1992

Discretion and Rules: A Lawyer's View

Carl E. Scheider
University of Michigan Law School, carlschn@umich.edu

Publication Information & Recommended Citation

Schneider, Carl E. "Discretion and Rules: A Lawyer's View." In *The Uses of Discretion*, edited by K. Hawkins, 47-88. Oxford Socio-Legal Studies. Oxford: Oxford University Press, 1992.

THE USES OF DISCRETION

edited by

KEITH HAWKINS

CLARENDON PRESS · OXFORD
1992

2. Discretion and Rules A Lawyer's View

CARL E. SCHNEIDER

IN modern society the law regulates the complex behavior of millions of people. To do this efficiently—to do this at all—broadly applicable rules must be used. Yet such rules are bound to be incomplete, to be ambiguous, to fail in some cases, to be unfair in others. Some of the drawbacks of rules can be minimized by giving discretion to the administrators and judges who apply them. Yet doing so dilutes the advantages of rules and creates the risk that discretion may be abused. Working out the proper balance of these considerations is both necessary and perplexing in every area of law.

Scholars, lawyers, and judges are hardly unaware of these problems. Those who have most directly addressed the problem of discretion fall primarily into two groups. The first group comprises of those—principally sociologists[1] and political scientists, but also some lawyers—who examine discretionary decisions and ways of controlling discretionary decisions in various particular bureaucratic contexts, most extensively the police. The second group consists of the legal philosophers who have for decades, if not centuries, asked, 'Do judges in some cases have freedom in resolving legal issues to decide them more than one way, or are judges always legally bound to reach one conclusion rather than any others?' (Greenawalt 1975: 365). The former group thus directs its attention to highly context-specific questions, the latter to highly abstract questions.

This chapter falls into neither category. Rather, it looks at the problem of discretion and rules from a lawyer's point of view. In thinking about how the law can best serve its purposes, lawyers are repeatedly confronted with what may be crudely described as a tension between writing rules and giving someone (to the lawyer's

I am grateful to Lynn A. Baker, David L. Chambers, Edward H. Cooper, Keith Hawkins, Richard O. Lempert, Frederick F. Schauer, Eric Stein, and Kent D. Syverud for their generous and helpful comments on various incarnations of this chapter.

[1] For a particularly good example of this genre, one uncommonly self-conscious about the systematic issues raised by the tension between discretion and rules, see Lempert, Chapter 6, which also contains helpful citations to the social science literature on discretion.

mind, usually a judge) discretion. In this chapter I consider how that tension should be handled. I ask what kinds of advantages rules and discretion seem systematically to offer and what kinds of disadvantages they seem systematically to present. While I cannot pretend that my answers will be those of a typical lawyer (if only because there is probably no such person), I do hope that they will give the reader of this volume some insight into the kinds of issues the tension between discretion and rules seems to lawyers to raise and the ways lawyers commonly deal with them.

Even in the minds of lawyers, the tension between discretion and rules provokes conflicting impulses. Most lawyers have pledged their faith to the concept of rules and to the doctrine of due process; correspondingly, they are dubious about discretionary decisions. And, like the public, lawyers tend to think about 'law' as a system of rules. Where an area of law—like my own field of family law—seems poor in rules and rich in discretion, they begin to wonder whether it is really law.

But lawyers know that rules must be interpreted and that rules can lead to wrong results in particular cases. Thus lawyers know with special acuteness that discretion is necessary. In addition, lawyers are as susceptible as anyone else to a new social attitude toward the authority of rules. This new attitude is vividly evoked by Keynes, who, speaking of himself and the friends of his youth, said:

> We entirely repudiated a personal liability on us to obey general rules. 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 . . . we 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. (1956: 252)

Professor P. S. Atiyah further illuminates this new attitude when he writes, '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 consequence which he is unable to identify or even perceive' (1980: 1270). Thus, despite their recognition of the primacy of rules, lawyers recognize that discretion is both invaluable and inevitable.

Because they are pulled so vigorously in both directions, lawyers as

a group cannot be said to have a coherent attitude toward the problem of discretion and rules. Nor, I think, do lawyers systematically divide along the lines of any discernible principle in approaching the problem. Rather, a lawyer's view of the choice between discretion and rules is often context specific. Sometimes that choice is driven simply by the lawyer's view of what substantive use a judge is likely to make of any grant of discretion.

In this chapter I will not try to resolve the tension between discretion and rules. I do not believe that one can be systematically preferred to the other. Nor do I offer any formula to follow in choosing between discretion and rules. On the contrary. My general position is that the choice will be complex and uncertain and that it will depend on factors that will be difficult to assess and that will vary from circumstance to circumstance (so that it is not unreasonable for lawyers to look to particular contexts in evaluating discretion and rules). I will argue that, in the world in which we live, there typically is not a choice between discretion and rules, but rather a choice between different mixes of discretion and rules. The first reason for this is that discretion and rules rarely appear in unadulterated form in any large area of legal significance. Typically, I will suggest, there is no such thing as an important legal decision from which all elements of discretion have been removed. Yet I will also suggest that, typically, there is no such thing as an important legal decision in which judicial discretion is free to roam wholly unchecked.

The second reason we rarely face a choice between discretion and rules is that there are compelling advantages and compelling disadvantages to both discretion and rules. We will commonly want to secure the advantages of *both* discretion and rules while avoiding their disadvantages. Worse, it will usually be unclear just how to secure those advantages and to avoid the disadvantages in any particular situation. This will generally mean that we must grope toward some satisfactory mix of discretion and rules.

The purpose of this chapter, then, is primarily analytic. I want to show how the problem of discretion and rules looks to a lawyer. I want to present a systematic, if brief, chart of the things to consider in evaluating what mix of discretion and rules to prefer in any particular situation. In so far as my purpose strays beyond the analytic, it is to domesticate both discretion and rules, to suggest that the dangers of each tend to be exaggerated. Thus I will treat at special length the advantages rules offer. And I will go to special trouble to show that

discretion is neither as uncommon in the American legal system as its critics suggest nor as unconstrained in its working as its critics fear.

Before beginning, we need a few brief working definitions. These definitions must be very rough ideal types, because, as I just said, part of my point will be that there is rarely if ever such a thing as a pure rule or pure discretion and that most cases are resolved through a complex mix 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 which instructs him how to decide a case or to resolve a legal issue.[2] 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' (Greenawalt 1975: 365).

On the continuum between rules and discretion are a number of intermediate categories. Some of these can be derived from the work of Professor 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 . . .' (1977*b*: 22). 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 or some other dimension of morality' (ibid.: 22). 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' (ibid.: 24). Policies and principles, on the other hand, 'do not set out legal consequences that follow automatically when the conditions provided are met' (ibid.: 25). Policies and principles, then, can be thought of as less directive than rules but more directive than confiding a decision to the discretion of the decision-maker.

There are also more directive versions of discretion. Professor Dworkin calls our working definition the 'strong' form of discretion. But he also specifies 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' (ibid.: 31). The other weak sense refers to occasions when 'some official has final authority to make a

[2] I am drawing here on Schauer 1991.

decision, which cannot be reviewed and reversed by any other official' (ibid.: 32).

There are conventionally thought to be two large categories 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 is formally and ultimately allotted to legislatures, but of course there are many areas of law in which American courts are expected to act as common-law courts and to be a primary source of rules (even though they must yield to any assertion of legislative authority) and many other areas in which they are expected to provide interstitial rules or to clarify legislative rules (often in quite consequential ways). The latter kind of discretion we may loosely call discretion to decide cases. In the United States this kind of discretion is primarily exercised by courts and administrative agencies. The distinction between discretion to write rules and discretion to decide cases is analytically helpful. But it must not be allowed to obscure the fact that there is a large blurred area between the two categories in which judges create rules in the process of finding facts and applying the law.

