in the presidential appointment of Supreme Court justices. Though presidents have sometimes been unpleasantly surprised, they have gotten what they wanted more often than is conventionally supposed. Of the recent members of the Court, probably only Justice Brennan and, in some but not all areas, Justice Blackmun have voted in ways that would have astonished those who appointed them.<sup>117</sup>

Lifelong tenure of course reduces the usefulness of the selection power in reducing discretion, but most state court judges do not have

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116. B. CARDOZO, *THE GROWTH OF THE LAW* 61 (1924).

117. For an extended and sensible discussion of this issue, see Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 *YALE L.J.* 1283 (1986); see also Ely, *supra* note 107.

lifelong tenure. On the contrary, many of them must be regularly reselected.<sup>118</sup> Further, the effectiveness of the selection power in reducing judicial discretion is greatest where the decisionmaker will be handling only one kind of case. Where the decisionmaker must address many kinds of issues, it will often be hard to discover all his views in advance and to find someone who has *all* the right views. Thus specialized family courts should make it easier to choose judges whose views on family law issues are predictable.<sup>119</sup> In any event, such choices are eased by the fact that people tend to think about sets of problems in systematic ways, so that someone who thinks "rightly" about one problem is likely (though hardly certain) to think "rightly" about related problems.

The second limitation on discretion is the socialization and training of decisionmakers. Decisionmakers, after all, do not live or work in a vacuum; they are inevitably products of their environment, and their environment is, to some extent, an environment of shared social norms. Some of these social norms will speak directly to the substantive issues to be decided. Others of them will speak to the way any issue should be decided. As Professor Dworkin writes, "Almost any situation in which a person acts . . . makes relevant certain standards of rationality, fairness, and effectiveness."<sup>120</sup> Most decisionmakers in industrialized Western democracies, and certainly governmental decisionmakers, are commonly felt to be obliged to reach conclusions that are rational within the standards of their society and that accord with its basic institutions. Important among the social norms that will inhibit decisionmakers' exercise of discretion are all the reasons for distrusting discretion that we have been reviewing. That some uses of discretion may not be strongly inhibited by social norms and that decisionmakers will sometimes resist inhibitory norms do not mean that those norms are generally ineffective brakes on discretion.

Judges are not only affected by their socialization as twentieth-century Americans, but also by their specifically legal training and the norms that training inculcates. In the United States, a system of national law schools offering intensive training (most particularly in the first year) helps give those norms some measure of universality and stability. These law schools explicitly try to train a student to "think

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118. Of course, judges are not subjected to any very searching scrutiny in many, perhaps most, election campaigns. For many elected state court judges, then, this constraint on discretion probably operates most strongly at the margin.

119. Even family courts generally have varied responsibilities. Their cases can include divorces, child abuse and neglect, abortion for minors, juvenile delinquency, and so on.

120. R. DWORKIN, *supra* note 55, at 33.



like a lawyer." Law classes are essentially sessions in which students are repeatedly made to practice legal analysis. The professor asks the students question after question. Each one is designed to show the students what kinds of questions to ask about a text and what kinds of answers are appropriate and inappropriate. After a year of this routine, students have begun to internalize many of the legal system's assumptions and to speak its language.

When students graduate, their training becomes less formal, but it hardly ends. Recent graduates often begin what is effectively an apprenticeship with a law firm. And the recent graduate's day-to-day work of dealing with lawyers from other firms and with judges offers another kind of practical education in the mores of the law.

Judges usually receive relatively little additional formal training. But the lawyers who become judges will usually have had abundant opportunities for watching judges work. And new judges learn from that experience, from the veteran judges who are their colleagues, and from the lawyers who practice before them a set of professional norms, some formally articulated, some simply assumed.

Through their training, then, lawyers and judges acquire habits of thought that limit the range of arguments that they find acceptable and the kinds of decisions that they will advocate and reach. They learn substantive norms that tell them what kinds of principles are legitimate and illegitimate. They learn procedural norms that tell them what kinds of evidence and procedures are permissible. They learn ethical norms that help deter them from exercising their discretion in self-serving ways.<sup>121</sup>

Third, the lessons of a judge's socialization and training are often reaffirmed, and the judge's exercise of discretion is further inhibited, by the criticism which judges (and other decisionmakers) receive. Some of this criticism is scholarly. But judges are likelier to hear and heed the strictures of their local bar and of their colleagues and superiors on the bench. "The inscrutable force of professional opinion," Justice Cardozo wrote, "presses upon us like the atmosphere, though we

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121. One family law commentator summarizes the points I have been making when he suggests that

Parliament can entrust some discretionary latitude where the repository of the discretion, by reason of his antecedents and training, is a part and product of the system itself which we call the common law. The fact that under that system appointees to the bench must first have been in actual practice in the very courts of which they are to become members can only confirm the likelihood that they will continue to speak with much the same voice as their predecessors. .

Finlay, *Judicial Discretion in Family and Other Litigation*, 2 MONASH U. L. REV. 221, 224 (1976).

are heedless of its weight."<sup>122</sup> Nor is criticism of judges confined to the legal profession: Sufficiently prominent and consequential decisions may be attacked by politicians, journalists, and members of other interested publics, including the public at large. Judges may even hear from their friends and family.

A fourth limitation on discretion grows out of the decisionmaker's internal dynamics. That is, courts and agencies are often constrained by their institutional structure and imperatives and by the psychological makeup of those who staff them. Efficiency and fairness concerns, simple laziness, a wish to avoid responsibility, and even a desire to escape the boredom of constantly repeating the reasoning necessary to decide a case can drive people toward relying on their own earlier decisions in factually similar cases rather than embarking on fresh discretionary frolics. In other words, decisionmakers usually have strong incentives to develop their own rules, their own common law, even if constraints on discretion are not forced on them from the outside.<sup>123</sup> The more work a court or agency must do, the less time it has for the labor of unfettered discretion. Such an institution may then exercise discretion in deciding how to decide cases, but it will have reasons to construct principles of decision that are easily applied and to follow those principles routinely. The institution will thereby have constrained (although not entirely prevented) its own exercise of discretion in the future.

These same kinds of pressures can limit discretion in another important way, for they can lead one decisionmaker to defer voluntarily to another. For instance, we have already seen how American appellate courts have adopted a series of rules and practices (of which Rule 52(a)<sup>124</sup> is a particularly prominent example) that limit the range of issues that they have to address by allocating discretion to decide many questions primarily to trial courts. Another example is the increasingly official practice of allowing criminal defendants to negotiate a guilty plea and a sentence with the prosecutor's office. But legal agents may also limit their own discretion by deferring to less official institutions. Courts regularly approve without real scrutiny all kinds of settlements between divorcing spouses, even though courts must theoretically examine and approve such settlements to ensure that vulnerable spouses and helpless children are not injured. This limitation on discretion is massively important in child custody. It is conven-

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122. B. CARDOZO, *supra* note 116, at 61.

123. For a richly illuminating description of this and other institutional and psychological constraints on discretion, see Lempert, *supra* note 5.

124. FED. R. CIV. P. 52(a).

tionally thought that ninety percent of divorces involving children are settled by the divorcing couple.<sup>125</sup> As a practical matter, the couple can almost always take a decision away from a judge. This will be scant consolation to an irreconcilably opposed couple whose case is decided arbitrarily by a judge abusing his discretion. But it is nevertheless a crucial fact to recall in evaluating the overall risks of discretion in custody decisions.

A related "institutional" constraint on discretion is the agency's need to coordinate the activities of several decisionmakers or to coordinate the same decisionmaker's activities over time. Because of the strength in American law of the principle that like cases should be treated alike, this pressure to coordinate is likely to be widely felt. Administrative agencies face the problem of coordination acutely, since they will often have many employees making decisions of a similar kind. But even courts need to coordinate their decisions. To some degree this is done hierarchically: it is a primary function of appellate courts to resolve doctrinal conflicts among the lower courts within their jurisdiction. But to some degree, lower courts are expected to coordinate their decisions among themselves. Thus the ruling of one trial court has precedential value for (although it does not bind) another trial court in the same jurisdiction.

Furthermore, all people try to make sense of the world by categorizing the events and problems they encounter. Judges and bureaucrats and the institutions they inhabit are no different. Their categories can in effect become rules of decision that govern, or at least influence, how issues are resolved. These categories constrain discretion because they limit the ways judges and bureaucrats think about cases. The categories are themselves limited. Although they can arise out of, for instance, a judge's general experience with the world, that experience is constrained by the fact that judges are generally drawn from a relatively narrow social spectrum. In addition, a judge's experience of deciding cases influences and limits the categories. To take a simple example, a judge who regularly awarded custody to alcoholics and as regularly found the parties returning to court with more problems might be discouraged from awarding custody to alcoholics in the future, and that experience might then be embodied in institutional categories.

Discretion is constrained not only by the internal dynamics of the decisionmaking entity, but also by the larger institutional context in

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125. Melli, Erlanger & Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988).

which the entity acts. Thus the fifth constraint on discretion is the fact that no governmental agency acts entirely alone and that, insofar as power is shared, each agency's authority and thus discretion is limited. An obvious example of this constraint is the legislature's authority to write rules that courts must follow. But this constraint appears in other forms.

Sometimes, for instance, this fifth constraint works "jurisdictionally." Courts conventionally lack authority to decide many kinds of family disputes, even if those disputes nominally involve the commonplace judicial task of enforcing a contract.<sup>126</sup> These cases are implicitly, and sometimes explicitly, rationalized on the theory that "family government is recognized by law as being as complete in itself as the State government is in itself . . ." <sup>127</sup> Thus the extent to which even a court deciding a custody question may unleash its discretion to reorder a family's life is limited by this "jurisdictional" principle.

This fifth restraint on discretion also operates where a decisionmaker has "jurisdiction" to regulate an area of life but shares that responsibility with another agency. For instance, a department of social services can alter a child custody battle by initiating proceedings to terminate one parent's parental rights, and its failure to do so might affect (although hardly eliminate) a court's willingness to deny a non-custodial parent visiting rights. That department of social services can also inhibit judicial discretion by issuing a strongly negative or positive report on a potential custodian.

Sometimes this kind of constraint works by giving other branches power to retaliate against the judiciary. At its most extreme, this means impeaching judges or depriving courts of jurisdiction. But it can also operate at a less dramatic, less official level. For instance, legislatures can sometimes pressure courts by lowering appropriations in which courts are interested or by refusing to approve the appointment of new judges.

Courts share authority not just with other governmental agencies, but also with the litigants. Most basically, litigants determine what disputes are brought to a court. This sounds obvious and trivial, but, as I remarked earlier, it is usually thought that only about ten percent of divorces involving children are actually litigated. Once cases have been initiated, the parties can affect what kinds of legal arguments a

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126. *E.g.*, *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1958). In that familiar case, the court found that it lacked the authority to resolve a parental dispute over whether a child should attend a public or a parochial school even though the parents had entered into a prenuptial agreement settling the question.

127. *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 456 (1868).

court is asked to resolve and what kind of evidence it hears. Both the introduction and the omission of important facts and arguments constrain a court's decisions. In modern custody decisions, the presence or absence of expert testimony may be particularly limiting. In *Painter v. Bannister*, for example, when Mr. Painter failed to provide a psychologist to contradict the confident Dr. Hawks, Mr. Painter made it harder for the trial judge to find for him and, in the mind of the Iowa Supreme Court, impossible for it to sustain the trial court.<sup>128</sup> In custody cases, the frequent presence of a guardian *ad litem* further expands this kind of constraint on judicial discretion. The guardian speaks with the moral force that is accorded those who are supposed to be disinterested and can take positions and make arguments that the decisionmaker must at least explain away.<sup>129</sup>

Litigants can place other limits on judicial discretion. Sometimes litigants have something the court wants, like the ability to settle a case. (In a system as overburdened as ours, this is no mean power.) Sometimes litigants can resist judicial orders. This problem is specially acute in family law, where the court must so often depend on cooperation from the litigants. The unfortunate Morgan-Foretich case is only a lurid example of a much larger problem.<sup>130</sup>

The limitations on discretion we have canvassed thus far can powerfully alter decisions, but they generally are not expressly designed to constrain discretion. A more deliberate attempt to do so lies in the hierarchical organization of most governmental decisionmakers. Because this is also one of the most familiar limits on discretion,<sup>131</sup> we need say little about it. Intermediate appellate courts review trial court procedures, opinions, and holdings; supreme courts review intermediate courts. This of course allows appellate courts to correct what they take to be errors. More significantly, the aversion to

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128. *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966). Mr. Painter had asked his in-laws to care for his son after his wife and daughter were killed in an automobile accident. When Mr. Painter eventually asked for his son back, his in-laws refused, and the Iowa Supreme Court reversed an order returning his son to him. On the centrality of the expert testimony in that case, see Schneider, *supra* note 66, at 1854-55.

