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Legal Culture, Legal Strategy, and the Law in Lawyers' Heads

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LEGAL CULTURE, LEGAL STRATEGY, AND THE LAW IN LAWYERS' HEADS

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Most lawyers and judges experience law as a process of logical deduction. They believe they apply the law laid down by legislatures and appellate courts to the facts of cases and generate answers.[1] Most law professors at elite schools (and many of the best trial lawyers) hold this "Formalist"[2] view of law in contempt. They espouse a competing "Realist"[3] view in which law is an inductive process, judges

* A. Robert Noll Professor of Law, Cornell Law School. I thank Rick Abel, Stuart Banner, Jean Braucher, Kathy Brickey, Lincoln Brooks, Corinne Cooper, Clark Cunningham, Ted Eisenberg, Frances Foster, Marc Galanter, Bob Hillman, Dan Keating, Ronald Mann, Marjorie Murphy, Larry Ponoroff, Jeff Rachlinski, Thomas Redding, Bob Summers, Elizabeth Warren, Leila Wexler, Walter Weyrauch, Bill Whitford, and participants in an informal workshop at Washington University for their comments on earlier drafts of this Article, and Jennifer Bae and David Conway for assistance with research.

1 *See, e.g.*, Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1667 (1989) ("Legal problems are understood to be technical, and clients on their own are assumed not to have sufficient knowledge to cope adequately with them. When lawyers articulate the legitimating assumptions of law, they portray success in the legal system as dependent upon expert knowledge and *the shrewd application of legal rules.*") (emphasis added) (citations omitted). The divorce lawyers Sarat and Felstiner studied de-emphasized the importance of rules in legal practice, but Sarat and Felstiner themselves attribute that to the high level of judicial discretion invited by the rules governing divorce. *Id.* at 1676 n.51.

2 I use the term "Formalism" not in some technical sense, but merely as the best available shorthand for the view described in the previous sentence. Other words expressing essentially the same idea are "legal positivism" and "determinate" when "determinate" is applied to law. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 179-81 (1986) (defining "formalism"); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (arguing in favor of formalism). Weinrib uses "Formalism" in a sense I find indistinguishable from "natural law." The concept of Formalism I employ here is the one he denounces as law "wafting down from the publicly recognized organs of power." Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988).

3 "Realism" has been used in such a variety of ways that it seems no longer to have a technical sense. I use it for its association with the idea that law logically mandates no particular result in real cases, but instead leaves judges "legally free [to decide cases as they please]." David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 953 (1981). The distinction I intend is captured in Professor Robert Summers's contrast of formalistic and non-formalistic views of law. *See* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 867 n.4 (1981).

choose results, and plausible legal justifications are rarely in short supply.[4] To these Realists, the nuances of legal doctrine seem wholly unimportant; they determine nothing.[5] Perhaps as an expression of their contempt for legal doctrine, scholars at elite law schools have largely abandoned its study.[6]

The triumph of Realism in legal academia has left lawyers and judges unconvinced. As Weinrib put it:

> Legal activity invariably takes place within some structure, however lax. No matter how often the impossibility of such structure is announced by academics, murmurs of disbelief are heard in the trenches below. Legal formalism is the effort to make sense of the lawyer's perception of an intelligible order. This is why in the last two centuries formalism has been killed again and again, but has always refused to stay dead.[7]

Weinrib claims to find the structure that explains Formalism's refusal to stay dead in natural law.[8] This Article argues for an entirely different explanation. Law exists in the minds of lawyers in a form separate and critically different from its form on the books.[9] The law in lawyers' heads *is* largely formalistic and the process by which it is applied

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[4] *See, e.g.*, John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 204 ("Because the legal world is comprised of contradictory rules, there will be sound legal arguments available not only for the hypothesis one is investigating, but for other, competing hypotheses as well.")

[5] *See, e.g.*, Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2078 (1993) ("[Most law teachers] would argue that, although doctrine supplies the language of legal—or rather, judicial—decisionmaking, it is not the major factor in deciding cases and that purely doctrinal scholarship is therefore of quite limited utility.").

[6] In keeping with the Realist view, Weyrauch describes the central theme of elite legal education in the United States as one of skepticism: nothing is true, and even if it were, one could not prove it. *See* WALTER O. WEYRAUCH, HIERARCHIE DER AUSBILDUNGSSTATTEN, RECHTSSTUDIUM UND RECHT IN DEN VEREINIGTEN STAATEN 29 n.47 (Juristische Studiengesellschaft Karlsruhe Nr. 129, 1976) (referring to the attitude of elite American universities as one of fundamental skepticism as attributed to Gorgias: "nothing exists; if anything exists, it could not be known; if it could be known, that knowledge could not be communicated").

[7] Weinrib, *supra* note 2, at 951.