We will be concerned with both kinds of discretion. However, it is judicial and administrative discretion that is the principal source of much of the concern about discretion. 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 and agencies to decide cases. We will thus be most centrally concerned with the dangers and delights of judicial (and to a lesser extent) administrative discretion.

Discretion in Context

In an illuminating discussion, Dean Teitelbaum writes that

> 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. (Teitelbaum, forthcoming)

The 'gap' view of discretion is, of course, the one I have described as paradigmatic of the way lawyers most readily think of discretion. And, of course, that view reflects a real, indeed a central, problem with discretion. But, as Dean Teitelbaum implies, the 'gap' view is incomplete and therefore misleading. In fact, discretion plays a larger, richer part in Western law than that view suggests and than we unreflectively assume. In this section, I want to take a first step toward domesticating discretion and understanding its functions by using American examples to show how broad, how commonplace, how unremarkable the role of discretion in Western law is.

Although we tend not to think of it in this way, the most important allocation of discretion in our system is to the government from 'the people'. The allocation is phrased in the broadest and haziest terms, if it may be said to be 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, those instructions and polls are extraordinarily obscure guides to governmental decisions. And there is not even agreement as to whether officials are elected simply to reflect the views of the voters or to express their own best judgments. In short, elected officials exercise discretion in perhaps all meanings of that term and wield it in perhaps every central aspect of their work.

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 awards vast grants of discretion to administrative agencies. Sometimes this is discretion to make rules, as testified by acres of trees that died so that the CFR might live.[3] 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, show every working day.

The executive branch acquires its own broad swaths of discretion as its share of the people's grant of authority. Part of that discretion is exercised in collaborating with the legislature in drafting, debating,

[3] The CFR is the Code of Federal Regulations, and in it are published the rules and regulations of federal agencies. I need hardly say that one set fills endless yards of bookshelf space.

and enacting laws. But discretion is also deployed in the ordinary process of administering the government and enforcing legislation. 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 breadth of discretion an administrative agency exercises at all levels of its work.

Police-agency discretion begins at the administrative level. Very generally, for example, police administrators have considerable discretion to decide whether the department's policy should be to respond to complaints from citizens about crimes or rather to try to institute programs which will prevent crimes from being committed in the first place. Less grandly, they can decide how the department should be organized and run day to day. But police commissioners and senior officials cannot monopolize police discretion: individual police officers have substantial discretion in doing their work. (Indeed, one might say that a primary constraint on administrative discretion is that officers wield so much discretion of their own.) As Professor Reiss indicates,

> 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 determine the facts in police encounters with citizens, the alternatives available to make choices, and their behavior. (1974*b* 181).

Individual officers exercise this kind of discretion even where they are in principle most strictly constrained by procedural regulations: 'in 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 . . .' (ibid.: 191). Nor is police authority or discretion limited to the task of enforcing the law, since police activities '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' (ibid.: 86).

The problem of controlling administrative discretion is a familiar one. What Americans call administrative law is centrally concerned with devising rules that allow governmental agencies the leeway they

need for doing their work while deterring them from abusing their discretion. The Administrative Procedure Act grants courts considerable power to supervise administrative agencies in the hope of accomplishing those delicate ends. The law of police procedure has been constitutionalized in the hope that through such doctrines as the 'Miranda' rule[4] 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 I have already noted, great discretion is granted to judges in various kinds of law-making. 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: 'In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. . . . the result is to leave a wide measure of discretion to the judicial delegate. The corrective power of Congress is also stringently limited in practice' (1976: 1314). A particularly vivid example is that centerpiece of US anti-trust law, the Sherman Anti-Trust Act. It contains two key provisions. The first makes illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade'. 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'. The meaning of these terse commands was left to the courts (and the executive) to supply.

Of course, judges also exercise great discretion in fact-finding, especially, but not exclusively, when there is no jury. Further, judges exercise (sometimes 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 anti-trust law.[5] Finally, considerable discretion is

[4] The 'Miranda' rule comes from *Miranda* v. *Arizona*, 384 US 436 (1966), and should be familiar to anyone who has ever seen an American movie or television program in which the police figure. It requires the police to tell suspects their rights when they are taken into custody, and it bars the use in court of statements made by defendants who have not been properly informed.

[5] I examine these areas of discretion at somewhat greater length in the next section of this chapter.

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 traditionally discretionary. Since an injunction can attempt to regulate the relations of the parties into the future in considerable complexity and since the role of injunctive relief has greatly expanded in recent years, this source of discretion can be broad indeed.

But judicial discretion is exercised in contexts other than trials. For instance, judges have wide discretion in what might be called semi-administrative matters. In the criminal justice system, for instance, the

main forms of discretion that they exercise are by decisions 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 . . .' (Reiss, 1974*b*: 197–8).

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. This is because juries deliberate in secret, usually need not explain their decisions, and are deferred to on the theory that they represent the voice of the community. Lawyers too are endowed with weighty kinds of discretion. Most prominently, prosecutors exercise discretion in such matters as deciding whether to file or to drop charges and in 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 particularly conspicuous discretion in pre-trial proceedings, especially in what is called discovery. In discovery, a lawyer may use judicial power to compel an opponent to produce records and submit to depositions. While ultimately the court can supervise discovery, in practice that supervision is loose and allows lawyers generous latitude. The lawyer's discretion in all these respects is, of course, limited by his 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 lawyer's special purview, and in others of those areas (like negotiating settlements)

the lawyer's professional expertise will often assure him considerable authority.

Finally, actors outside the formal legal system exercise discretion in ways that affect that system. For instance, the law has co-operated in making semi-legal institutions of such enterprises as arbitration, mediation, and conciliation, all of which accord some non-official person considerable authority to resolve disputes that might otherwise go to a court or government agency. Even ordinary citizens retain a good deal of discretion about the work of the criminal and civil justice systems, since these systems primarily depend for their workload on the initiative of citizens. And, in so far as citizens 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 centrality of discretionary decisions in the American legal system can be put into perspective by comparing it to civil-law systems, for, by contrast with them, the common-law system seems almost designed to promote the exercise of discretion.[6] For one thing, the common law seems intently 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. (1949: 4)

A consequence of this approach is that, despite the doctrine of *stare decisis* (the doctrine that courts must follow the relevant precedents in making decisions) judges often have real discretion in shaping and reshaping legal doctrines. Common-law decision-making seems not just designed to secure doctrinal flexibility. It also conduces to allowing judges to 'do justice' in a particular case where a rule seems not to. The common-law judges' discretion is preserved out of what sometimes seems a preference for making fine distinctions so that justice can be done in each case. And the classic common-law judge

[6] 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 chapter that there are many kinds of discretion which no system can escape and many kinds which no system would want to escape.

has mastered the art of detecting distinctions between cases which duller eyes might miss.

The common law's emphasis on 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 extraordinarily discretionary; early equity judges decided cases as 'reason and conscience' demanded. Equity expanded the scope of judicial discretion to ensure flexibility in the decision of individual cases and in remedial relief. While, as readers of *Bleak House* know, equity (particularly in England) itself became sclerotic, its ultimate contribution has been to broaden judicial discretion, since the common law has incorporated many of its more flexible doctrines, remedies, and attitudes. Discretion pervades the common-law system in still other ways: Much fact-finding and law application are done by the jury, a lay group which does not consider enough cases to develop its own rules and which cannot be effectively reviewed. As I wrote earlier, the jury meets in private, its findings of fact are reviewable only under a standard that defers generously to the jury's conclusions, and it generally need not explain how it understood or applied the law. The consequence of this is that 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. One reason for doing so is to allow for the injection of 'community values' into the legal process. As Professor Damaska writes, 'It 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' (1986: 42).