129. Some of the factors I describe in this paragraph can cut the other way as well, by expanding the range of choices that are effectively open to a judge.

130. Glimpses of that unhappy litigation may be had in *Morgan v. Foretich*, 846 F.2d 941 (1988); *Morgan v. Foretich*, 564 A.2d 1 (D.C. App. 1989); and *Morgan v. Foretich*, 546 A.2d 407 (D.C. App. 1988), cert. denied, 488 U.S. 1007 (1989). The dispute is described in detail in J. GRONER, *HILARY'S TRIAL: THE ELIZABETH MORGAN CASE: A CHILD'S ORDEAL IN AMERICA'S LEGAL SYSTEM* (1991). On the enforcement problem, see Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039, 1056 (1985).

131. "Hierarchy is probably the oldest axiom of organization; see Exodus 19:25." H. KAUFMAN, *RED TAPE: ITS ORIGINS, USES, AND ABUSES* 50 n.61 (1977).

being reversed often deters lower courts from erring in the first place. In extreme cases of judicial misbehavior, disciplinary proceedings may be brought or judges may be impeached. And judges who wish to rise to a higher court may feel constrained to please whatever powers make promotions. Of course, because of their more bureaucratic structure, administrative agencies constrain discretion through the tools of hierarchy rather more vigorously and thoroughly than courts.

The seventh limitation on discretion is to require a court or agency to follow a set of procedures. These procedures may be self-imposed or externally imposed. In either event, they limit discretion. Some procedures do so by telling the court how to conduct its proceedings. They limit the evidence that may be received, specify who may make arguments, state who must receive notice of the proceedings, identify the litigant who speaks first, and so on. The underlying idea is that if a decisionmaker has followed the right procedure, the right decision is likelier to follow. In other words, procedural rules limit substantive discretion.

Other procedures limit discretion by telling the decisionmaker what procedures to follow in deliberating about a case. One such requirement is the obligation to justify decisions, particularly to justify them in writing.<sup>132</sup> The process of explaining affects the decisionmaker, if only because writing clarifies thought and makes it harder for the decisionmaker to avoid noticing his own abuses of discretion. It also (as the decisionmaker will know) opens the decisionmaker to criticism from the parties and the public and to review from hierarchical superiors.

Guidelines for decisions constitute the eighth limitation on discretion. Decisionmakers are commonly furnished with at least a statement of the purposes and goals the decision is ultimately intended to serve. The best-interest principle is a classic example. While it vests a judge with discretion, it also constrains that discretion. For example, even if the guideline doesn't tell us exactly what is in the best interests of children, there are many results virtually everyone would agree are *not* in those best interests, as where a court choosing between otherwise equally qualified parents awards custody to the parent who habitually beat the child. And, for example, the best-interest guideline eliminates some plausible alternative bases for making custody decisions. For instance, it directs a judge not to consult the interests of the would-be custodians in making a decision. (Indeed, this is one of the things some critics dislike about the best-interest standard.) In any

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132. See, e.g., FED. R. CIV. P. 65(d).

event, decisionmakers are also often given (or will construct) a statement of second-level considerations intended to promote the purposes and goals embodied in more general pronouncements. The UMDA's list of factors to use in custody decisions exemplifies such a statement.

Perhaps the most obvious way of limiting discretion is to devise rules written at some level of detail that instruct the decisionmaker what to do when faced with a particular set of facts. This limitation is in some senses not a limitation on discretion but rather its polar opposite, since we often say that where a decisionmaker applies a rule, he has no discretion. However, if one believes, as I have been arguing, that interpreting and applying rules involve discretionary judgments of many kinds, rules can be seen as a limit on discretion, and not simply as an alternative to it. As we will later see, even the best-interest standard is often supplemented with some rules.

Our final means of limiting discretion is to accord rights to one or more of the disputants. Rights transfer partial and sometimes complete responsibility for a decision from a governmental body to an individual. If there is a constitutional right to enter into binding surrogate mother contracts, for example, a judge's discretion in custody disputes between a natural father and a surrogate mother will be importantly limited.

So far, we have seen that discretion has prolific sources and pervades American law. We have asked how such apparently broad discretion is tolerable. In this section, we have formulated part of the answer — that a multiplicity of factors will almost always limit the discretion of almost all deciders. In other words, I have tried to counter the conventional distrust of discretion by showing that discretion is subject to more numerous and severe constraints than is commonly supposed. I am not saying, of course, that these constraints necessarily free discretion of danger. Nothing can. But I am saying that, in deciding what mix of discretion and rules to prefer, one cannot stop one's investigation with the discovery that an actor has discretion. Rather, one must ask what kinds of cultural, social, political, psychological, institutional, and doctrinal forces may moderate that discretion.

## VI. CHOOSING BETWEEN DISCRETION AND RULES IN CUSTODY LAW

We will now take what we have learned about the merits of rules and discretion and ask how we should choose between discretion and rules in custody law. In keeping with my insistence that the relationship between rules and discretion is fearfully complicated, this inquiry

will produce only equivocal results. We will find that both discretion and rules have both important advantages and important disadvantages in custody law. We will also find that we know less than we need to about many of the factors that ought to influence our choice. In other words, we will discover that the case against discretion is weaker than the critics of the best-interest standard suppose, but that the case for it is not overwhelming. We will, then, find ourselves relegated to an uncertain and unstable mix of discretion and rules.

### A. *The Advantages of Discretion*

Discretion's classic advantage is that it provides flexibility, that it allows the decisionmaker to do justice in the individual case. Here, the best-interest standard's central disadvantage — its "indeterminacy" — becomes its great advantage. Professor Cooper's praise of Rule 52(a) of the Federal Rules of Civil Procedure<sup>133</sup> offers a nice analogy. Professor Cooper attributes the "enormous[ ] success" of that rule to

the fact that the "clearly erroneous" phrase has no intrinsic meaning. It is elastic, capacious, malleable, and above all variable. Because it means nothing, it can mean anything and everything that it ought to mean. It cannot be defined, unless the definition might enumerate a nearly infinite number of shadings along the spectrum of working review standards.<sup>134</sup>

But do custody decisions in fact require flexibility? There is some reason to think so. First, the people who may be in the best position to know — those who actually make these decisions — apparently feel that they need real latitude. As Professor Mnookin notes, while many commentators have attacked the discretionary scope of the best-interest standard, "courts, legislators, and other commentators have shown enormous hostility towards the development of rules that provided tight substantive standards for custody disputes."<sup>135</sup> The Connecticut Supreme Court represents what appears to be the predominant judicial attitude: "We continue to adhere to the view that the legislature was acting wisely in leaving the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines."<sup>136</sup>

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133. "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED. R. CIV. P. 52(a).

134. Cooper, *supra* note 110, at 645.

135. Mnookin, *supra* note 4, at 227.

136. Seymour v. Seymour, 180 Conn. 705, 710, 433 A.2d 1005, 1007 (1980). One study of judicial attitudes toward custody litigation found that "the judges unanimously asserted that discretion was imperative. 'Each case is unique. With defined guidelines you could use a com-



Courts obviously cannot be the sole judges of their own case. But their plea for flexibility in custody cases has independent appeal. Custody decisions, for all the reasons that the critics of the best-interest principle themselves recite, are uncommonly complex and deal with some of the most emotion-laden and irrational parts of people's lives. As to such matters, each person's "uniqueness" is especially prominent and several people's uniquenesses will be relevant. It is thus common ground that it is forbiddingly hard to formulate a rule that will cope with the full complexities of each case. I suggest, then, that the critics and I disagree not about the need for flexibility, but rather about how often that flexibility will be put to good uses, about whether the risks of discretion outweigh the benefits of flexibility.

The flexibility that custody decisions seem to demand and that the best-interest principle seeks to preserve is of two kinds. The first is the kind we have been discussing — flexibility in taking into account all the errant but relevant facts in custody disputes. The other kind is flexibility in developing second-level rules to govern custody law. That is, after a legislature has instructed a court to use the best-interest standard, the court will need discretion to devise rules that give that standard meaning.

These second-level rules could of course be written by the legislature, and legislatures often do try to write some (though usually not all) of them. But there is something to be said for allowing courts the discretion to participate in writing these second-level rules. Courts have experience with custody decisions that no other entity can match. This experience can be both a profitable source of ideas and a valuable check on the imagination of rule-writers. Even if courts do not help write these second-level rules, courts will apply them in such various and complex circumstances that they will sometimes effectively have discretion to rewrite them. Once again, the analogy to Rule 52(a) may be instructive. Professor Cooper writes,

Rule 52(a) has been successful because the clearly erroneous standard of review does not establish a single test. Appellate courts have been left free to adapt the measure of review to the shifting needs of different cases, different laws, and different times. This success reflects the rulemaking process at its best. A general tone is set, no attempt is made to anticipate and meet the exigencies of countless multitudes of cases, and practice develops along lines that are not often articulated but are often wise.<sup>137</sup>

One reason judicial discretion to create second-level rules may be

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puter and not bother me with the decision.'” Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 723 (1983).

137. Cooper, *supra* note 110, at 670.

pecially important is that we have recently undergone and may still be undergoing rapid and great social change. Under such circumstances, rules are hard to write because the rapidity of change makes them controversial and because the direction and extent of change are uncertain. Rules thus must be replaced frequently. Discretion alleviates these problems by allowing courts to adjust incrementally to changing social ideas without having to readjust legislative standards too often and too radically.

Another possible benefit of giving judges some discretion in custody decisions is that it allows them to take their community's standards into account. As the critics insist, this advantage has its perils. But it may be desirable for judges to consider such standards on two theories. First, it may sometimes be best for the child to have local standards applied, since those standards may be most likely to accord with the child's actual social circumstances. Second, the community has an interest in custody disputes, since the community has an interest in the welfare of its children and thus an interest in having its own standards affect the way those disputes are resolved.

Consulting local standards obviously raises some difficulties. The first is that the larger and more diverse the local community is, the more diverse and thus less discoverable local standards may be. The second is the conventional objection that local standards may conflict with broader social understandings:

Domestic relations disputes, because they are so much a matter of community interest and deal with relations which engage every member of the community, may be especially likely to call forth deeply held local values which vary sharply from legal norms regarding divorce and familial relations. . . . Indeed, these dangers seem peculiarly great in precisely those settings where one could identify common values most readily: communities which are relatively homogeneous or where those with social authority share a single, strongly-held set of religious or other values.<sup>138</sup>

These objections are both weighty, but here again it is hard to say a priori just how weighty each will be in any particular circumstance. Perhaps we can only say that the risks and rewards of allowing some community standards to be filtered into a decision should be part of the mix of factors that we consult in looking for the right blend of discretion and rules.

The flexibility of discretion proffers a further advantage: it allows the court to consider the parties' own preferences. Dean Levi made this point in general terms years ago:

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138. Teitelbaum & DuPaix, *supra* note 4, at 1125-26. I deal with this kind of objection below in section VI.B.1.

[The litigants] . . . are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so.<sup>139</sup>

In custody decisions it may be particularly important to allow the contenders' preferences to be respected as fully as possible. For in the typical situation where the contenders are the two parents, conventional principles require allowing them as much authority over the upbringing and values of their child as possible.