[8] Other scholars have attempted to reconcile the competing claims of Formalism and Realism. *See, e.g.*, Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 815-16 (1987) ("In order to break with the formalist ideology, which assumes independence of the law and of legal professionals, without simultaneously falling into the contrary instrumentalist conception, it is necessary to realize that these two antagonistic perspectives, one from within, the other from outside the law, together simply ignore the existence of an entire social universe (what I will term the 'juridical field') . . . . [I]t is within this universe that juridical authority is produced and exercised.").

[9] Other scholars have noted the existence of unwritten rules of law that tend to prevail over written rules. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 19-30 (1983) (demonstrating that various religious communities have succeeded in establishing community law that prevails over written law promulgated by the state); Todd R. Benson, *Taking Security in China: Approaching U.S. Practices*, 21 YALE INT'L L.J. 183 (1996) (discussing sharp differences between written law and practices as described by Chinese lawyers interviewed); Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514 (1971); Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 330-31, 364-66 (1993). For a more

is largely deductive. The Formalists are correctly reporting on their own experience. The Realists, who consider only the written law, are at least largely correct in their conclusion that it is overwhelmingly indeterminate. The problem is that neither the Formalists nor the Realists have yet recognized the existence and importance of the separate realm of law in lawyers' heads and its power to drive legal outcomes.

When law is applied, it is always through the agency of a human mind. That mind must absorb both the law and the situation to which it is to be applied, represent them internally, make the application, and report the results. It is mental representations—referred to in the cognitive psychology literature as "mental models"—not written law, by which lawyers and judges process cases. They can and sometimes do describe the law contained in their mental models in speech and in writing. The law in those models is remarkably simple, virtually black letter. That simplicity embarrasses the lawyers and judges. When pressed on a point, they are likely to scramble for a book or offer to prepare a memorandum.

American jurisprudence has yet to recognize the law in lawyers' heads.[10] The literature that comes closest is the literature that seeks to explain judicial decision making phenomenologically.[11] But that literature does not explain the process in the judge's head so much as it describes the inputs and outputs. To the extent it attempts direct description of what happens "in between," it speaks almost exclusively of such mystical concepts as the "judicial hunch,"[12] "practical reason,"[13] and "balancing."[14]

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lucid statement of Auerbach's point, see Corinne Cooper, *Justice Without Law? A Search Through History for Contemporary Solutions*, 48 ALB. L. REV. 741, 745-46 (1984).

10 The psychological nature of law is, by contrast, a principal tenet of Scandinavian Legal Realism. *See infra* note 210.

11 *See, e.g.*, Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988). Legal scholars have used the insights of cognitive psychology to illuminate the subjects law addresses as distinguished from the law itself. *See* Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (arguing against basing economic analyses on the assumption of rational decisionmaking and describing alternative decisionmaking algorithms as "strategies"). *But see* Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329 (1986) (arguing against adjustments to consumer law to attempt to compensate for consumers' cognitive illusions).

12 Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). The idea of the hunch is still being taken seriously today. *See, e.g.*, Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 279 (1990) ("[T]he Realists were right in emphasizing the importance of the judicial hunch.").

13 Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

This Article attempts to probe the "in-between," using a combination of empirical data, anecdote, insights from cognitive theory, and speculation. It is a preliminary effort to deal with uncharted realms. Most of the examples I use are from the field with which I am most familiar, debtor-creditor relations.[15] Nothing inherent in the ideas I present suggests that they are limited in applicability to that field.

I approach the subject with an attitude developed during eight years of legal practice in a relatively small legal community and confirmed through empirical research in other relatively small legal communities that process bankruptcy cases. Within such communities, the law in lawyers' heads plays a dominant role. A shared mental model of law implicitly proclaims "this is how we do things" (or, if the conversation should skip to a higher plane, "this is the right thing to do"). The challenger who would have them do otherwise must demonstrate that the law requires it. Because the written law is permeated with exceptions, ambiguities, and authorizations for the exercise of discretion, the challenger can rarely do so. The view contained in the model nearly always will be consistent with *some* interpretation of the written law, and that is all it takes for the model to prevail. In these communities, the shared mental model is primary law, and the written law merely background with which the model interacts.[16] Sensing the relative unimportance of the written law to the processing of cases, lawyers and judges are quick to delegate research to law clerks and new associates.

The theories presented in this Article can be summarized as follows: Law is practiced mostly in communities. Those communities forge shared mental models of the law and process cases principally in accord with them. The law contained in the models is a gross simplification of written law, distorted in ways that render it highly determinate. While these shared mental models interact with written law and

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14 *See* T. Alexander Alienikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (arguing that balancing is merely a metaphor that cloaks an essentially political process of decisionmaking). *But see* Kennedy, *supra* note 11 (examining the factors in the judge's choice and discussing what are essentially mental models of written law).