When in a common-law system fact-finding is confided to a judge, he is accorded more discretion than his civil-law counterpart. The common-law trial judge is essentially expected to 'find' facts after a single event—the trial—and his conclusions may, as I have said, be reversed only if they are egregiously ill founded. In civil-law systems, in contrast, the trial court assembles a factual record which is then passed on to the appellate court, which can review that record *de novo*.

Furthermore, common-law judges are much less subject than civil-law 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, the judge is brought in laterally after achieving some stature in another branch of the legal profession. Once anointed, the judge may not particularly expect a promotion, which will often depend on the vagaries of politics. 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 which may affect the civil-law judge.

One scholar has argued that the discretionary powers of Anglo-American judges are in fact expanding. Professor Atiyah writes,

> 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. (1980: 1251)

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' (ibid.: 1255). Professor Atiyah associates this change with a change in the prominence of two of the 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 behavior' (1980: 1249). Professor Atiyah suggests that the former function has acquired a much more prominent position relative to the latter function than it used to have. And, since the latter works through rules and the former through 'pragmatism', the scope of discretion has grown greatly.

Professor Schauer confirms the growing power of discretion and places it 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. (1987: 847)

If the scope of discretion in American law has been increasing in recent years, one explanation lies in the rise of what Professor Chayes has called 'public law' litigation (1976: 1281). That litigation involves unusually complex issues of public policy, issues which often cannot be resolved without imposing on judges broadly discretionary duties. It includes 'school desegregation, employment discrimination, and prisoners' or inmates' rights cases' as well as 'antitrust, 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 (ibid.: 1284). Public-law litigation may be contrasted with what Professor Robert Mnookin calls 'traditional adjudication', which a civil suit by a person injured by another person's negligence exemplifies. Traditional adjudication, he suggests, 'require[s] determination of some event and [is] thus "act-oriented"'. It 'usually requires the determination of *past* acts and facts'. It does not involve 'appraisals of future relationships where the "loser's" future behavior can be an important ingredient'. It relies heavily on precedent. And parties to traditional adjudication all 'have a right to participate in the adjudicatory process' (Mnookin 1975: 251–3). In contrast to this kind of litigation, public-law litigation necessitates exercises of judicial discretion: it is not 'act-oriented'; it looks in large part to future, not

past, events; it features interdependent, outcome-affecting factors; it often finds precedent an unhelpful guide to decision; and it frequently excludes affected parties.

Let me fill out these points slightly. Public-law litigation it is not 'act-oriented' in anything like the sense that Professor Mnookin intends by that phrase. Instead, it is often oriented to the complex behavior of complex institutions. In public-law adjudication, '[t]he fact inquiry is not historical and adjudicative but predictive and legislative', (Chayes 1976: 1302) and the decree that concludes that litigation often 'seeks to adjust future behavior, not to compensate for past wrong' (ibid.: 1298). The public-law decree 'provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer', (ibid.: 1298) and that regime regulates 'an elaborate and organic network of interparty relationships' (ibid.: 1299). 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' (ibid.: 1299–300). And, finally, public-law remedies 'often hav[e] important consequences for many persons including absentees' (ibid.: 1302). (Indeed, a large part of the conventional objection to public-law litigation is exactly that many of the parties who have an interest in the litigation are unrepresented in it, including the public at large.) In all these ways, then, public-law litigation requires judges to make much more complex and uncertain judgments with less guidance from rules than the model of traditional adjudication seems to countenance, and thus it obliges them to call more fully on judicial discretion.

In this section, I have argued that discretion is intricately and inextricably woven into the warp and woof of American law. This argument, of course, does not prove that discretion is always desirable or always harmless. But it should raise doubts about whether discretion is simply an inconvenient power legal actors have that problematically creates gaps between what the law should be and what the law is. It should suggest that discretion is integral to the American (and perhaps any) legal system, that it serves crucial and irreplaceable functions. In the next section we will pursue this possibility by looking more closely at the attractions of discretion.

The Advantages of Discretion

Why is discretion so ubiquitous in Anglo-American law? What functions does it serve? What basic ideas in Western jurisprudence does it promote? What costs would eliminating it impose? What, in sum, are the advantages of discretion?

The first attraction of discretion is a negative one—rules can have disadvantages or can malfunction. Sometimes rule-makers fail to anticipate all the problems a rule is written to solve. Discretion can fill gaps in rules. Sometimes two or more rules simultaneously apply but dictate conflicting results. Discretion can permit the decision-maker to resolve the conflict in ways that best accommodate 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 decision-maker to promote the rule's purpose. Sometimes a rule will, applied to a particular case, produce a result that conflicts with our understanding of what justice demands. Discretion can let the decision-maker do justice. And sometimes the circumstances in which a rule must be applied will be so complex that no effective rule can be written. Discretion frees the decision-maker to deal with that complexity.

The advantages of discretion can be put in a more positive form by asking what the sources of discretion are. If we can understand how and why discretionary authority is created, we can better understand its attractions. Often there is a direct and deliberate grant of discretion (of varying levels of completeness) to a decision-maker. 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 it is understood in Western industrialized countries. The rest of them are distinguishable by the reason for the grant of discretionary authority. They are not, however, mutually exclusive; discretion may be granted for more than one reason.

The first kind of directly and deliberately created discretionary authority can be called 'khadi-discretion'. This kind of discretion is the most complete and the most foreign to our legal system. It is created where it is thought that decision-makers can be found who are wise, who understand the principles of justice, and who already know or are well placed to discover the relevant facts, sometimes through acquaintance with the parties or through personal enquiry of people who know them. Of course, my name for this kind of discretion is

taken from Max Weber's concept of khadi-justice. As Professor Kronman cogently summarizes 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. (1983: 76–7)

King Solomon's child-custody decision exemplifies khadi-justice. The litigants cite no law to Solomon, and he does not appear to consult any rules, procedural or substantive. His principle of decision 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' (Rosen 1980–81: 231).

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 unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written. Rule-failure discretion differs from khadi-discretion in several ways. The first is in the motive for its creation. Discretionary authority is accorded the khadi partly because of the khadi's special personal qualities and status. While Western judges are expected to have a 'judicial temperament', discretion is generally not accorded them because of that quality. On the contrary, that quality is supposed to restrain them from abusing their discretion. A judicial temperament

is thought necessary because discretion must be exercised; judicial temperament does not justify the exercise of discretion. A second difference between the two kinds of justice is that, unlike the khadi, the Western judge is not expected to bring his own knowledge of the parties and their situation to bear. On the contrary, if he knows the parties, he is expected to excuse himself from the case. A third difference is that, while khadi-justice is 'peculiarly ruleless', Western justice is ordinarily embarrassed to be ruleless. Finally, unlike the khadi, the Western judge is generally expected to eschew 'non-legal' sources of authority. Even a judge with broad discretion is expected to consult only 'legal' sources, doctrines, and policies. He should look as much as possible to the law for norms and should not rely on his personal preferences or political allegiances.[7]

I have been distinguishing rule-failure discretion from khadi-discretion. But both variations draw on discretion's classic advantage—that it provides flexibility, that it allows the decision-maker to do justice in the individual case. Professor Cooper's praise of Rule 52(a) of the Federal Rules of Civil Procedure—'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'—nicely exemplifies this virtue of discretion. Professor Cooper attributes that rule's 'enormous success' 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' (1988: 645). Professor Cooper continues,

> 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 rule-making 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. (ibid.: 670)

[7] I am not arguing that US law is without its impulses to khadi-justice. For example, some of the popular and even scholarly justifications for according the US Supreme Court broadly discretionary authority sometimes seem to draw on elements of the justifications for khadi-justice.