What I have said in this section is not remarkable, for it boils down to saying that the conventional justifications for discretion apply neatly and even strongly to custody. To put the point another way, each of the sources of discretion helps give rise to the need for discretion in resolving custody disputes. The authority that comes from the best-interest standard is in part rule-failure discretion, for it would be hard to write a rule that would adequately replace the best-interest standard. It is also rule-building discretion, since we may hope that judges will be able to develop a common law of custody. It is rule-compromise discretion, because legislatures have been foiled by perplexities of agreeing on a satisfactory substitute for the best-interest principle. It may even have hints of khadi-discretion, as an acknowledgement that the basis for custody decisions may sometimes be more than purely and narrowly "legal." The point can be put yet differently. The very factors the critics of the best-interest rule note — the complexity of individual custody decisions, the variety of factual circumstances in which custody disputes arise, and the complexities of writing rules to govern custody disputes — unite to justify some degree of discretion.

### B. *The Advantages of Rules*

The critics of the best-interest standard do not, I think, really deny the case in favor of discretion I just sketched. Rather, they stress the disadvantages of discretion and the corresponding advantages of rules. We will therefore now revisit our discussion of those topics with an eye to identifying the factors that should be used in deciding what mix of rules and discretion should be preferred in custody law.

#### 1. *Rules and the Sources of Legitimacy*

The first advantage of rules is that they can contribute to the legiti-

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139. E. LEVI, *supra* note 77, at 5.

macy of a decision by bringing the standard used closer to the ultimate source of legitimacy. Would rules lend greater legitimacy to custody decisions than discretionary decisions made under the best interest standard?

This issue surfaces at several points in the work of the critics of the best-interest standard. For instance, Professor Mnookin fears that discretionary decisions will not represent a social "consensus" and that they will instead reflect the judge's "personal" preferences.<sup>140</sup> These fears reflect a classic and real problem with discretion — that it permits the substitution of private for public rules, that it allows judges to consult their own preferences and even prejudices rather than applying those social preferences that have succeeded in acquiring the force of law.

Nevertheless, we should treat Professor Mnookin's fears cautiously. First, "consensus" is not the standard for making democratic decisions; "majority rule" is.<sup>141</sup> Professor Mnookin advances no reason we should use a different standard in custody disputes from the one we ordinarily use. That standard is, after all, one we regularly apply to issues at least as controversial and momentous.

Second, while judges certainly sometimes substitute their own standards for public ones, the critics do not attempt to show how often that actually happens.<sup>142</sup> Their readers are thus left to their own dark imaginings. Of course, systematic evidence about how often judges stray is cruelly difficult to collect and analyze. But the critics do need to try, since there is some evidence that judges commonly at least try to do what is expected of them. Writing generally about legal decisionmaking, Professors Lempert and Sanders conclude that

rules of decision as well as methods of presentation apparently make a difference in the way evidence is used. . . . At times such ideas are debunked by lawyers and nonlawyers alike on the theory that lay people will decide cases as they see fit and that nothing will alter this. This

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140. *E.g.*, Mnookin, *supra* note 4, at 264.

141. In any event, it is not clear what Professor Mnookin means by "consensus." Unanimity? Virtual unanimity? A "supermajority," like three quarters or two thirds? A simple majority?

142. Except by dragging out *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966), and a few other cases yet once again. (*But see* Schneider, *supra* note 66, at 1854-55, where I argue that the case is better interpreted as deferring to the psychologist's astonishingly confident testimony.) The evidence of these cases is problematic not just because anecdotes are inadequate evidence of systematic misbehavior, but also because the cases cited are usually old, and the judges in them may have been applying standards of their own time that in fact reflected a social "consensus" then but that neither they nor their successors would apply now. Yet the critics need some empirical evidence of the extent to which discretionary power is abused because "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

"perfidy" theory of human behavior finds little support in the previous data. Decision rules structure the problem the fact finder must resolve, and so alter the ways in which cases are decided.<sup>143</sup>

There is some support for this position in family law. One of the most startling examples comes from Professor Mnookin's own fascinating study of the judicial reaction to *Bellotti v. Baird*.<sup>144</sup> In that case, the Supreme Court held that a minor who wished to have an abortion without parental consent had to be given an opportunity to show a judge either that she was capable of making the decision on her own or that an abortion would be in her best interest. Professor Mnookin investigated what happened when such rules were instituted in Massachusetts, where many judges were Catholic males who presumably opposed abortion. He found that judges virtually never denied minors an abortion.<sup>145</sup>

Another such piece of evidence comes from Professor Weitzman. She is not notably sympathetic to the work of courts handling divorces, but she writes that courts have adapted to "progressive" views about women by not disadvantaging working mothers in custody disputes.<sup>146</sup>

There is also some evidence about the use of "improper" standards in the law of child abuse and neglect, an area of law that raises issues sufficiently similar to those raised in custody law to be worth consulting. Professor Garrison writes, "The laxity of traditional standards has undeniably permitted intervention in some cases in which there were no discernible problems in family functioning, but these egregious abuses of discretion appear to be the exception rather than the rule."<sup>147</sup> And Professor Wald finds "little reason to believe that such cases constitute even a significant proportion of interventions in most states."<sup>148</sup>

There is a third reason for treating cautiously fears that judges will substitute personal for public standards. In some of the circumstances in which judges are conventionally taken to be doing so, they may in

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143. R. LEMPert & J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 75 (1986).

144. 443 U.S. 622 (1979).

145. R. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149-264 (1985).

146. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 239 (1985).

147. Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1791 (1987) (footnote omitted).

148. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 676 (1980).

fact simply be reflecting just the kind of social consensus Professor Mnookin seeks. As has been acutely observed,

[t]here is substantial evidence that courts applying the best interest standard do so in a way that is favorable to mothers, and fathers typically do not prevail in custody disputes unless they are able to demonstrate that the mother has some serious disability. These results are often attributed to the insidious biases of judges. Another explanation is that judges in awarding custody to mothers are continuing to track a powerful social norm which, in fact, has not suffered significant erosion. There is ample evidence today that mothers continue to assume the major responsibilities of caring for children.<sup>149</sup>

As examples of the danger he is discussing, Professor Mnookin lists custody cases involving extramarital sexual relations, lesbian mothers, illegitimate children, religious fanaticism, unconventional beliefs, and dirty houses.<sup>150</sup> But, in many of these situations too, judges who consult these criteria may be reflecting a widespread, and sometimes even carefully considered, community viewpoint. That viewpoint may be wrong, but the fault would then lie in the community's error, not in the judge's substitution of private for public standards.

More generally, we can identify several principles that are a conventional part of custody law and that are probably supported by a consensus (even if not a unanimity) of social opinion: That children should generally be in the custody of their natural parents. That children should have as much contact as possible with both parents. That stability, particularly stable contact with a primary caretaker, is important. That a parent who physically abuses a child is unlikely to be a good parent. That a parent who devotes time, attention, and love to a child is likely to be a better parent than one who doesn't. That very young children ordinarily ought to be with their mothers. That siblings ought not be separated. And so on. Indeed, contrasted with an area like the law of equitable distribution or the law governing the separation of unmarried cohabitants, the law of child custody seems to rest on a firm foundation in social agreement. It is hard to imagine a similar list of comparably concrete principles with wide social support that could guide courts in either of those areas.

The principles I listed above may not be supported by the kind of social science evidence that the critics of the best-interest standard sometimes seem to demand. But those principles may be as well supported as the principles relied on in many other kinds of important social decisions:

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149. Scott, Reppucci & Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1076-77 (1988) (footnote omitted).

150. Mnookin, *supra* note 4, at 269 n.194.

It is a feature of the human predicament . . . that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact; the second is our relative indeterminacy of aim.<sup>151</sup>

Fourth, even if there is not a social consensus on all the principles likely to be used in custody decisions, there probably is a social consensus that the best-interest standard is the correct one. People may not have thought fully about that standard's problems, but if social consensus is our concern, we cannot ignore the (probable) presence of this one.

Fifth, substituting private for public standards is systematically likelier and more troubling in some situations than in others. The more an issue speaks to the irrational sides of human nature, the greater the risks of discretionary error. As Professor Schauer writes,

The Supreme Court's decision [in *Palmore v. Sidoti*<sup>152</sup>] that the fact of an interracial marriage could *not* be considered is a typical example of the fear of error through bias. Although there may be cases, perhaps including this one, in which a conscientious and sensitive decision-maker would make the optimal decision by taking this factor into account, there are likely even more cases in which a decision-maker, empowered to consider the racial identity of any of the participants, will be guided by racial hostility and so make the wrong decision.<sup>153</sup>

On the other hand, where these special risks are not present (and I suspect that they are not regularly present in custody cases), we should feel only a diminished pressure to incur the costs associated with abandoning discretionary decisions in order to avoid the risk that judges will rely on "private" standards.

Sixth, rules do not necessarily produce "correct" decisions while private standards necessarily produce "incorrect" decisions. For example, Professor Mnookin seems to assume that, were a legislature writing rules, it would disallow factors like the ones he lists. However, as I suggested above, that assumption may be wrong. If so, Professor Mnookin's goals might be better served by discretion than rules, since discretion would allow at least some judges to reject the factors he dislikes. Sometimes — perhaps even often — a judge's "private" standards will be more "correct" than those embodied in a rule, particu-

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151. H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961).

152. 466 U.S. 429 (1984).

153. F. SCHAUER, *supra* note 53, at 151. It does not, of course, follow ineluctably from this argument that *Palmore* is rightly decided. For a discussion of some of the problems that case raises, see C. SCHNEIDER, *FAMILY LAW: CASES AND MATERIALS* ch. 13 (forthcoming).

larly where changing social circumstances and beliefs have made the rule anachronistic.

Seventh, the proper question is not whether private standards will ever be substituted for public ones. The question is how great that risk is, what the best means of diminishing it are, and what those means cost. Measuring the extent of the risk is discouragingly difficult, and we have seen that it has not been attempted in any serious way. I have suggested that while we cannot hope to eliminate all substitution of private for public standards,<sup>154</sup> the risks are probably less serious than the critics imply.

This brings us to the question of means. I suspect that the best way of diminishing those risks is also the most direct way. Many of the "private" standards we may most want to avoid can probably be easily identified. For many people, they will be the ones Professor Mnookin lists. If improper standards can be identified, the best course may be simply to prohibit judges from using them. This is roughly what the UMDA tries to do (in more general and vague terms) by prohibiting courts from considering parental behavior that does not affect the child. Of course, this technique would not wholly prevent judges from using improper standards. Few measures could do so. But this technique, used with sufficient precision and clarity, probably could reduce the incidence of impropriety considerably.

A crucial advantage of this technique is its low cost. The standards to be prohibited can be fairly easily articulated. Other standards for deciding custody cases need not be tampered with. Only undesirable behavior to be prohibited is prohibited; desirable behavior — discretionary decisions — need not be prohibited in order to deter undesirable behavior.

## 2. *The Advantages of Rulemakers in Identifying Just Solutions*

The second advantage of rules is that rulemakers (in our context, generally legislators) may be better situated than decisionmakers (generally judges) to decide what justice is. As a matter of establishing in general terms what good child custody policy is, this argument has genuine appeal. But the reasons legislatures may be better situated than courts to set wise policy hardly need to be extensively restated here,<sup>155</sup> and in any event I canvassed some of the relevant reasons

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154. Only the most draconian rule could entirely prevent judges from manipulating the many kinds of discretion they exercise so as to smuggle in their private standards.

155. On the problem generally, see D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977). For a variety of views on courts, legislatures, and social policy in the law relating to children, see R. MNOOKIN *supra* note 145. I have expressed opinions on the subject in Schneider,



above.<sup>156</sup> Very briefly, the argument is that there are, as the critics urge, many social views about child custody, all of which need to be taken into account in a way that courts are ill-equipped to do, and that these questions may have "expert" answers that courts cannot well collect systematically and accurately.<sup>157</sup>

But when the question moves from setting general custody policy to deciding particular cases, it is less clear that legislative resources will be more reliable than a judge's experience and feel for the special facts of each case. We could only resolve this uncertainty by measuring the relative costs of errors caused by incorrect and incorrectly interpreted rules on one hand and errors caused by incorrect exercises of discretion on the other. This we cannot practically do, if only because we don't know what a "correct" result in any particular case is.