15 Legal scholars are most likely to be capable of seeing the difference between the written law and the law in shared mental models in the fields of the scholars' own expertise. When exploring a field in which one is not an expert, it is easy to fall victim to the kinds of shared mental models that law professors create for their students. *See infra* note 209. To the outsider, those models appear to be written law. In fact, they are often general models that express the academic community's shared mental model, which may be very different from written law in the area.

16 For an interesting expression of essentially this idea, see Walter O. Weyrauch, Book Review, 42 AM. J. COMP. L. 807, 808 (1994) ("Since the vast majority of cases in all fields of law are settled before they reach the appellate level or even the lower courts, these settlements are likely to be based on experiential norms of what is tenable under the circumstances, although only vaguely related to traditional written law.").

are to significant degrees products of it, they are at the same time highly resistant to written law.

Shared mental models explain not only the determinate nature of law as experienced by lawyers and judges, but also two other legal phenomena for which current explanations are inadequate. The first is persistent, systematic differences in legal outcomes between communities governed by the same written law. The second is the prevalence and effectiveness of legal strategy, particularly legal strategy that seems to compel judges to decide cases against both their personal preferences and what they believe to be the intentions of the lawmakers.[17]

These explanations depend on the factual premise of a community processing repetitive caseloads and therefore capable of forging a shared mental model. They are limited to circumstances where the premise holds. With no data on how much of the practice of law occurs under these circumstances it is difficult to predict how widely the ideas presented here apply. Some lawyers and judges work in environments where repeat players are the exception, and the group working on a case starts from ground zero, that is, written law, in the construction of their legal reality.[18] But I suspect that such lawyers and judges are in the minority.[19] For most, law is an exercise in community relations in a community whose expertise is not captured well in written law.

Part I of this Article begins by presenting evidence of persistent, systematic differences in legal outcomes between communities governed by the same written law. It then explains how mental models shared within legal communities could produce those differences.

Part II argues that the determinate nature of shared mental models renders them vulnerable to manipulation through legal strategy. It explores that vulnerability and the models' defenses to it. Part III then presents two partial theories about how law evolves. The first holds that lawyers are socially constrained in the number of challenges they can make to the shared mental model; how they exercise their limited challenges determines the direction of change. The second holds change to emanate from a dialectic in which legal strategy first achieves results thought unattainable. That leads to a new set of expectations and, finally, to the collapse of the old rules into a new set of rules that explain the new expectations directly.

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17 Weyrauch & Bell, *supra* note 9, at 382-85. Weyrauch and Bell have presented a theory of legal strategy, which is discussed *infra* notes 116-17 and accompanying text.

18 These lawyers and judges may construct a shared mental model during a long trial.

19 Mental models can be of substantive law, legal procedure, or both. While repetition in the applicable substantive law may not be the norm, repetition in the procedures applied in legal practice clearly is.

Part IV first explores the explanatory implications of the law in lawyers' heads. Law is psychological phenomena; systematic differences in legal outcomes from community to community are not only possible but inevitable; and any attempt to alter the situation will render legal communities less efficient. Part IV then turns to the normative implications. It argues that strategic analysis has important advantages over economic analysis as a means of understanding law; that the legal system should strive for a level of simplicity at which it is understandable by the governed; and that lawyers and judges should attempt to write the unwritten law that governs their various communities. Part V summarizes the argument and conclusions.

A brief comment on the methodology employed in this Article may be helpful to the reader. Much of what passes for theory in legal scholarship is in fact what I have called "paradigm dominance."[20] Such pseudo-theory argues for a particular way of thinking about some subject and may provide a catchy label, but ultimately makes no empirically testable assertions. Professors Warren and Westbrook have proposed, as the antidote to such armchair theorizing, that scholars routinely propose empirical research, in part to begin the process of testing their theories, but in part merely to assure that their theories have anything at all to say about reality.[21] In recognition of the need for that kind of discipline, I explain at various points how the assertions I make might be operationalized[22] and empirically tested.

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20 *See* Lynn M. LoPucki, *Reorganization Realities, Methodological Realities, and the Paradigm Dominance Game*, 72 WASH. U. L.Q. 1307, 1307-10 (1994) (describing the paradigm dominance game).

21 Elizabeth Warren & Jay L. Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257, 1259-62 (1994); *see* Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1268 (1981) (arguing that "a theory should be treated as vacuous unless it is formulated so as to be falsifiable or infirmable by evidence yet to be collected"). Cognitive psychologists seeking to develop a working model of the mind recognized the danger of empty theorizing even earlier. They require that theories about the operation of the mind be expressed as "effective procedures," by which they mean procedures that will run on a computer. Such expression assures that the procedures could run in a human mind. *See, e.g.*, P.N. JOHNSON-LAIRD, MENTAL MODELS 4-8 (1983).