A direct and deliberate grant of discretionary authority can be made for a third and related reason. 'Rule-building discretion' arises where the rule-maker could devise tolerably effective rules, but concludes that better rules would be developed (or that the same rules could be developed more efficiently) if the decision-makers were allowed to develop rules for themselves as they go along. The rule-maker might believe, in other words, that a decision-maker would, out of his experience with individual cases over long periods of time, acquire a better understanding than anyone else could of the generic problems being dealt with and of the concrete circumstances in which such problems present themselves. The decision-maker's experience may be both a valuable source of ideas for rules and a valuable check on the imagination of rule-writers. This is 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, principles for solving them will eventually emerge, and rules (based on experience) will finally be written.

Judicial discretion of this kind may be specially useful during times of rapid and great social change. Under such circumstances, rules are hard to write because (1) the rapidity of change makes them controversial, (2) the direction and extent of change are uncertain, and (3) rules must be replaced frequently. Discretion can alleviate these problems by allowing courts to adjust incrementally to changing social ideas instead of being confined to legislative standards that are not readily altered.

Another advantage of giving judges such discretion is that it allows them to take their community's standards into account. Of course, this advantage is attended by risks. But judges might desirably consider such standards on two theories. First, it may sometimes be appropriate to evaluate and resolve disputes on the basis of, or at least with a good and sympathetic understanding of, the social and normative environment in which the litigants acted and in which they will have to live. A variety of factors might make this preferable. Such an understanding might promote a more accurate interpretation of the litigants' behavior. It could help keep the law in touch with the people the law seeks to regulate and assist, with the social circumstances in which they live, and with norms that ought to affect the interpretation of the law. A second justification for allowing community standards to affect judicial decisions is that the community has an interest in those decisions, since they affect the community. American, and (to a lesser

extent) English, law recognizes this interest by confiding important legal decisions to juries. We may also sometimes find it appropriate to recognize that interest when judges make decisions.

There are some obvious difficulties with consulting local standards, of course. The first is a practical one: it will often be hard to know just what local standards are. And the larger and more complex the local community is, the more diverse and undiscoverable local standards may be. The second is the conventional objection that local standards may conflict with broader (and, it is usually assumed, better) 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. (Teitelbaum and DuPaix 1988: 1125–6)

Discretion presents a futher, related advantage: it allows the court to take into account the parties' own preferences. As Dean Levi wrote years ago (and not for the first time even then),

> [T]he 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. (1949: 5)

The fourth and last form of a direct and deliberate grant of discretionary authority may be called 'rule-compromise discretion'. Sometimes the members of the governmental body responsible for instructing the decision-maker cannot agree on rules or even guidelines, and they will then deliberately choose to pass responsibility to the decision-maker. In other words, according discretion to courts, administrative agencies, or regulatory authorities can be a form of deliberate legislative compromise. Less deliberately, legislative inaction may have the effect of tacitly giving courts authority to decide cases without legislative direction.

We have been surveying the reasons a rule-maker might adduce for according a decision-maker 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 decision-maker is not subject to review, the decision-maker has discretion in one of Professor Dworkin's 'weak senses' (1977*b*: 32). As Justice Jackson put it, 'We are not final because we are infallible, but we are infallible only because we are final' (*Brown* v. *Allen*, 1953: 540). In any kind of adjudication, of course, this kind of discretion will eventually be exercised: someone must make the final decision.

But it is not just the last decision-maker in the hierarchy who acquires considerable discretionary authority from 'structural' sources. Indeed, the first decision-maker often has very considerable discretion (not least because he is often effectively the last decision-maker). First, someone must find facts, and fact-finding is inevitably a partly discretionary process, since it requires making complicated judgments whose components cannot be foretold and resolved in advance. Deciding what actually happened always involves some discretionary judgments about what evidence to hear, what evidence to 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 will be impractical to keep regathering evidence, so that many discretionary decisions about facts will be effectively unreviewable. In much litigation, this fact-finding 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 first decision-maker often has great discretion (in many ways greater discretion than the last decision-maker) is that someone must decide what the relevant rules are, and in the first instance this must effectively be the fact-finder, since it is impossible to know what facts are relevant until the rules to which the facts are relevant have been identified. While a decision about the law can more easily be reviewed and reversed than a decision about the facts, the trial judge's conclusions about the law will often have large, practical effects. They can, for instance, influence the way the parties conceive of and litigate the issues in the case. They can affect what evidence is collected and what evidence is left unexplored. And, since the costs of an appeal and of a new trial can often be prohibitively great, the trial judge's rulings about the law often are effectively irreversible (as to the particular case).

A third source of the initial decision-makers's discretionary authority arises from his power to 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' (1988: 658). This process involves difficult and complicated decisions which inevitably involve the exercise of judgment and hence create scope for discretion. These decisions require the decision-maker to exercise the discretion of both an interpreter of law and a finder of facts. Further, because these decisions 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 by an appellate court only if the trial court has seriously erred), they are not easily reversed on appeal. Finally, since, as regularly happens in litigation of any real complexity, multiplicitous and uncertain facts must be applied to broadly written rules, the scope for discretion is obviously substantial.

The argument that discretion is an inherent part of deciding cases may be stated in a still 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 uncertain that even rules cannot cabin discretion. This is not the place to enter into the vast jurisprudential debate that assertion raises.[8] However, in the last section of this chapter I will express some doubts about this strongest statement of the scope of judicial and administrative discretion by cataloguing the powerful forces that constrain discretion.

Let me now conclude this exploration of the advantages of discretion by briefly summarizing them. Discretion allows decisions to be tailored to the particular circumstances of each particular case. Discretion gives decision-makers flexibility to do justice. It does so partly by allowing them to consider all the individual circumstances that ought to affect a decision but that could not be anticipated by rules. It also does so by allowing decision-makers to watch how well their decisions work and to adjust future decisions to respond to the new information. Finally, discretion conduces to better decisions by discouraging overly bureaucratic ways of thinking and by making the decision-maker's job attractive to able people.

One study of the criminal-justice system summarizes the advantages of discretion with special passion:

[8] For an admirable treatment of these issues, see Schauer 1991.

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 1984: 32)

On the one hand, this brief summary of the advantages of discretion is curiously negative. It suggests that, were rules as capable of clear statement as the basic laws of mathematics and were people's minds as mechanical and predictable as calculators, legal decision-makers would not need and would not be given discretion. More positively, however, this summary is intended to make clear that we do not live in such a world. Rules cannot be written that will always work as their authors would have wanted them to, and decision-makers work in institutional settings which necessarily give them scope for judgment. In sum, however much we may acknowledge the primacy of rules in a system of law, we cannot deny the large and essential service discretion performs, even in a world of rules.

The Advantages of Rules

What, then, are the drawbacks of discretion? Why do we speak of the primacy of rules? The most prominent drawbacks of discretion hardly need elaboration. Discretion makes it easier than rules usually do for decision-makers to consult illegitimate considerations, and it does nothing to keep them from making 'mistakes'. Less prominently, discretion may have untoward psychological effects on decision-makers. Discretion is a kind of power, and power corrupts. Discretionary power seems conducive 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 more meaningfully phrased in terms of the advantages rules offer. I will consider a number of these

advantages. The first is that 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 (except those in the House of Lords) are elected; no judges in England are elected, and many in the United States are not. Legislators generally campaign on the basis of their views about issues; judges (when they run for election) generally do not. It is thought legitimate to vote against a legislator because you dislike his decisions; it is often thought improper even to ask a judge how he would vote on a kind of case his court seemed likely to confront.