Nevertheless, in deciding what degree of discretion to allocate to courts, we should consider one crucial but often overlooked factor — the quality of the decisionmaker. As Professor Cooper wrote with shocking frankness in evaluating discretion in interlocutory appeals:

The nature and quality of the federal district judges is the single most important factor to be counted. The better the judges are, the less need there is for frequent interlocutory appeal — they will make fewer mistakes, and more often correct their own mistakes before serious harm is done. . . . Should trial judges prove to be much like appellate judges in ability and temperament, it is possible to rely on them to play a significant role in determining the need for interlocutory appeals. . . . To the extent that we do not trust trial judges, on the other hand, we will be driven to rely more on clear rules or on discretionary devices that are controlled by the courts of appeals.<sup>158</sup>

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*Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 MICH. L. REV. 919 (1986) (reviewing R. MNOOKIN, *supra* note 145).

156. See Part IV.

157. Of course, that legislatures have a greater capacity in principle to make wise social policy does not mean that they will take advantage of it. Furthermore, legislative solutions have disadvantages. One is that, if they fall out of favor, they can be cumbersome to change or eliminate. This is, I think, a particularly acute problem in family policy, which seems to be painfully susceptible to fads. In a telling comment, Professor Levy invites mediation advocates to "remind themselves regularly that their 'movement' has been swelled by those who were previously employed by the custody investigation 'movement,' the conciliation court 'movement,' [and] the compulsory marriage counseling at divorce 'movement' . . ." Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 532 (1984) (footnotes omitted). One might hope that it would be harder for fads to be enacted into statutory than case law. Yet the speed with which, for example, joint-custody and grandparental-visitation reforms have been given statutory form may suggest otherwise.

It is also true that judges have something important to add to formulating policy. Judges, as I said earlier, have experience with the problems presented in custody cases of a very direct kind, and judges are the people who will have to apply whatever policies are established. On the other hand, judges can contribute their views either in direct testimony before legislative committees or through dicta in opinions, and they will commonly be able (to some degree) to turn those views into law while interpreting and applying the legislature's statutes.

158. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP.

Nor can we stop with evaluating the quality of the judges who make custody decisions. We must also worry about the quality of the higher courts that review custody decisions and of the bar that argues before both benches. Professor Cooper's comments are again relevant and wise:

The timing of appeals may have to depend on rules that are clear, simple, and rigid if it is not possible to rely on the learning, wisdom, and character of the lawyers who take appeals. Complex or discretionary rules carry high costs at the hands of an ignorant or supine bar . . . . Complex rules can be tailored to special needs, however, if lawyers can be trained to understand them.<sup>159</sup>

It is not easy or pleasant to evaluate the quality of the bench and bar. However, the critics of the best-interest standard may well have real cause for concern here. State trial courts probably do not attract the ablest lawyers in the country, and if prestige is what attracts people, family courts may attract even less able judges than state trial courts of general jurisdiction. And, for a variety of reasons, domestic relations lawyers have generally not been the best regarded part of the bar.<sup>160</sup>

In any event, in deciding whether legislative rules or judicial discretion will produce wiser results we might say that, with a rule, we know we are right most of the time (or at least we know we are doing what we think will be effective most of the time) and we know that we have eliminated (what we take to be) the major errors. With discretion, there is no way of assuring ourselves that a decisionmaker won't regularly make major errors, and identifying errors when they occur is difficult.

Another way of approaching the question of the relative preferability of rules and discretion is to ask whether one is satisfied with the quality of rules one can write. In general, one may suspect that in any area of life as complicated as this one, it will be difficult to write rules that are not intolerably complex, that actually confine discretion to the extent the critics seem to wish, and that produce satisfactory results. As we will see in Part VII, the critics do not identify a rule that meets these criteria. In other words, if we are deeply uncertain (as the critics take us to be) about what "right" is, a rule cannot assure us that "we

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PROBS., Summer 1984, at 157, 158-59. Professor Cooper notes a further problem with thinking about the relationship between discretion and judicial quality: The quality of the decisionmaker may depend in part on the extent of the discretion. People of ability are unlikely to take jobs that allow them little scope for discretion; people of less ability may prefer jobs that do not tax their ability to exercise discretion. Yet it is not clear that merely according judges discretion will be enough to attract able people to the bench.

159. *Id.* at 161.

160. See Schneider, *supra* note 130, at 1044-45.

are right most of the time.” (Of course, even if we don’t know what “right” is, we might still have some good ideas about what “wrong” is, and we thus might write rules specifically prohibiting such decisions.)

Indeed, implicit (and sometimes explicit) in the critics’ attack on the best-interest principle is the belief that we are so far from knowing what a correct result is that good rules are impossible. And, of course, the critics also suggest that discretionary decisions suffer the same defects. To an important extent, then, several of the critics resolve the conflict between rules and discretion on grounds other than the superior wisdom of the results either approach produces. That is, these critics are generally committed to finding some flat rule that may not produce justice more systematically but that reduces the costs associated with custody litigation. We will consider this approach in several of the sections that follow.

Our attempts to decide whether rules or discretion will produce wiser results in custody litigation thus end in uncertainty. Both discretion and rules seem to have their attractions and their flaws. But before we lose hope, we should note a crucial point, one that often gets lost in discussions of rules and discretion. We need not, and we probably cannot, choose either complete discretion or entirely mechanical rules. We *can* mix legislatively (or judicially) written rules with judicial discretion of various kinds. The real question then becomes what mix of the two best serves the many interests we would like to promote.

### 3. *The Principle That Like Cases Should Be Treated Alike*

The third advantage of rules is that they can promote treating like cases alike. As Professor Mnookin writes, “Indeterminate standards . . . pose an obviously greater risk of violating the fundamental precept that like cases should be decided alike.”<sup>161</sup> However, this advantage of rules (never absolute) does not apply neatly to custody disputes. The complexity of those disputes and the multitudinous differences between cases make it hard to tell which cases are truly alike. Should urban and rural cases be treated similarly? May the value preferences of local communities or the litigants themselves be consulted even if this produces different results around a state? Is the would-be custodian’s race relevant? And so on.

Furthermore, in custody cases, who has an interest in being treated similarly to whom? Normally, we want litigants to be treated like similarly situated litigants. But the best-interest standard implies we are

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161. Mnookin, *supra* note 4, at 263 (footnote omitted).

not (primarily?) concerned about custody litigants: the whole point is to make the best possible decision for the child, whatever the consequences for the litigating parents. This seems to suggest that it is the child who has an interest in being treated similarly to other children. But how important an interest is this? Insofar as the treat-like-cases-alike principle is intended to eliminate irrelevant or improper standards, it no doubt applies to custody law. But, as we saw in our discussion of importing private standards into custody decisions, the scope of this problem ought not be exaggerated. Insofar as the principle is intended to prevent social benefits or burdens from being disproportionately allocated, its pertinence to child custody disputes is unclear. It will often be doubtful that one child is getting a better deal than another. It may rather be more accurate to say that one child's case was decided in one plausible way and that another child's was decided in another. In such cases, it is not evident that either child has been injured. Rather the children have been treated alike in that each court has tried in a reasonable way to do its best for each child.

Even if we concede that a highly discretionary principle creates a serious risk that like cases will be treated differently, we still need to ask whether a rule will solve the problem. The answer depends on the rule's complexity. The simpler the rule, the greater the extent to which different cases will be decided under a single principle.<sup>162</sup> Yet complex rules which might avoid this problem can be costly because they can be cumbersome to apply, obscure, and unpredictable.

One important function of the treat-like-cases-alike principle is giving litigants (and their children) the sense that they have been treated fairly. But what will give custody litigants that sense? Rules tell litigants clearly that the standard under which their case is decided has the authority of legitimacy. Discretionary decisions, in contrast, are more readily criticized as merely reflecting the judge's personal and arbitrary preferences. But even if litigants accept a standard's legitimacy, they may still reject the way it is applied. Losers (including children whose preferences have not been honored) are likely to see differences between "like" cases that look large to them but that look trivial to others. Given the difficulty of custody disputes and the partiality of litigants to their own cases, I doubt that any plausible set of rules can reliably prevent this from happening. I suspect, further, that a mechanical rule of the kind some of the critics argue for would produce a sharp sense of injustice, often exactly on the theory that different cases were being treated alike. Losing litigants would surely argue

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162. One response to this is that then the cases are not really different. But this brings us back to the problem we discussed earlier — deciding what the criteria for similarity are.

that any decision so personally important ought to be decided with the fullest possible attention to all the facts and all the equities; attempts to substitute flat rules for such inquiries seem most unlikely to satisfy the litigants' sense of justice.<sup>163</sup>

On the other hand, were there clear rules, the parties might anticipate the result and adjust to it. They would also know that the person making the decision did not act out of improper motives, particularly out of some improper favoritism for the winner or some improper distaste for the loser. They could not make all the objections to judicial discretion that the critics raise. Yet the loser still might feel that the rule itself was unjust. Groups of fathers, for example, have formed in part around objections to rules (and practices) favoring mothers in custody disputes. And, in any event, the loser might feel that the rule had been unjustly applied in his case.

In sum, while like cases should no doubt be treated alike, that principle does not seem to apply forcefully to custody decisions. To the extent that it does — to the extent that the principle requires excluding improper private standards — we have already found reasons to be somewhat less concerned than the critics are.

#### 4. *Rules and the Planning Function*

Professor Mnookin writes, "Inherent in the application of a broad, person-oriented principle is the risk of retroactive application of a norm of which the parties affected will have had no advance notice."<sup>164</sup> This reminds us that the fourth advantage of rules lies in warning people how their cases will be decided so that they can plan their lives and in preventing the unfairness of retroactivity.

How important is the planning function in custody disputes? I suspect that Professor Elster is essentially correct when he says that "the idea that custody rules also create incentives during the marriage itself, before it is threatened by dissolution, is more tenuous. It is far from clear that married people make a rational assessment of the probability of divorce and adjust their behavior accordingly."<sup>165</sup> There are, however, undoubtedly some exceptions. Anna Karenina, for instance, thought during her marriage about the chances of losing

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163. Cf. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197.

164. Mnookin, *supra* note 4, at 262-63.

165. Elster, *supra* note 41, at 34. For an empirical justification of those doubts, see generally L. Baker & R. Emery, *When Homo Economicus Marries: An Empirical Study* (unpublished manuscript). For an extended discussion of them, see Schneider, *supra* note 163.

custody of her son because of her adultery.<sup>166</sup> And even if parties need not know how custody cases will be decided in order to plan, that knowledge may still offer them psychological repose. A mother might feel better knowing that the primary-caretaker presumption would ensure her custody of her child even if her marriage ended in divorce. (And, on divorce, her husband might adjust to his disappointment more easily.)

Where the custody dispute is not between two natural parents, but between a natural parent and a nonparent, planning may be more important. Thus a parent in the position of Mr. Painter might very much need to make plans when deciding whether to confide the care of his child to in-laws during a time of trouble.<sup>167</sup> Purely in terms of the planning function, it thus may make sense for there to be relatively great discretion in deciding which of two natural parents should have custody (because they will commonly not plan) but relatively little discretion where the contest is between a natural parent and someone else (since both the natural parent and the other person are likelier to want to plan).<sup>168</sup> Just such reasoning about planning probably informed the rules challenged in *Smith v. Organization of Foster Families*,<sup>169</sup> rules that were intended to tell the foster parents and the natural parents what the relationship of all the parties was.

Even if couples do not rely on custody rules in planning their behavior during marriage, they are likely to want to rely on them once they have decided to divorce. In particular, they presumably will conduct divorce negotiations with an eye to how a court would decide their case. The opponents of the best-interest principle typically make two kinds of arguments about the effects of discretion on bargaining over custody. The first is that the less predictable the judicial decision, the more prolonged and thus expensive bargaining is likely to be. As one court wrote,

[T]here is an urgent need in contemporary divorce law for a legal structure upon which a divorcing couple may rely in reaching a settlement.

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166. It may also be true that custody rules can be used to affect the way parents treat their children. For example, it is sometimes said that making joint custody the regime of choice expresses the message that both parents have a shared and inescapable responsibility for their children. It is, of course, difficult to measure the effectiveness of such a technique.

167. *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966). See *supra* note 128 for a description of the case.

168. This relationship between discretion and rules grows out of the fact that we accord special privileges and duties to natural parents to ensure that *everyone* knows who is responsible for each child. Where parents divorce, both parents may expect to continue to bear that responsibility, and so we can tolerate a discretionary decision about which parent will have physical custody. Where a nonparent acquires custody of a child, the clarity of responsibility is reduced. Rules may help to restore it.

169. 431 U.S. 816 (1977).

. . . [O]ur legal structure has not . . . been tightened to provide a reliable framework within which the divorcing couple can bargain intelligently. Nowhere is the lack of certainty greater than in child custody. . . . Now, . . . when divorces are numerous, easy, and routinely concluded out of court intelligible, reliable rules upon which out-of-court bargaining can be based must be an important consideration in the formulation of our rules.<sup>170</sup>

The second argument critics of discretion make is that where the parties do not know how a court will resolve their case, the parties have more leeway to bargain abusively:

The greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial. . . . To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue — and a large measure of discretion means exactly that — the economically stronger party gains negotiating leverage from the superior ability to prolong negotiation, to engage in expensive pretrial discovery, and to use preliminary court appearances for harassment.<sup>171</sup>

Two responses might be made to the critics' two arguments. The first is that both arguments rest on assumptions that could (with some difficulty) be, but generally have not been, empirically assessed. How does the law actually affect bargaining? Does it really affect it at all? If so, how centrally? How directly? Does it do so in the anticipated ways? These are knotty questions that have been mooted at some length in theory.<sup>172</sup> But theory is no substitute for evidence. We need evidence because there are at least hints that, here as elsewhere, the law may make less difference than lawyers think it ought to.

The realities of divorce negotiations are so intricate and tangled that the degree of judicial discretion in resolving custody issues is probably only one of many influences on bargaining. For instance, several factors might help mitigate a father's attempt to bargain improperly. First, even where a court uses a discretionary standard, the array of constraints on discretion we discussed earlier will make many — perhaps most — cases predictable, at least to the lawyers who regularly practice before that court. Custody cases even under the best-interest standard are not wholly discretionary and thus not wholly or even largely random. Second, the father is swimming against the tide created by the powerful if informal judicial preference for giving chil-

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170. *Garska v. McCoy*, 167 W. Va. 59, 67, 278 S.E.2d 357, 362 (1981) (footnote omitted).

171. Glendon, *supra* note 30, at 1170.

172. *E.g.*, Cooter, Marks & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015 (1985); Mnookin, *supra* note 4; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

dren to their mothers. Third, many things affect the father's bargaining position, including any wish he may have to conclude the divorce quickly and any fears he may have about his vulnerability in the other areas as to which the parties are bargaining.<sup>173</sup>

Fourth, there is some evidence that lawyers try to encourage their clients to settle and try to discourage them from bargaining abusively. Thus Professor Kressel detects an "unwritten code that lawyers should play the role of mediators, resolving as much through compromise and cooperative problem solving as possible."<sup>174</sup> A study that looked carefully at what divorce lawyers actually do found that most of them "construct an image of the appropriate mode of disposition of a case that is at odds with the conventional view in which lawyers are alleged to induce competition and hostility, transform noncontentious clients into combatants, and promulgate a 'fight theory of justice.'"<sup>175</sup> Most lawyers "advised their clients to try to settle the full range of issues in the case. . . . [M]ost seemed to believe that it is generally better to settle than contest divorce disputes."<sup>176</sup> And most lawyers invested significant "time and energy in selling negotiation as the means of resolving the case. . . . [I]t is the exceptional lawyer who fans the flames of the client's anger or accepts uncritically the client's version of events without reminding the client of the difficulties and costs of acting out of emotion."<sup>177</sup> As to child custody specifically, Professor Weitzman reports that over ninety-five percent of the lawyers in her sample had tried to discourage a client from seeking custody where the lawyer thought that the client would lose, that the client was being vindictive, or that the client would not be the better parent.<sup>178</sup> In sum, while there are clearly limits to what lawyers can, and should, and will do, their generally moderating influence should not be ignored.

I have been suggesting that the first response to the critics' argu-

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173. In addition, it will sometimes happen that a rule *increases* the power of the person abusing the bargaining process, since such a person may well fall quite coincidentally within a category of people a rule is intended to benefit.

174. K. KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 158 (1985). Professor Kressel observes that "the lawyers' dependence on each other for the successful resolution of the case, their anticipation of future interaction once the case is completed, and their concern for their professional reputation, all represent significant collegial bonds which run counter to the adversary spirit." *Id.*

175. Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC. REV.* 93, 113 (1986) (citation omitted).

176. *Id.* at 109.

177. *Id.* at 131. Further confirmation of the moderating role lawyers can play comes in K. KRESSEL, *supra* note 174.

178. L. WEITZMAN, *supra* note 146, at 237.



ments about the effects of discretionary decisions on negotiations is that those arguments presently lack a convincing empirical foundation. The second response is a normative one. The less certain the litigants are what result a court would reach, the greater the practical scope for bargaining: the clearer it is that a court would reach a particular result, the less incentive the party who would benefit from that result has to make concessions. Judicial discretion thus tends to give the parties greater freedom in negotiation. It is usually assumed that a virtue of the present system is that it allows divorcing couples to bargain almost freely over the whole range of disputes arising out of their divorce. The usual reasoning is that the parties know their own situation best, know their own children's interests best, and have some autonomy claim to deciding for themselves how to structure their lives after divorce. An argument for clearer, stronger rules, then, seems to be an argument for less freedom in arranging one's own affairs.

Sometimes, of course, the weaker party to the negotiations gains nothing in freedom because he is too weak to secure his own interests through bargaining. But to devise a rule that would systematically protect the weaker party, we would need a way of identifying the weaker party. The only way to do so without prohibitively difficult and expensive individual inquiries (inquiries that would import at least a degree of discretion into the decision) would be to assume that the woman was always the weaker party. Present social circumstances may make it true that, where there is a weaker party, it is likelier to be the woman than the man.<sup>179</sup> But, for the kinds of reasons I discussed above, there will not always be a weaker party, and the weaker party may sometimes be the man. Thus a rule that automatically held the woman to be the weaker party would be problematically procrustean and might be unconstitutional.<sup>180</sup> And even if the weaker party could reliably be identified, what kind of rule would simultaneously protect that party while allowing both the weaker and (so far as proper) the stronger party leeway to work out a fair arrangement that embodies

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179. That weakness is apparently more pronounced at the time of divorce in financial than custody disputes, since in the latter women benefit from the still prevalent social preference for giving mothers custody of their children. However, financial and custody issues can easily become intertwined and interdependent during negotiations.

180. *Orr v. Orr*, 440 U.S. 268 (1979). A particular problem is that one thing that makes a party weak is an especially strong desire to have custody. That strong desire might cause that person to give up too much in the other, largely economic, areas of negotiation in order to obtain custody. Since that person is, *ceteris paribus*, likely to be the better custodian, we would presumably want him to win, and (as a matter of justice and often of the child's welfare) to win with the full economic advantages to which he is entitled. But again, it is hard to see how one could write rules that would influence bargaining so as to ensure that result.

their own preferences? How, in other words, could such a rule both prevent injustice and retain the advantages of bargaining?

The theory of the current law, of course, responds that courts supervise bargaining to prevent abuses of it and to ensure its fairness. Such supervision is, however, of uncertain effectiveness. By hypothesis, both parties will have agreed to the terms that the court is reviewing, and thus the court will not be alerted by one of the parties to possible injustices in the agreement. And busy courts are physically incapable of looking seriously at all the agreements they process. Even if they could do so, it would often be unclear just what constitutes "unfairness." Thus, the relative freedom that a discretionary standard offers is bought at the cost of some level of unprevented injustice.<sup>181</sup> The (presently unanswerable) question, then, is what that level is and whether it could effectively and efficiently be reduced without giving up too much in the advantages of bargaining.

In sum, most custody litigants will probably not have had a strong need to know how a court would decide their dispute before the dispute arose. However, on divorce, that knowledge can influence the bargaining they are likely to undertake. We do not know, however, the extent of that influence or how it works. Nor is it clear that we want to substitute legally imposed standards for free bargaining or that we can find legally imposed standards that would reliably enhance the fairness of bargaining.

### 5. *The Social Functions of Rules*

The fifth advantage of rules is that they can serve social purposes that discretionary decisions generally serve less well. Principally, rules can guide social conduct better than discretionary decisions. But custody law, at least as it is presently understood, has to do primarily with settling disputes, not guiding social conduct. And insofar as custody law tries to guide social conduct, the indeterminate best-interest standard may itself serve some social functions. Indeed, the principle's very indeterminacy may be necessary if the rule is to promote some of its expressive ends.<sup>182</sup> The principle stands for the proposition that children's needs may be hard to identify and may conflict with their parents' needs, but that they nevertheless should predominate. Professor Mnookin makes something like this point when considering

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181. For a critical examination of the problem of judicial supervision of separation agreements, see Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984).

182. For a brief definition of the "expressive function," see *infra* note 189 and accompanying text.

whether custody disputes could be resolved by the radically undisciplinary device of tossing a coin:

[T]he repulsion many would probably feel towards this suggestion may reflect an intuitive appreciation of the importance of the educational, participatory, and symbolic values of adjudication as a mode of dispute settlement. Adjudication under the indeterminate best-interests principle may yield something close to a random pattern of outcomes, while at the same time serving these values, affirming parental equality, and expressing a social concern for the child.<sup>183</sup>

### 6. *The Efficiency of Rules*

Finally, rules may be more efficient than discretion. In custody cases, it is plainly desirable to have quick and inexpensive decisions. First, there are many custody cases, and settling them imposes large social costs. Second, the parties will often be hard-pressed to support the economic costs of litigation. Third, divorce litigation is hard emotionally on the litigants and on their children. Thus rules that abbreviate or eliminate litigation seem attractive. The critics make this point vigorously, and they are right to do so.

On the other hand, rules are not invariably more efficient than discretion. Cumbersome rules and elaborate procedures can be expensive. Discretion can be inexpensive where judges can informally consult unarticulated premises, where, in other words, they can short-circuit the process of reasoning through an issue step by step. Thus rules may be preferable to discretion in efficiency terms only where the rule is fairly simple but where we would expect a discretionary decision to be made with meticulous and costly care. Yet obviously such a rule gives up a lot in precision. The (imponderable) question in evaluating the efficiency of a rule then becomes, what number of suboptimal results are outweighed by how much savings of cost?

Professor Elster argues in favor of a rule that would resolve all custody disputes. He reasons that the costs of litigation are so high and the inaccuracy of a discretionary system is so great that a rule that produced even a nontrivial number of suboptimal results would be tolerable. His is a version of Justice Brandeis' view that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>184</sup> But his position raises several questions that should be pondered even if they cannot be answered.

First, how accurately does Professor Elster measure the ability of a discretionary system to make correct judgments? As will be recalled,

183. Mnookin, *supra* note 4, at 290-91.

184. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting).

he argues that that ability is slight. This is surely true of borderline cases. But how often are there custody disputes that are not borderline, where one of the parties seems clearly the less desirable parent?

Second, how accurately does Professor Elster measure the costs of litigation? How many of what seem to be the costs of litigation are in fact costs of the conflict that inescapably surrounds divorce? How far can you reduce that conflict by reducing litigation? For instance, Professor Elster notes that one cost of litigation is that a "custody battle places a child in many difficult roles: mediator, weapon, pawn, bargaining chip, trophy, go-between or even spy."<sup>185</sup> But many children who are the subject of custody disputes are too young to play most of these roles, or even to know what is going on. And many of these costs to the child are incurred whether or not there is litigation, or even a custody dispute. They are costs of conflict in the marriage and of separating, not of the divorce litigation.