The most commonly feared drawback of discretion is closely related to this function of rules. That drawback is the risk that a judge will so far depart from the sources of his authority as to substitute his own standards for public ones. There is no doubt that this happens. But, if we are trying to decide what mix of discretion and rules should govern an area of law, what we need to know is how often it happens. Unfortunately, critics of discretion often provide little evidence with which to answer that question, and what they do present is often anecdotal and outdated. Their listeners are thus left to their own dark imaginings. These critics deserve our sympathy, since systematic evidence about how often judges abuse their discretion in this way is hard to collect and analyse. On the other hand, there is some evidence that judges try to do what is expected of them. Writing generally about legal decision-making, Professor Lempert and Professor 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 '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. (1986: 75)

There is some more specific evidence for this position in my own field of family law. One of the most startling examples comes from Professor Mnookin's fascinating study of the judicial reaction to *Bellotti* v. *Baird*.[9] In that case, the Supreme Court held that a minor

[9] 443 US 622 (1979).

who wished to have an abortion without parental consent had to be allowed 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, a state many of whose judges are Catholic males, many of whom presumably oppose abortion. He found that judges virtually never denied minors an abortion (1985: 149–264). Similarly, Professor Weitzman, who is not notably sympathetic to the work of courts handling divorces, writes that courts (which had long followed older principles) have adapted to new views about women by not disadvantaging working mothers in custody disputes (1985: 239).

There is also some evidence about the judicial and administrative use of 'improper' standards in the law of child abuse and neglect. Professor Garrison writes, 'The laxity of traditional standards has undeniably permitted intervention in some cases in which there were no discernible problems in family function, but these egregious abuses of discretion appear to be the exception rather than the rule' (1987: 1791). And Professor Wald finds 'little reason to believe that such cases constitute even a significant proportion of interventions in most states' (1980: 676).

In some of the circumstances in which judges are conventionally taken to be substituting private standards for public ones, they may in fact simply be reflecting widely held social views. As has been acutely observed,

> There is substantial evidence that courts applying the best interest standard [in child-custody disputes] 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. (Scott, Reppucci, and Aber 1988: 1076–7)

Of course, the legislature might wish to change the law so that judges no longer draw on this 'powerful social norm'. But for us the point is that the judges who are drawing on it may not be substituting their private standards for public ones. Rather, they may be giving meaning to a broad legal standard (that custody disputes should be decided in whatever way serves the child's best interests) by consulting a deeply held social consensus.

In any event, our concerns about substituting private for public standards should probably be more acute in some situations than in others. The more the question presented may speak to the irrational sides of human nature, the greater the risks of discretionary error presumably are. As Professor Schauer writes,

> The Supreme Court's decision [in *Palmore* v. *Sidoti*[10]] that the fact of an interracial marriage could *not* be taken into account 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 decisionmaker would make the optimal decision by taking this factor into account there are likely even more cases in which a decisionmaker, empowered to consider the racial identity of any of the participants, will because of racial hostility make a significantly suboptimal decision. (1991: 259)

On the other hand, there will often be no special risks of bias. Where those risks are not present, the likelihood of discretionary error will be diminished, as will the incentive for avoiding discretionary decisions. The less the risk of bias, the greater the need to ask whether substituting rules for discretion would be more costly than running the risk of bias. In other words, the knowledge that bias and 'private' standards can sometimes distort decisions ought to lead us to assess the likelihood and severity of that risk in the particular circumstances of each kind of decision. But that knowledge should not drive us toward an automatic preference for rules, however slight their advantage and however great their cost, and away from discretionary decisions, where their costs are slight and their advantage great.

In short, in deciding what mix of discretion and rules to prefer, we ought not to ask whether private standards will *ever* be substituted for public ones. 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. Rather, we should ask how great is the risk that judges will abuse their discretion, what are the best means of diminishing that risk, and what are the costs of those means. These are all questions which cannot be answered a priori, since the answers will depend on a range of highly various circumstances. And these are questions which will be difficult to answer even in a specific context. But they are the right questions to ask.

[10] 466 US 429 (1984).

The best means of diminishing the risk that discretion will be abused will often be the most direct means. Often, the 'private' standards we may most want to avoid will be easily identified. In those cases, the best course may be the simplest—expressly to prohibit judges from using the improper standards. While this technique cannot wholly prevent judges from using improper standards, used with sufficient precision and clarity it can probably markedly reduce the incidence of impropriety. This means of reducing the risk that judges will substitute private for public standards has the advantage of imposing relatively low costs. The standards to be prohibited can often be readily articulated. Any other standards already in place need not be tampered with. And the many costs of trying to deprive judges of discretion completely need not be endured. Only the standards to be avoided are prohibited; judges need not be deprived of otherwise desirable discretion in order to deter them from consulting improper standards.

The second advantage of rules is that (despite what we have said about the advantages of allowing decision-makers discretion to do justice in individual cases) rule-makers may often be better situated than decision-makers to decide what justice is and how to achieve it both in an individual case and in general. Rule-makers typically have more time than decision-makers to study a problem, which can allow them to take more of the elements of the problem into account and to think about them more reflectively. Rule-makers may have more resources for gathering information, and legislative rule-makers need not be inhibited by the rules of evidence and procedure which limit courts. Legislative rule-makers may also be better able to bring together the whole range of social groups interested in the resolution of a problem and thus to acquire a fuller range of information about the problem and to secure a better degree of acquiescence in the solution.

Nor does one always get the best view of a problem by looking at a particular controversy in which it presents itself. This is the point of many criticisms of the common-law method of developing rules. For instance, a judge viewing a particular case may be distracted from a just decision by the special but irrelevant circumstances of the particular litigants. Sometimes these may 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 would

argue that the marital misbehavior of a spouse which does not directly and evidently affect a child has too often diverted courts from consulting only the child's best interest when they decide which parent should have custody of that child.

In thinking about which institution will make the better decisions and thus about how discretion should be allotted among institutions, one crucial but often overlooked factor should be kept in mind—the quality of the decision-maker. As Professor Cooper wrote with shocking frankness in discussing discretion and interlocutory appeals:

> The nature and quality of the federal district judges is the single most important factor to be counted. The better the judges are, the less need there is for frequent interlocutory appeal—they will make fewer mistakes, and more often correct their own mistakes before serious harm is done. . . . 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. (1984: 158–9)[11]

Nor can we stop with evaluating the quality of trial judges. We must also worry about the quality of the higher courts that review their decisions and of the bar which 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. (ibid.: 161)

We may summarize this advantage of rules by saying that rule-makers will sometimes, perhaps often, be better situated than decision-makers to establish the principles by which a dispute should be resolved. But this will not always be the case. Once again, then, we see that the proper mix of rules and discretion can be found only by looking at the full facts of the particular context in which the rule-makers and decision-makers will be acting.

[11] Professor Cooper notes a further problem with thinking about the relationship between discretion and judicial quality: the quality of the decision-maker may depend in part on the extent of the discretion. People of ability are unlikely to take jobs which allow them little scope for discretion; people of less ability may prefer jobs which do not tax their ability to exercise discretion. Yet it is not clear that according judges discretion will be enough to attract able people to the bench.

The third advantage of rules relates to our basic assumption that like cases should be treated alike. As Professor Mnookin writes, 'Indeterminate standards . . . pose an obviously greater risk of violating the fundamental precept that like cases should be treated alike' (1975: 263). One way to try to ensure that they are is by employing rules instead of allowing each decision-maker to decide case by case what principles to apply to what fact situations and how to apply them. Rules suppress differences of opinion about what works to serve what purpose, about how to balance factors, and about what justice requires; such differences of opinion could otherwise lead to different results in similar cases. Rules also serve as record-keeping devices, devices that are more efficient and therefore more likely to be used effectively than an elaborate system of precedent. Finally, rules provide an often superior way of co-ordinating the decisions of multiple decision-makers and one decision-maker over time. But will it always be true that a rule will be more conducive than discretion to treating like cases similarly? The answer to this question depends in part on the complexity of the rule. The simpler the rule and the more capacious its categories, the greater the extent to which different cases will be decided under a single principle. Yet the more complex the rule and the more differentiated its categories, the greater the discretion judges are likely to have in applying it.

One important function of the treat-like-cases-alike principle is giving litigants the sense that they have been treated fairly. But will rules or discretion better give litigants that sense? Rules have the advantage of telling litigants clearly that the standard under which their case is to be decided has the authority of legitimacy. Discretionary decisions, in contrast, are more readily open to the objection that they merely reflect the judge's personal and arbitrary preferences, that they arise out of some untoward favoritism for the winner or some prejudice against the loser. But, even if litigants accept the legitimacy of the source of the standard applied, they may still believe the standard to be unjust. And, even if litigants accept the standard's desirability, they may reject the way it is applied. Losers are likely to see differences between cases that look significant to them but that look trivial to others. Because litigants are usually able to see only the strengths of their own case, it is unlikely that any plausible set of rules can prevent this from happening. It is likely, though, that mechanical rules of the kind that prevent the court from looking at the particular facts of a case would produce an acute sense of injustice, often on the

theory that different cases were being treated alike. Litigants seem likely to feel that cases involving important consequences ought to be decided with the fullest possible attention to all the facts and all the equities. Attempts to substitute flat rules for such enquiries seem most unlikely to satisfy the litigants' sense of justice (Schneider 1991).

The fourth and fifth advantages of rules arise out of the relatively 'public' nature of rules and the relatively 'private' nature of discretion. Generally speaking, rules will in some useful sense be public in both formulation and dissemination. Where rules are formulated by a legislature, hearings are held, committee reports are issued, and bills are debated. Where rules are formulated by an administrative agency, drafts are issued, public comments are invited, and the rules are promulgated in some public way. Even where rules are formulated by a court in the process of adjudication, the court hears a public argument and issues a public explanation of the rule and the reasons for adopting it. In all three of these cases the proceedings may have been reported in the press and followed and debated by interested publics.

In addition, rules must usually be disseminated in some importantly public way. First, many rules are intended to instruct people how to act. Such rules cannot have their intended effect unless people know before they act what the rule is. Secondly, many rules are intended to instruct legal actors how to make particular kinds of decisions. Such rules cannot have their intended effect unless the actors know before their decision what the rule is. (Of course, many rules are intended to have both effects, and thus are 'publicized' for both reasons.) At the least, then, even where a rule does not receive genuinely public attention, it will have been formulated in advance of a decision and will generally be accessible to anyone who knows and cares to look.

By contrast, discretion looks private. Most discretionary decisions are not formulated publicly because they are usually made by the legal institutions whose deliberations are least public—courts and administrative agencies. While discretionary decisions are often publicly announced and explained, they are generally less widely and intensively disseminated, in part because they give less guidance than rules both to interested publics and to legal actors. More basically, while standards for the exercise of discretion may be written and circulated before a decision is made, a discretionary decision is precisely one whose outcome cannot be described in advance. It is precisely one that is confided to a decision-maker, and thus no exact

prior instructions need be given. In sum, while most rules are publicly formulated and disseminated, discretionary decisions cannot readily be.

This contrast between the public nature of rules and the private nature of discretion helps us see that the fourth advantage of rules is that they can serve the 'planning function' better than discretionary decisions. The people and institutions affected by a 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. But, as Professor Mnookin writes, 'Inherent in the application of a broad . . . principle is the risk of retroactive application of a norm of which the parties affected will have had no advance notice' (1975: 262–3). On the whole, rules give better warning than discretionary decisions because they are likelier to provide clear and complete information about what a court or agency will do. (One important reason common-law adjudication is not an intolerable affront to the planning function is that rules are eventually adduced and articulated.)

Yet even this apparently clear advantage of rules cannot be stated without enquiring into the particular decisions which the choice between discretion and rules may affect. People will not always need to know what the law is before they act. For example, most husbands and wives are probably not interested in the law governing child-custody disputes on divorce. Most couples do not expect to be divorced, and many of them would find it impractical and perhaps even wrong to shape their marital behavior and their care for their children with an eye to gaining an advantage in divorce litigation. There are, however, undoubtedly some exceptions. Anna Karenina, for instance, thought during her marriage about the chances of losing custody of her son because of her adultery. And, even if parties do not need to know custody law in order to plan, that knowledge may still offer them psychological repose. A mother might feel better during her marriage if she knew that the law would ensure her custody of her child even after a divorce. (And, on divorce, her husband might accommodate himself to the disappointment more easily if he had known all along that he had little chance of gaining custody.)

But even if people sometimes do not need to know the law in order to plan their behavior before they become involved in a legal dispute, they will surely want to know it after they become involved. Yet even this undoubtedly legitimate interest will not always dictate an answer to the choice between discretion and rules. For example, it is often said that litigants ought to be told as clearly as possible

how a court will decide a case so that they can be guided in their settlement negotiations. On the other hand, the less certain the result a court would reach, the greater the practical scope for bargaining. Discretion, in other words, tends to give the parties greater freedom in negotiation. We might, for all the usual reasons given for freedom of contract (yet keeping in mind the usual reasons for being cautious about the consequences of that kind of freedom), prefer a discretionary standard which accorded parties that greater freedom while still giving a court the authority to resolve their dispute if they could not do so themselves.

The fifth attraction of rules also grows out of the contrast between the public quality of rules and the private quality of discretion. This attraction is that rules can serve social purposes that discretionary decisions generally serve less well. Rules are often an announcement about how people should behave, an announcement that attempts to affect behavior. Rules frequently (although not inevitably) communicate this information more clearly and emphatically and are more easily recognized as commands than a series of individual decisions from which general principles have to be drawn. On the other hand, this attraction of rules will present itself less forcefully where the law's primary purpose is not to influence behavior. The largest category of such situations is probably where that purpose is to settle disputes, rather than to guide social behavior.

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 case should be handled. Decision-makers exercising discretion, unless they consult some rules or guidelines, risk having to go through the entire process for each decision. Rules can relieve decision-makers of that burdensome and repetitious enquiry (and can reduce the risk that the decision-maker will make a mis-step in retracing the process).

Rules also promote efficiency by telling decision-makers which facts and arguments will be relevant, thus allowing them to exclude from their consideration the many arguments and facts that will be irrelevant. And rules not only make the work of decision-makers easier; they also help litigants and their attorneys by alerting them to the facts and arguments the decision-maker will want to hear and by warning them not to expend their efforts on irrelevant arguments. 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. (Whitehead 1948: 41–2)

On the other hand, rules are not invariably more efficient than discretion. Writing rules can itself cost time and effort. Elaborate and cumbersome rules can impose onerous costs on decision-makers and on litigants. When people complain about bureaucracy, it is often such costs which provoke their displeasure. Not only can rules thus be inefficient; discretion can be efficient. Discretion can be inexpensive where the decision-maker's choices are not momentous—where, that is, the decision-maker has relatively few alternatives and cannot easily make a seriously wrong choice. Thus it may be efficient to accord discretion to the decision-maker who is a 'repeat player' who regularly applies a narrow set of policies to standard fact patterns. On the other hand, circumstances of this last kind are likely to be circumstances in which rules (or strong guidelines) can be developed which are more efficient than discretion. (Indeed, such a decision-maker is likely to develop such rules informally even if they are not imposed formally (see Lempert, Chapter 6)). Where, in contrast, the decision-maker regularly applies diverse and conflicting policies to widely differing situations, the efficiency advantage of rules may be relatively slight. First, in that circumstance, the decision-maker will not often have to retrace steps, since a different path will be followed for almost every decision. Secondly, in that circumstance, the rule-maker will be hard put to identify all the possible situations in advance and to write rules for them (and only for them).