Third, does Professor Elster include in his calculations the advantages of a system that permits litigation? Some of those advantages lie in the possibility that the hostilities between parents may sometimes be diminished by litigation.<sup>186</sup> (For instance, our legal system commonly assumes that some losers in litigation, having had their day in court, will then accommodate themselves to the result and try to go on about their business.) Others of those advantages lie in the possibility of correct outcomes that would not otherwise be achieved. (Such outcomes may be a result of litigation or a result of negotiations influenced by legal standards.)

Fourth, how high are the costs of suboptimal results? Many of the critics of the best-interest principle tacitly assume that custody disputes are commonly between two decently qualified parents, and thus that those costs are low. But to evaluate this supposition, we need to see what kinds of costs incorrect custody decisions might impose. What, then, is the state trying to achieve through custody law?

Elsewhere, I have identified five functions of family law.<sup>187</sup> Each of them is implicated in custody law. The protective function is represented by the state's interest in protecting children from living in harmful circumstances and in ensuring that responsibility for every child is clearly assigned to a specific person. The arbitral function is represented by the state's interest in giving the would-be custodians a means of resolving their dispute. The facilitative function is repre-

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185. Elster, *supra* note 41, at 24 (footnote omitted).

186. See Teitelbaum & DuPaix, *supra* note 4.

187. C. SCHNEIDER, *supra* note 153, ch. 15.

sented by the state's interest in giving the parents a way of arranging in legally binding form the terms under which care for and access to their child is to be assured. The channeling function is represented by the state's interest in directing people toward what it regards as the "best" forms of child custody.<sup>188</sup> The expressive function is represented by the state's interest in stating the importance of serving children's interests in divorce disputes and in emphasizing the responsibility both parents have for their children.<sup>189</sup>

Some of the state's interests in custody disputes are more important than others, but some of them, particularly child protection, are plainly urgent. Suboptimal results in these areas can cost children their happiness, health, and even lives and might well occur frequently enough to be disturbing. To put the point somewhat differently, I suspect that a clear rule of the kind Professor Elster would prefer would regularly produce results that would widely be regarded as intolerable. Nor, as we will see in Part VII, do the critics make a convincing case for any alternative rule.

We have now investigated the benefits and detriments of rules and discretion in custody litigation. No simple conclusion can be drawn from that investigation. At almost every step we found that both discretion and rules were a mixed blessing. We often discovered that we quite lacked the information we would need to choose wisely between them. In some ways, the critics' arguments seemed not only convincing, but understated. In other ways, they seemed exaggerated and too simple. We were left, then, with the certainty of uncertainty.

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188. The protective, arbitral, and facilitative functions of family law are probably self-explanatory. The channeling function may not be. I have written that

[t]he law performs the channelling function by creating or (more often) supporting social institutions and practices which are thought to promote desirable ends. Generally, the law does not require that people use these institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is the very presence of these institutions, the social currency which they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channelled into them.

*Id.* See generally Schneider, *State-Interest Analysis and the Channelling Function in Family Law*, in *COMPPELLING GOVERNMENT INTERESTS: THE MYSTERY OF CONSTITUTIONAL ANALYSIS* (S. Gottlieb ed., forthcoming).

189. Like the channeling function, the expressive function may need a little explanation: The channelling function works by creating institutions which people are "channelled" into. The expressive function works by deploying the ability of law to impart ideas through words and symbols. The expressive function has two (usually related) aspects: First, the expressive abilities of law may be utilized because doing so gratifies those speaking through the law. Second, the expressive abilities of law may be utilized in the hopes of affecting the behavior of people who hear the law speak.

*Id.* Family law's expressive function has recently received a good deal of attention. Prominent examples include M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293 (1988); and Weisbrod, *On the Expressive Functions of Family Law*, 22 *U.C. DAVIS L. REV.* 991 (1989).

## VII. THE CRITICS' ALTERNATIVES TO THE BEST-INTEREST PRINCIPLE

We have been discussing whether the best-interest principle is too discretionary by looking at the tension between rules and discretion in custody litigation. In doing so, we often inquired in general terms how well less discretionary alternatives to that principle would actually work. We will now address that question more concretely by examining the alternative the critics themselves most often propose.

Generally, the critics do not have a strong candidate to replace the best-interest standard. Professor Mnookin frankly allows that a good one is hard to find. "My conclusion is hardly comforting: while the indeterminate best-interests standard may not be good, there is no available alternative that is plainly less detrimental."<sup>190</sup>

As we have seen, there is support among the critics for preferring some "rule" to the best-interest standard. The rule that the critics as a group seem to favor most is one giving custody to the child's primary caretaker. Professor Elster, for instance, toys with three alternatives to the best-interest principle and finds all three at least problematic. However, he ultimately seems to favor the primary caretaker standard. Likewise, Professor Chambers prefers a (weak) primary caretaker principle. He proposes "that judges applying the current test should adopt a loose assumption that the best interests of preschool children will be fostered by placing them with the parent, if there is one, who has provided a substantial majority of the day-to-day care for the child."<sup>191</sup> Professor Glendon appears to agree.<sup>192</sup>

While the critics have hardly exhausted themselves with enthusiasm for the primary caretaker standard, it does seem fair to use that standard as a way of evaluating the proposition that a rule ought to replace the discretion associated with the best-interest principle. Our brief investigation of that standard will tend to confirm a point I have been developing all along — that discretion is not easily discarded because it is created for substantial reasons. We will see that, once you establish an apparently flat rule like the primary caretaker standard, you immediately run into conflicting interests and arguments that can only be accommodated by writing ever more elaborate rules or by conceding judges some discretion. I will now develop the point by raising

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190. Mnookin, *supra* note 4, at 282.

191. Chambers, *supra* note 20, at 478.

192. Glendon, *supra* note 30, at 1181-82. The primary caretaker standard also finds favor with one of the courts that has made a particularly deliberate, self-conscious effort to deal with the custody-standards problem. *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357 (1981).

Professor Mnookin wrote before the current enthusiasm for the primary caretaker principle.

a series of questions that hint at the breadth and weight of those interests and arguments.

First, could the primary caretaker standard be used by a nonparent to defeat a claim of a parent? To defeat the (separate) claims of both parents? Would *any* primary caretaker have standing to participate in a child custody suit? To initiate one?

Second, what would the relationship of the primary caretaker principle be to another currently popular idea — joint custody? A number of jurisdictions have believed that joint custody can help ameliorate some of the conflict over custody and can help keep children close to both parents. These jurisdictions have thus sought to channel parents into joint custody. Could such efforts coexist with a flat rule in favor of the primary caretaker? How far would they dilute a “weak” rule?

Third, what would be done where the primary caretaker seems likely to be a bad custodian? What if, for example, the primary caretaker had serious psychological problems? One answer would be to make an exception to the primary caretaker standard for unfitness. But unfitness is usually defined by abuse and neglect standards, which increasingly tend to be narrow. Would we want to limit the exception that much? In some cases, there is not that kind of unfitness, but one custodian has serious problems and the other is much more attractive. For example, what would be done where the primary-caretaker mother had married a man who had been convicted of sexually molesting his own children and who was not “cured” and where the father had a close relationship with the children and could offer them an excellent home?

Fourth, what status would children’s preferences have? The universal American understanding is that those preferences are to be taken into account in some way (often, with older children, quite an important way), and that understanding is widely thought to be soundly based both psychologically and normatively. Yet children do not universally prefer their primary caretaker.

Fifth, what place would issues of fairness to the litigants have? The best-interest standard suggests that those issues are subordinate to the child’s welfare. But many of the critics, particularly Professor Elster and Professor Chambers, argue (with some force) that those interests should be taken into account. Certainly some of the most wrenching custody cases arise where a parent has involuntarily lost contact with the child and then recovers it after someone else has become the child’s primary caretaker. What would be the status of such parents under a primary caretaker rule? Relatedly, how would the problem of litigation delay be handled? That is, it sometimes happens

that an initial judicial ruling places custody in the hands of one contender and that delays in litigation then allow that contender to become a primary caretaker. Should special rules be written for such situations?

Sixth, what would be the relation between the primary caretaker standard and the well-established doctrine that siblings should usually have the same custodian? Suppose two siblings had come to have different primary caretakers but wished to live together? Suppose they had the same primary caretaker but wished to live apart?

Seventh, is it fair to ignore, as the primary caretaker rule seems to do, the ways in which parents who are not primary caretakers may contribute to the care of their children? Even if those kinds of contribution may generally be ignored, what ought a court do in a particularly compelling case?<sup>193</sup>

Eighth, what should a court do when the primary caretaker seems likely to be uncooperative in permitting the other parent visitation but the secondary caretaker would be cooperative? Visitation is widely considered desirable for the child and for the noncustodial parent, and courts sometimes consider the willingness of a custodian to cooperate with visitation in making custody decisions. Courts even occasionally intimate that noncustodial parents have some sort of constitutional right to visitation.<sup>194</sup>

Ninth, what should be done where the child has closer psychological ties to the secondary caretaker than to the primary caretaker? This case will not arise frequently, one supposes, but it seems likely to arise occasionally.

Tenth, how easy will it be to tell the primary caretaker from the secondary caretaker? As Professor Clark observes, "Determination of which parent is the primary caretaker . . . is not easy for the increasingly common contemporary family in which both spouses work outside the home and share the care of the children."<sup>195</sup> In *Brooks v. Brooks*,<sup>196</sup> for instance, the mother had been the primary caretaker from the children's births in 1969 and 1972 until June 1980, when the father became the primary caretaker (with the help of a live-in babysitter). A hearing was held in July 1981. Who was the primary care-

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193. It is often said that women who give up careers to be with their families should be compensated in dividing marital property. Should men who give up being with their families to have a career that will support that family be compensated in deciding child custody?

194. See, e.g., *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983).

195. 2 H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 20.4(b) (2d ed. 1987).

196. 319 Pa. Super. 268, 466 A.2d 152 (1983).



taker? (Does the reason for the change in caretakers matter?) Or consider a problem presented by the work of one of the courts that has been most enthusiastic about the primary caretaker preference. That court said that "it is incumbent upon the circuit court to determine as a threshold question which parent was the primary caretaker parent before the domestic strife giving rise to the proceeding began."<sup>197</sup> Why is this the rule? Does it make sense from the child's point of view? How long do you have to have been a primary caretaker in order to qualify? And so on.

Eleventh, what if there is no single primary caretaker? Sometimes the primary caretaker will have died. Sometimes the primary caretaker will not want or be able to have custody (because the caretaker is ill or jailed, for example). Sometimes the child simply will not have had any real caretaker. Sometimes each parent will to all appearances have contributed equally to caring for the child.

Twelfth, what consequences would a stringently enforced primary caretaker rule have for our desire to encourage both parents to take as serious an interest as possible in the children? Might the parent who was not the primary caretaker come to feel less responsibility for the child even during the marriage? Might that parent feel more inclined to avoid, for example, paying child support after divorce?

Thirteenth, is the primary caretaker standard favored by the kind of social consensus that some of the critics of the best-interest principle seem to demand? No doubt there would be wide public support for it as a factor to be considered, but would there be broad support for it as anything like an exclusive rule? Would litigants see it as fair? Does it have the support the best-interest principle appears to have?

Fourteenth, is the primary caretaker standard supported by the kind of evidence from the social sciences that some of the critics seem to demand? After a meticulous and searching survey of the literature, Professor Chambers concludes that "[o]n the basis of the current empirical research alone, there is . . . no solid foundation for concluding that children, even young children, will be typically better off if placed with their primary caretaker."<sup>198</sup>

The kinds of problems these questions raise have not been unrecognized by courts and commentators. Thus the West Virginia Supreme Court (one of the most prominent sources of judicial support for the primary caretaker standard) admits that as a mechanical rule the prin-

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197. *Garska v. McCoy*, 167 W. Va. 59, 68-69, 278 S.E.2d 357, 363 (1981).

198. Chambers, *supra* note 20, at 560 (footnote omitted).

ciple works only for some cases. And thus Professor Chambers is willing to see the primary caretaker presumption defeated fairly easily.

The point that my questions make is not that the primary caretaker rule is a bad one. I think it has obvious attractions. Rather, the point is that constructing a rule that eliminates or even greatly reduces discretion in making custody decisions is stubbornly difficult. All of my questions can be answered, but often too imprecisely to resolve enough cases "correctly" and thus to deprive a court of discretion. And the more questions one tries to answer simultaneously, the more complex the rule must be, the less likely the rule to foresee all the possibilities, and the greater the court's discretion.

My questions, then, suggest how legislators are driven to invest courts with discretion. First, my questions indicate that the primary caretaker standard is susceptible to many of the charges the critics make against the best-interest principle. As Professor Mnookin recognizes, *any* custody rule is likely to have trouble with those charges:

Our inadequate knowledge about human behavior and our inability to generalize confidently about the relationship between past events or conduct and future behavior make the formulation of rules especially problematic. Moreover, the very lack of consensus about values that makes the best-interests standard indeterminate may also make the formulation of rules inappropriate: a legal rule must, after all, reflect some social value or values.<sup>199</sup>

Furthermore, my list of questions implies that there are many things we strongly feel are good for children and that sometimes those things conflict. When conflicts occur, either there must be rules for resolving the conflict or the resolution of the conflict must be left to judicial discretion. But writing such rules is not easy. Where two principles conflict, we might try to say that one of them is always weightier than the other. But what if the more important principle is, in a particular case, served only weakly by a given decision while the less important principle is served powerfully? In other words, perhaps the importance of a principle in a particular case as well as its importance in general should be taken into account. Furthermore, there will often be more than two principles in conflict. Soon we cannot work out in advance all the possible conflicts and devise rules resolving them. To all these problems discretion is the standard answer.

The questions I asked about the primary caretaker standard also indicate that even as simple a rule as the primary caretaker standard cannot be applied mechanically, without an exercise of discretion in

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199. Mnookin, *supra* note 4, at 264.

finding and interpreting the facts. And that discretion can greatly affect the ultimate decision.

All these points can be restated in familiar terms: custody disputes vary largely, and no single rule can take that variety into account. Furthermore, the things we think are good for children also vary largely, and often they cannot all be achieved at once. Consider, for instance, a short list of some of the currently popular principles of child custody: the maternal preference, the primary caretaker preference, the preference for the child's preference, the preference for joint custody, the preference for the "psychological parent," the preference for stability, and the preference for natural parents. A legislature might try to work out ways of accommodating all those interests. But then the advantages of simple rules would be lost. Legislatures are thus drawn to allowing courts to exercise discretion in deciding when one of the possibly relevant principles applies, in deciding how to resolve a conflict between principles, and in deciding what to do when no principle applies. Insofar as legislatures (or, for that matter, courts) write rules, they are likely to be "presumptive" rules only, rules that apply unless they conflict with another rule (or possibly with a principle or policy).

### VIII. STRIKING THE BALANCE

All that we have said so far leads, if I may say so, to a rather indeterminate result. My theoretical survey of rules and discretion suggested that there are important advantages and important disadvantages to both rules and discretion. When we looked at the particular problem of child custody, no clear general pattern emerged, although we did find reason to doubt both that the case against discretion is as powerful as the critics of the best-interest principle contend and that the case for it is as inspiring as one might wish.

More specifically, we saw reasons to be concerned about the ways in which discretionary decisions may be distant from the sources of legitimacy, but we also found reasons to doubt that those concerns need be overwhelming. We reached a complicated and equivocal answer to the question whether rulemakers are better situated than decisionmakers to decide what justice is than decisionmakers. We acknowledged fears that discretionary decisionmaking may impede treating like cases alike, but we also questioned whether treating like cases alike is as imperative in custody cases as elsewhere. We concluded that discretionary decisions may impose "planning costs," but we were less certain that those costs are debilitating in most custody situations. We had doubts about the ultimate effects of discretionary

decisions on divorce negotiations and ambivalences about how far we wanted to inhibit negotiations. We saw that discretionary custody decisions had conflicting effects on efficiency. We reasoned that discretionary decisions interfere with the social purposes of rules in custody cases less than in some other contexts and might even serve some social purposes. Finally, we discovered that the critics of the best-interest rule cannot muster enthusiasm for an alternative, and that their favored choice seems open both to many of the same criticisms they make of the best-interest principle (albeit perhaps less intensively) and to the standard attacks on rules that proponents of discretion make.

Where should all this leave us? How should we go about choosing the proper mix of rules and discretion in custody decisions? First, we need to realize that we should not expect to find happiness at either end of the continuum. Indeed, in real life it may be impossible to locate either end of the continuum. As we saw earlier, discretion has many sources and limitations. These sources and limitations are so numerous, so embedded in the American system of law, that they are essentially inevitable. In the American legal system, at least, it is hard to imagine a plausible system for judicially resolving child custody disputes that would be exclusively discretionary or exclusively nondiscretionary.

Suppose that judges were furnished with no rule of decision at all. They would nevertheless bring with them some fairly systematic ideas about custody questions. They would find themselves under several kinds of internal and external pressure to make decisions in ways that accorded with some socially prevalent ideas about children and parents.<sup>200</sup> Judges under these circumstances would begin to borrow and develop rules of their own.<sup>201</sup>

Suppose on the other hand that judges were furnished with something like a real rule. As our discussion of the primary caretaker principle suggests, in an area as various and perplexing as child custody,

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200. What the law gives in discretion . . . social forces may take away. This is not surprising, for what legal discretion necessarily accords is the freedom to be influenced by factors other than the law. When the law leaves open a range of choices, unless the choice is made randomly, it must be influenced by something other than and in addition to the law.

Lempert, *supra* note 5.

201. Consider Neil Smelser's reflections on three studies of intentional or communitarian experiments. Most of these experiments are spawned out of some kind of alienation from and rejection of that web of values and norms from which the adherents of the experiments withdraw. Furthermore, in at least a portion of them, a positive utopia is envisioned in which there will be no rules . . . . The three studies show, in different ways, that these communitarian experimenters cannot bring it off. Before long, understandings and rules begin to emerge (having to do, for example[,] with the division of labor, or with how to deal with very young children) . . . .

From *Structure to Order*, in *THE SOCIAL FABRIC: DIMENSIONS AND ISSUES* 33, 33-34 (J. Short ed. 1986).

perhaps no rule could ever be so simple and so mechanically enforced as to deprive the decisionmaker of discretion in making or applying law. Even the tender-years presumption was only a presumption, and parental unfitness and even marital fault were, *inter alia*, grounds for rebutting it. Similarly, even the considerable preference for the natural parent over another contender is sometimes overcome. Thus it may be a false opposition to say that we have a choice between rules and discretion. Rather, we may have a choice at the extremes between rules formally adopted and systematically applied and rules informally adopted and perhaps unsystematically applied. Outside those extremes, we have a choice between a mix of discretion and rules too complex to be denominated by one term or the other.

In fact, in custody cases we have already rejected the most discretionary kind of plausible solution, one we live with all the time in many other vital and delicate kinds of cases — a jury decision. The jury decision is made by people who have not been selected to make any particular kind of decision, who have not necessarily been socialized in making decisions according to law, who have not been trained in resolving legal issues, who are not readily or systematically subject to criticism, who do not have to explain their conclusions, who are not subject to most kinds of hierarchical authority, who are unlikely to make a decision of this sort again, and who thus are not under institutional pressures toward consistency. Of course, juries are not entirely unchecked: they are supposed to represent community sentiment, they are instructed on the law by a judge, they are expected to explain their decisions during their internal deliberations (even if not publicly), and they are subject to reversal by the trial judge or an appellate court if their decision manifestly exceeds the outer bounds of rationality (except when they have acquitted criminal defendants).

Nor would we have trouble rejecting the least discretionary system — the coin toss. As Professor Mnookin suggests, the coin toss is unsatisfactory, partly because, even if we don't know what is best for children, we have a pretty clear idea of what may be worst, and we are anxious to prevent the worst when we can. We also have some reasonably good ideas about some of the things that are good for children — affection, stability, and so on — and want to see them provided when we can.

In fact — and this point bears emphasizing — the present child custody regime is much more a mix of discretion and rules than one would gather from the harsher critics of the best-interest standard.<sup>202</sup>

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202. It should be said that this may be partly due to the fact that the law has responded to some of the arguments against discretion that the critics have made.

They tend to assume that the principle is applied as if it meant what it says and as if it were all that is said. But in fact, the discretionary aspects of the best-interest principle are frequently tempered. For instance, a number of jurisdictions have instituted various rules or presumptions. Sometimes these are phrased as positive instructions, like the preference for joint custody, the primary caretaker rule, the psychological-parent preference, and so on. More weakly, the instructions may list factors to consider, as the UMDA does. Sometimes these are phrased as negative instructions. The UMDA's prohibition on taking marital fault into account is an example. Thus a recent survey of family law reports that thirty-one states and the District of Columbia have "statutory custody guidelines," that thirty-nine states and the District of Columbia "consider the children's wishes," and that thirty-six states have "joint custody laws."<sup>203</sup>

Even where only the best-interest principle is provided, it may be given meaning by judicial interpretation that evolves into rules. Professor Elster thus understates things when he says, "The interpretation and implementation of the best interest principle have been governed by various hypotheses that have sometimes acquired the status of informal presumptions. . . . Thus in actual adjudications the best interest principle is not always implemented in a case-by-case, unstructured, or discretionary manner."<sup>204</sup> In short, the critics attack the best-interest standard as though it were intended to establish khadi justice. In fact, the best-interest principle operates as part of a complex *mélange* of rules, rights, presumptions, and guidelines.

In addition, we should remind ourselves that the present system in practice if not in theory massively deprives judges of discretion to decide custody disputes. In the huge majority of custody disputes (again, the usual estimate is ninety percent), the parties reach a settlement that the judge merely ratifies.

I have been arguing that we can find no formula that will prescribe any satisfactory mix of rules and discretion. There are too many imponderables, and too much will depend on what substantive goals we want to promote. Trial and error may be better friends than *a priori* programs. Thus I will not — can not — end with any concrete recommendations. Nevertheless, it is worth considering the possibility that, at its best, the present system provides as reasonable a framework for balancing the advantages of rules and discretion as we are likely to find. That system (again, at its best) recognizes at some level that

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203. Freed & Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 467 (1989). Two of the states with joint custody laws had established them through case law.

204. Elster, *supra* note 41, at 10-11.

many child custody cases fit a pattern, that we know what we think about many of those patterns, and that we can write rules (or at least create presumptions) to deal with cases that fall into those patterns. As Professor Glendon sensibly observes, “[T]he fact that no two family situations are identical does not mean that there are not regularly recurring fact patterns that can and should be treated in the same way.”<sup>205</sup> On the other hand, we should not try to fit all cases into one pattern (or even into a very few). This is the burden some of the critics (like so many other commentators) seem (quite unnecessarily) to assume, a burden under which they stagger when trying to support the primary caretaker rule as an exclusive principle. Again, Professor Glendon has it right: “First and foremost, we would have to abandon the idea that a single set of principles, policies, standards, and rules can or should govern all divorces . . . .”<sup>206</sup>

In the present system, lawmakers can write concrete rules (often only presumptive rules) where there are clear patterns of cases while preserving discretion where there are not. Judges are allowed several kinds of discretion. First, judges have, as they have always had, discretion to decide what the facts are. Second, they have discretion to decide whether the facts match any of the patterns for which clear rules have been written. In other words, judges have discretion to find facts and apply the facts to the law.

Judges also have some kinds of discretion to make law. For example, they have the authority to decide what to do when two rules or presumptions conflict. This is important, because perhaps the hardest problem in writing custody law may be deciding what to do when two goals conflict. Similarly, judges have discretion to decide what to do when no rule applies. In other words, judges have discretion to act when the law provides no reasonably clear guidance.

Some other kinds of discretion are perhaps more problematic — those that arise where judges have the power to reject rules that seem clearly applicable but that also seem somehow unsatisfactory. For instance, ought judges have discretion when applying a rule to a particular case seems to produce a result that conflicts with the purpose of the rule? Or when applying a rule to a particular case seems to produce a result that conflicts with our broad understanding of what justice is?<sup>207</sup> These are questions about which people may reasonably differ. The

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205. Glendon, *supra* note 30, at 1171.