Essentially, these observations take us back to the sources of discretion which I enumerated earlier. Each of those sources (khadi-, rule-failure, rule-building, rule-compromise, and structural discretion) can be said to describe a respect in which there is no way to write a rule that efficiently accomplishes what the rule-maker would like to accomplish. The more severe that problem, the greater the comparative efficiency of discretion.

In this section, I have been at pains to show that it cannot safely be assumed that rules will be superior to discretion, or even that all the

advantages of rules will prevail in a given situation. I have emphasized that the correct mix of discretion and rules must be determined situation by situation. But I hope that this emphasis has not obscured the fundamental point of the section—that there are powerful, often overwhelming, arguments for rules.

This survey of the virtues of rules suggests that, when a good rule can be written, it is much to be preferred to a grant of discretion. Compared to discretion, rules offer advantages in terms of legitimacy, wisdom, fairness, and efficiency. But, as this survey has also sought to show at each step of its way, we can never safely assume that each advantage fully presents itself in any particular situation. All the defects to which rules are heir work to dilute those advantages and to drive us toward some mix of rules and discretion.

A Thousand Limitations: The Constraints on Discretion

I have just recited the arguments in favor of rules. So central are rules to our idea of what law is, and so basic are the advantages of rules, that I need not dwell further on their legitimacy and importance.[12] However, the legitimacy and importance of discretion are less widely accepted. I have argued that discretion is much more deeply and widely embedded in law than the casual observer might suppose. But something more needs to be said in defense of discretion. In this section I will argue that our legal system can tolerate so much discretion in part because limitations on discretion are as inevitable and abundant as the sources of discretion, and because 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. 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' (Cardozo 1924: 61). Let us briefly survey some of those thousand limitations on discretion.

Discretion is limited in the first instance because someone must choose the people who will exercise discretion. That power is commonly used to select people who may be expected to exercise discretion with

[12] The reader who wishes to pursue the subject further would do well to consult Schauer 1991.

restraint or to exercise it in ways the appointer prefers. Americans are most accustomed to this limitation in the Presidential appointment of Supreme Court justices. Though Presidents have occasionally been unpleasantly surprised, they have gotten what they wanted more often than is conventionally supposed. Of the present members of the Court, only Justice Brennan and, in some but not all areas, Justice Blackmun have voted in ways that would have astonished the Presidents who appointed them.

Lifelong tenure of course reduces the usefulness of the selection power in reducing discretion, but most state-court judges do not have lifelong tenure. On the contrary, many of them must be regularly reselected. Of course, the effectiveness of this technique is greatest where one is selecting a decision-maker who will be making only one kind of decision. Where the decision-maker has to make many kinds of decisions, it will often be difficult to know all his views in advance and to find someone who has *all* the right views. Still, the task of making such choices is made easier by the human tendency to think about sets of problems in systematic ways. Thus someone who thinks 'correctly' about one problem is likely (although not certain) to think 'correctly' about related problems.

Decision-makers' exercise of discretion is further inhibited by their socialization and training. Decision-makers, 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. Some others of these social norms will speak to the way any issue may be decided. As Professor Dworkin writes, 'Almost any situation in which a person acts . . . makes relevant certain standards of rationality, fairness, and effectiveness' (1977*b*: 33). Most decision-makers in an industrialized Western democracy, and certainly governmental decision-makers, are widely felt to be obliged to make decisions that are rational within the standards of their society and that accord with its basic institutions. Among the social norms which will inhibit decision-makers' exercise of discretion are all the reasons for being skeptical of discretion which we are exploring in this chapter. That some uses of discretion may not be strongly inhibited by social norms and that decision-makers will sometimes resist inhibitory norms do not mean that those norms are generally ineffective brakes on discretion.

Judges will be affected not only by their socialization as twentieth-

century Westerners, 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 (particularly in the first year) helps give those norms a measure of universality and stability. These law schools explicitly try to train a student to 'think like a lawyer'. Law classes are essentially sessions in which students are repeatedly made to practise 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 will often begin what is effectively an apprenticeship with the law firm which first hires them. And the recent graduate's day-to-day work of dealing with judges and with lawyers from other firms offers another kind of practical education in the mores of the law.

Judges are usually given relatively little formal training. But the lawyers who become judges will usually have had abundant opportunities to watch judges work. From that experience, from talking and working with veteran judges, and from dealing with the lawyers who practise before them, new judges learn 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 will find acceptable and the kinds of decisions that they will be willing to 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.

I have been arguing that decision-makers' discretion is constrained by their socialization and training. Generally speaking, that socialization and training will reduce the extent to which decision-makers apply 'private' standards instead of 'public' ones. And that socialization and training will generally equip decision-makers with a common language, with shared assumptions, and with standard ways of reasoning, all of which make it easier to predict how they will act and what kinds of instructions will produce what kinds of responses.

However, socialization and training can have the defects of their virtues. They can themselves create 'private' standards which unduly reflect the interest of the decision-maker's own profession and institution. Thus some critics of judicial discretion fear that judges will serve the guild interests of lawyers and will promote the political power of the judiciary. Similarly, some critics of police discretion note that the police have strong institutional interests and strong cultural values of their own that may conflict with broader 'public' interests and values. More generally, students of bureaucracy commonly observe that large organizations can resist outside or even hierarchical control exactly because the organization's employees have internalized institutional norms, attitudes, and practices which they will not gladly abandon.

Next, 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 decision-makers) receive. Some of this criticism is scholarly. But judges are much more likely to hear and to feel the strictures of the local bar and of their colleagues on the bench. 'The inscrutable force of professional opinion', Justice Cardozo wrote, 'presses upon us like the atmosphere, though we are heedless of its weight' (1924: 61). 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 even hear from their friends and family.

Another kind of limitation on discretion grows out of the decision-maker's internal dynamics. That is, courts and agencies will often be constrained by their institutional structure and imperatives and by the psychology of those who staff them. Efficiency concerns, simple laziness, a wish to avoid responsibility, and even a desire to escape the boredom of constantly repeating the reasoning necessary to decide a case can drive decision-makers toward relying on their own earlier decisions in factually similar cases rather than embarking on fresh discretionary frolics. In other words, decision-makers usually have strong incentives to develop their own rules, their own common law, their own constraints on discretion, even if such restrictions are not forced on them from the outside. The more work a court must do, the less time it will have for the work of exercising unfettered discretion. Such a court may then exercise discretion in deciding how to decide cases, but it will have an incentive to construct principles of decision that are easily applied and to follow those principles as

routinely as possible. Such a court will thereby have constrained (although not entirely prevented) its own exercise of discretion in the future.[13]

These same kinds of pressures can limit discretion in another important way, for they can lead one decision-maker to defer to some other decision-maker, often another officially constituted decision-maker. For instance, we have already seen how American appellate courts have adopted a series of rules and practices (of which Rule 52a is a particularly prominent example) designed to limit the range of questions which appellate courts have to address by confiding discretion to decide those questions largely to trial courts. But legal agents may also limit their own discretion by deferring to less official institutions. In the United States it has become an increasingly official practice for courts to allow criminal defendants to negotiate a guilty plea and a sentence with the prosecutor's office. Less officially still, courts regularly approve without real scrutiny all kinds of settlements between divorcing spouses, even though the doctrine of the law is that courts must examine and approve such settlements to ensure that vulnerable spouses and helpless children are not injured.