206. *Id.*

207. One way the law presently attempts to answer these questions is to use presumptions instead of rules. This is one reasonable way of trying to adjust the balance between rules and discretion.

usual answer to questions of this kind is to say nothing about them. Thus courts are not invited to find occasions to exercise this sort of discretion. Nevertheless, able judges can often justify such exercises within the ordinary limits of judicial craftsmanship.

Under the system I have been describing, the best-interest principle can act as a statement of the ultimate goal of child custody law and as a default standard to be applied wherever a more specific policy is unavailable. As a default standard, it plays a crucial part, because the cases that actually reach courts are often precisely those that are specially likely to be hard to resolve under specific rules. However, a major function of the principle is not just to provide the basic principle for decision, but also to provide a goal to be used in interpreting rules and a safety valve where rules produce conflicting results, no results, or (perhaps) "wrong" results.

The system I have been describing limits discretion more than a pure "best-interest" approach because it more willingly envisages lawmakers writing rules of limited scope where possible. I might also limit trial court discretion more than most jurisdictions now do by urging appellate courts to involve themselves in custody cases somewhat more actively. Generally, they now tend to do fairly little: "[T]he often-stated rule is that an appellate court cannot interfere with the determination of a trial judge in a custody dispute unless the lower court has exercised its discretion on some wrong principle or taken an inappropriate factor into account."<sup>208</sup> I would not urge that appellate courts closely supervise the trial courts' exercise of discretion in finding facts and applying the law. But they might work more fully with trial courts in exercising judicial discretion to make law.

The legislature, of course, will often wish to participate in writing custody rules. But, for the reasons I have mentioned before, legislative rules sometimes sweep too broadly, apply too rigidly, and respond too little to experience. The more extreme kinds of joint-custody presumptions seem to me an example of such rules. They seem to me premature and of doubtful wisdom.

Appellate courts, on the other hand, probably tend to err too much on the side of trial court discretion and ad hoc decisions. To reach a satisfactory balance between discretion and rules, appellate courts may need to be modestly more active. What I am proposing, in other words, is common law rulemaking of the kind courts are vastly experienced with in many areas of law. But the common law method works

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208. Mnookin, *supra* note 4, at 254 (footnotes omitted).



only where appellate courts make it work. As Professor Atiyah writes,

[I]f all principle is to be abandoned, and everything left to the discretion of a single trial judge, the whole value of the case by case methodology of the common law will be lost. For that reason I confess to feeling great anxieties at the signs in a number of recent cases that discretionary power to do what seems just and equitable [is] to be exercised solely by a trial judge, with virtually no appellate supervision unless manifest errors of principle are made.<sup>209</sup>

Professor Glendon's views are similar:

As case law begins to develop under a grant of discretion, appellate courts also have an important role to play. Rather than automatically deferring to the "sound discretion" of the trial judge, they should, especially in the early application of a new statutory grant of discretion, carefully examine lower court decisions to promote coherence, continuity and predictability in the case law.<sup>210</sup>

She notes that, "as the history of equity (at least at times) demonstrates, a system of discretionary, yet highly predictable, judge-made law can develop if its evolution is guided by clear principles and is supervised by a single higher court."<sup>211</sup>

To make the appellate court's work easier, trial courts could explain their conclusions more regularly and thoroughly than they now often do.<sup>212</sup> This has several well-known advantages. First, to explain itself clearly, the trial court will often need to think more clearly about what it is doing. This should improve the quality of the trial court's decisions. Second, the requirement to provide an opinion should reduce the extent to which improper factors influence decisions, since a judge may recognize the influence of improper factors and then try to exclude them, either out of a sense of duty or a fear of being seen to do wrong. And where a judge expressly states improper justifications (which certainly happens), the appellate court can readily reverse. Third, the trial court opinion tells the litigants exactly why they won or lost, information they presumably wish to have and seem entitled to. Fourth, the opinion allows trial court judges to help appellate

209. Atiyah, *Common Law and Statute Law*, 48 MOD. L. REV. 1, 4 (1985).

210. Glendon, *supra* note 30, at 1196.

211. *Id.* at 1171.

212. There is some authority for the proposition that trial courts in custody cases should explain themselves carefully in writing. For example, the Minnesota Supreme Court has written, In light of the importance of written findings and the fact that [Minnesota law] directs the family court to "consider and evaluate" certain specific factors in determining the best interest of the child, we conclude that the family court must make written findings which properly reflect its consideration of the factors listed in [the statute].

*Rosenfeld v. Rosenfeld*, 311 Minn. 76, 82, 249 N.W.2d 168, 171 (1976).

courts develop rules and to contribute the special knowledge their experience gives them to that process.

All this being said, there are undeniable and perhaps onerous costs to imposing additional lawmaking duties on appellate courts and a reasons requirement on trial courts. Doing so exacts time and effort from already burdened courts: trial courts would have to take time to write opinions; appellate courts would, especially at first, have to decide more cases than they do now. These extra efforts would lengthen the decision time and thus the time in which the child's custody is not firmly settled. This can be agonizing for both the contenders for custody and the child. Here I join the many critics of custody decision-making in the United States who urge that such cases be resolved as expeditiously and finally as possible.

On the other hand, the burden this modest reform would impose on courts is hardly unlimited. The appellate court's task is primarily to supervise the exercise of discretion to make law, not the exercise of the other kinds of discretion. Thus appellate courts need not intensify their scrutiny of findings of fact, although "[c]ourts of appeals cannot avoid completely the task of ensuring that there is a plausible fact platform for their declarations of law."<sup>213</sup> They might need to intensify somewhat their scrutiny of law application. They would need to examine somewhat more fully the law's substance. Yet they do not need to commit themselves permanently to intensive scrutiny. They need only provide it when it seems likely to be productive. As Professor Cooper observes, the degree of scrutiny under Rule 52(a) has changed "according to the relative capacities of district courts and appellate courts in many dimensions, the need for uniformity between cases, the perceived importance of the dispute, and the nature of the legal rules involved. . . . Over time, all of these factors change . . . ."<sup>214</sup>

I am suggesting that appellate courts can contribute to a somewhat less discretionary (yet still flexible) law of child custody. But in the end, the Court's statement in *Commissioner v. Duberstein*<sup>215</sup> is worth remembering. There, the IRS proposed a new test which, "while apparently simple and precise in its formulation, depends frankly on a set of 'principles' or 'presumptions' derived from the decided cases, and concededly subject to various exceptions; and it involves various corollaries, which add to its detail."<sup>216</sup> The Court said,

Decision of the issue presented in these cases must be based ultimately

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213. Cooper, *supra* note 110, at 657.

214. *Id.* at 646.

215. 363 U.S. 278 (1960).

216. 363 U.S. at 287.

on the application of the fact-finding tribunal's experience with the main-springs of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.<sup>217</sup>

The extent of trial court discretion under my proposal will, of course, depend on the extent to which appellate courts can develop rules, but it is likely to be considerable. So let me close with one last effort to quiet any fears we may have about the extent of that discretion. First, any exercise of discretion in American courts is subject to the many constraints on discretion I cataloged earlier — the inhibitions resulting from the selection, training, socialization, and criticism of judges; the limitations imposed by the internal dynamics of the decisionmaker; the sharing of powers; the restraints of hierarchy; and the restrictions imposed by procedures, substantive rules, and rights. These constraints are so deeply ingrained that they are often not noticed, but, as I have argued, they are numerous, substantial, and consequential.

Second, the system I am proposing leaves a good deal of room for negative rules. The critics of the best-interest principle seem most worried about the use of particular factors in making custody decisions — taking a parent's sexual misconduct into account, for instance. Many of these bases for decision can easily, clearly, and cheaply be attacked by direct prohibitions. Such prohibitions have the advantage of sharply limiting judicial discretion in desired ways but only in desired ways. Discretion in other, more appropriate, areas can remain essentially unhampered.

Third, while I am proposing to depend on courts to exercise discretion both in finding facts and writing rules, my proposal could also make legislative supervision of custody law easier by requiring both trial and appellate courts to state more explicitly than before the bases for their decisions. A legislature might not always take advantage of this information, but this constraint is far from toothless. Legislatures have hardly been inactive in family law in recent years.

Fourth, unlike most other kinds of court judgments, child custody decisions can be reconsidered if the situation changes in some significant way. To be sure, not all of the harms of an incorrect custody decision can be reversed, and reconsideration will sometimes come too

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217. 363 U.S. at 289.

late and cost too much. But this special feature of custody law can ameliorate some mistakes.

Fifth, it is worth reiterating a point I made earlier: The gravity of discretionary custody decisions, indeed of judicial custody decisions as a whole, is lessened by the reality that in most divorces, custody is decided by an agreement between the husband and the wife. True, negotiations leading to such agreements may be conducted "in the shadow of the law." But it has not been convincingly demonstrated that the discretionary nature of the best-interest principle seriously damages negotiations, and to some extent it frees negotiations to serve the parties' preferences.

Sixth, the critics' own objections to the best-interest principle might cause us less instead of more concern about custody decisions. The critics argue that it is hard to say that a child custody decision is right. By the same token, it may often be hard to say that such a decision is wrong. As Professor Chambers writes,

One reason why case-by-case inquiries are difficult and one reason why it is difficult to commend new preferences is that, as recent research has confirmed, in most families *both* parents develop strong ties to their children, ties important to the child and to the parents, and either parent seems likely to do a reasonably competent job of child rearing. Thus the urgency for new rules may be less than we suggested at the beginning. Courts may lack bases for principled choices but even their "bad" choices may still usually turn out reasonably well for children.<sup>218</sup>

Finally, perhaps discretion's scope is not too broad, but rather too narrow. "Problems arise," Professor Lempert writes, "because the tendency to use shallow case logics in repetitive decision making make[s] it likely that not all the factors that might shape the wise case-by-case exercise of discretion are considered."<sup>219</sup> In other words, the real problem with the best-interest standard may be not that courts have too much discretion, but that they have voluntarily limited their own discretion and made decisions on the basis of too few factors.

## CONCLUSION

In this article, I have observed that the critics of the best-interest principle have become numerous and formidable. They contend that that principle is indeterminate and thus allows courts to exercise too broad a discretion. I agree that the best-interest principle by itself does not dictate results in cases and that any grant of judicial discretion may be abused. And I agree that the best-interest principle some-

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218. Chambers, *supra* note 20, at 568-69.

219. Lempert, *supra* note 5, at 84.

times gives courts too little guidance and that custody courts have sometimes abused their discretion.

Nevertheless, in resolving important legal questions there is rarely a purely discretionary decision or a decision that can be made purely mechanically. Thus the relationship between rules and discretion in any substantive area is always forbiddingly complex. It is complex because of the many ways courts exercise discretion in applying rules and because of the many forces that limit judicial discretion. It is complex because there are many advantages and many disadvantages to both rules and discretion. It is complex because it changes from court to court, from jurisdiction to jurisdiction, from litigant to litigant, from issue to issue, and from time to time.

All this is true of custody adjudications. The critics are right in saying that the discretionary best-interest standard has its flaws and hazards. But they are too grudging in their recognition that the rules that might replace discretion likewise have their flaws and hazards and that discretion allows courts to do good as well as harm. The critics are right in saying that unfettered discretion is problematic. But they are wrong in believing that courts applying the best-interest principle exercise unfettered discretion.

If the relationship between rules and discretion is as complex as I have suggested, we can probably only make small adjustments in the balance between the two. Thus I have suggested that the critics' arguments can best be accommodated by asking courts, with legislative help and supervision, to address somewhat more fully the process of writing common law rules that would provide judges and litigants with some of the advantages of rules without losing most of the advantages of discretion.

This conclusion is inglorious. The system I propose will sometimes produce deplorable results. But deplorable results will not be eliminated by giving judges complete discretion, by denying them any discretion, or by entirely depriving them or the state of power over custody questions. Deplorable results are the inevitable consequence of intractable problems.