A related constraint on discretion is the institution's need to co-ordinate the activities of several decision-makers or to co-ordinate the same decision-maker's decisions over time. Because of the strength in American law of the principle that like cases should be treated alike, this pressure to co-ordinate is widely felt. Administrative agencies face the problem of co-ordination in a particularly acute form, since they will often need to co-ordinate the decisions of numerous employees, many of whom may be making decisions of considerable importance. But even courts need to co-ordinate their decisions. To some degree this is done hierarchically: it is a primary function of appellate courts to resolve differences in legal interpretation among the lower courts within their jurisdiction. To some degree, though, the lower courts are expected to co-ordinate 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 agency officials are no different. Such categories can in effect become rules of decision which govern, or at least influence, how issues are resolved. These

[13] For a particularly illuminating description of this and other institutional and psychological constraints on discretion, see Lempert, Chapter 6.

categories work to constrain discretion because they limit the range of ways in which judges think about cases. These categories are themselves limited. Although they can arise out of a judge's general experience with the world, that experience is constrained by the fact that judges are generally drawn from a fairly narrow social spectrum. In addition, these categories will be influenced by a judge's experience of deciding cases. To some degree, judges will find that experience limiting. 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.

Discretion is constrained not only by the internal dynamics of the decision-making entity, but also by the larger institutional context in which the entity acts. No governmental agency acts entirely alone and, in so far as power is shared, each agency's scope of discretion is limited. An obvious and generally important example of this constraint is the legislature's authority to enact statutes which courts must follow. But this constraint appears in other forms.

Sometimes, for instance, this constraint works 'jurisdictionally'. For example, 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.[14] 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 . . .' (*North Carolina* v. *Rhodes* 1868: 458).[15] Thus, the extent to which a court may exercise its discretion to order a family's life is limited by this 'jurisdictional' principle.

This kind of restraint on discretion also operates where a decision-maker has 'jurisdiction' to regulate an area of life but shares that responsibility with another governmental actor. For instance, a department of social services can alter a child-custody battle by initiating proceedings to terminate one candidate's parental rights, and its failure to do so will limit (although not eliminate) a court's authority to deny a non-custodial parent visiting rights. That department of

[14] e.g., *Kilgrow* v. *Kilgrow*, 107 So.2d 885 (1958). There 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 pre-nuptial agreement settling the question.

[15] 61 NC 445 (1868).

social services can also limit 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 power involves impeaching judges or depriving courts of jurisdiction. But it can also operate at a less dramatic level. For instance, legislatures can sometimes attempt to put pressure on courts by lowering judicial appropriations or refusing to approve the appointment of new judges.

Courts share authority not just with other governmental agencies, but even with the litigants themselves. At the most basic level, litigants' decisions determine what disputes will be brought to a court. This sounds obvious and trivial, but the importance of the litigants' decisions is suggested by the fact that, even in an area as intensively legalized as disputes over child custody on divorce, only about 10 per cent of the cases are actually litigated (Melli, Erlangen, and Chambliss 1988: 1142). Once cases have been initiated, the parties will have considerable control over what kinds of legal arguments a court is asked to resolve and what kind of evidence it hears. Both the introduction and the omission of important facts cabin a court's decisions.

Litigants place other limits on judicial discretion. Sometimes litigants will have something the court wants, like the ability to settle a case. Sometimes litigants will be able to resist a judicial order. This problem is particularly acute in areas like family law or much 'public-law' litigation, where the court seeks to affect the future behavior of the parties and where it must thus often depend on co-operation from the litigants. The unfortunate Morgan–Foretich case is only a lurid example of a much larger problem.[16]

The constraints on discretion which we have canvassed thus far can have powerful effects, but they generally are not directly designed as constraints on discretion. A more deliberate attempt to restrain discretion is to be found in the hierarchical organization of most decision-makers, notably including the judiciary. Because this is also

[16] In that case, the mother was ordered to allow the father to visit the child. The mother claimed that the father had sexually abused the child. She sent the child into hiding and refused to reveal its whereabouts. She was imprisoned for contempt of court and was released only after Congress passed a law limiting the length of time a person could be imprisoned on such grounds. Glimpses of that unhappy litigation may be had in *Morgan* v. *Foretich*, 846 F.2d 941 (1988); *Morgan* v. *Foretich*, 564 A.2d 407 (DC App.) (1988); *Morgan* v. *Foretich*, 564 A.2nd 1 (DC App.) (1989). On the enforcement problem, see Schneider 1985: 1056.

one of the most familiar limits on discretion,[17] we need say little about it. Intermediate appellate courts review trial-court procedures, opinions, and holdings; supreme courts review intermediate courts. This power of course allows appellate courts to correct what they take to be errors. More significantly, the aversion to 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 be elevated to a higher court will often feel constrained to please whoever has the power to make promotions. Of course, because of their more bureaucratic structure, administrative agencies constrain discretion through the tools of hierarchy even more vigorously and thoroughly than courts.

Another way of restraining the exercise of discretion common to both courts and bureaucracies is to require that decision-makers follow a set of procedures. Some procedures limit discretion by telling a court or agency how to conduct its proceedings. These procedures may 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 decision-maker 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 decision-maker what procedures to follow in deciding a case. One such procedural requirement is the obligation to justify decisions, particularly to justify them in writing. The process of explaining affects the decision-maker, if only because writing clarifies thought and makes it harder for the writer to avoid noticing abuses of discretion. It also opens the decision-maker to criticism from the parties and the public and to review from hierarchical superiors.

A yet more direct way of limiting discretion is to provide the decision-maker with policies and principles to guide him in making his decision. Decision-makers are commonly furnished with a statement at least of the purposes and goals the decision is ultimately intended to serve. A classic example is the rule that, in a dispute over which parent should have custody of a child after a divorce, the court should use the child's best interest as its only criterion. It has often been noted that this standard by itself does not decide cases. But, while this

[17] 'Hierarchy is probably the oldest axiom of organization: see Exodus 19: 25.' Kaufman 1977: 50 n. 61.

standard does vest a judge with discretion, it also constrains that discretion. For example, even if the guideline does not tell us exactly what is in the best interests of children, there will be many results virtually everyone would agree are *not* in those best interests, as where a court choosing between two otherwise equally qualified parents awarded 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. Thus a judge is directed not to consult the interests of the would-be custodians in making a decision. In any event, decision-makers are also often given (or will construct) a statement of second-level considerations which are intended to promote those purposes and goals.

Perhaps the most obvious way of limiting a decision-maker's discretion is to provide him with rules written at some level of detail that attempt to tell him what decision to reach where a particular set of facts exists. This limitation is in some senses the polar opposite of discretion, since we often say that, where a decision-maker applies a rule, he has no discretion. But, as I have been arguing, even a rule will often not deprive the decision-maker of all his discretion, since applying and interpreting the rule will regularly involve judgments of several kinds. In this section, we have been concerned with how far the whole range of powers of decision-makers can be constrained. In that context, then, rules can be seen as a limit on discretion, and not simply as an alternative to it.

Finally, a decision-maker's discretion is limited where one or more of the parties before him is endowed with rights. 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, the power to exercise discretion in custody disputes between a natural father and a surrogate mother is limited.

In this section, then, 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. 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.

Conclusion

It has been wisely said that when we walk toward one blessing, we walk away from another. In this chapter I have tried to show that this is true of the choices we face in deciding what mix of discretion and rules should govern the making of legal decisions. I have argued that rules have a primacy in law because of their capacity to provide superior legitimacy, wisdom, fairness, and efficiency. But I have also tried to demonstrate that rules regularly fail to deliver on those promises and that the imperatives of institutional decision-making bar us from eliminating discretion from law.

I have also sought to argue that the necessity of discretion is not as grim as it is often thought to be. As we have seen, discretion is so much a part of Western law that its extent often goes quite unnoticed. And, as we have seen, discretion offers advantages that are otherwise unobtainable.

All this leaves us in an irreducibly equivocal position, for it is not possible to say a priori what mixture of rules and discretion will best serve in any particular situation. Rather, that choice must be made case by case, with an eye to all the social, psychological, institutional, and political forces that will shape the way a legal decision is made. In fine, the only rule governing the choice is the rule of discretion.