22 Among social scientists, a concept is said to be operationalized when it is expressed in objectively verifiable terms. *See, e.g.*, David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 831 (1990) (operationalizing "grievance procedure effectiveness" as numerical responses to the question: "Overall, on a scale of 1 to 10, with 10 being 'excellent,' 5 being 'average,' and 1 being 'poor,' how would you rate the grievance procedure?"); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1235-36 (1992) (describing Turing's operationalization of "thinking" as the ability to persuade a human subject in conversation that the machine is human); Joseph E. Scott, Book Review, 78 J. CRIM. L. & CRIMINOLOGY 1145, 1151-52 (1987) (describing proposal by a member of the Attorney General's Commission on Pornography to operationalize "pornography" as material that aroused more than five percent of men as measured by a penile plethymoraphs machine). *Compare* STEWART MACAULAY, LAWRENCE FRIEDMAN & JOHN STOOKEY, LAW & SOCIETY, READINGS ON THE SOCIAL STUDY OF LAW 51 (1995) ("[D]eciding how to measure a variable is called 'operationalizing' the variable.") *with* MARY G.

I. LAW AS SHARED MENTAL MODEL

A. Geographical Inconsistencies in Legal Outcomes

In the late 1970s, I was one of three lawyers who did most of the bankruptcy work in the Gainesville Division of the Northern District of Florida. The situation commonly arose in which a close relative made a bona fide loan of money to a debtor before bankruptcy and the debtor then sought to repay the money under a Chapter 11 plan. The court routinely permitted repayment of the relative just as it would a creditor who lent "at arms length." If the relative's loan was unsecured, it shared pro-rata with other unsecured loans; if the relative's loan was secured, it could have priority over the others. The fact that the loan was from a relative went to the factual issue of whether the loan actually had been made or the mixed fact-law issue of whether the loan had been made in good faith. But so long as the loan had been made in good faith, we saw it as of equal dignity with any other.

In one of my cases, the debtor's mother had lent him money and taken a third mortgage against the business premises. A lawyer from a city sixty-five miles away who represented a competing creditor objected to the claim of the debtor's mother and sought to have it "equitably subordinated" to the claims of all other creditors. My initial reaction was that the objection was absurd. But when finally forced to research the matter, I found an ocean of legal doctrine making a variety of distinctions among loans by relatives.[23] The written law was complex and ambiguous with regard to the case at hand. The judge, who regularly sat on Gainesville cases and never sat on cases in the challenger's home city, disposed of the case quickly and in accord with my initial reaction to it. I breathed a sigh of relief, made a mental note of the existence of that previously uncharted (by me) ocean of legal doctrine, and continued to draft Chapter 11 plans that repaid relatives on the same basis as arms-length lenders.

A few years later, I conducted empirical research on Chapter 11 cases in the Western District of Missouri.[24] Much to my surprise, I found that *every* Chapter 11 plan filed in that district separately classified loans from the debtor's relatives and subordinated their repayment to the repayment of other creditors. Loans from relatives effectively were treated as equity investments that could be repaid only if the business survived.

KWEIT & ROBERT W. KWEIT, CONCEPTS AND METHODS FOR POLITICAL ANALYSIS 21, 165-74 (1981) (explaining techniques for operationalizing concepts in social research).

[23] *See, e.g.*, Jules S. Cohen, *Shareholder Advances: Capital or Loans?*, 52 AM. BANKR. L.J. 259 (1978).

[24] Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?* (pts. 1-2), 57 AM. BANKR. L.J. 99, 247 (1983) (reporting results of the study).

The cause of this difference could not have been a difference in written law. The governing body of written law—bankruptcy law in general and the bankruptcy doctrine of equitable subordination in particular—is federal law equally applicable in both districts. Something other than written law was at work.

Substantial, systematic differences in legal outcomes that cannot be accounted for by differences in written law are a common feature of the American legal system.[25] Discussions of these kinds of differences often invoke Dean Roscoe Pound's distinction between "law in action" and "law on the books."[26] Today, such differences are likely to be attributed to "local legal culture." Probably the best definition of local legal culture is that offered by Professors Sullivan, Warren, and Westbrook:

> [S]ystematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime.[27]

Sullivan, Warren, and Westbrook provide vivid examples of local legal culture at work in the processing of consumer bankruptcy cases. They

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25 *See* Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23, 30 (1985) (describing a genre of scholarship knows as "legal effectiveness" or "gap" studies that examine empirically the gap between law in action and law on the books). Use of the term "gap" to apply to the numerous examples of practices that deviated from the law on the books apparently originated with Professor Richard Abel. *See* Richard L. Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 184-89 (1974) (discussing explanations for the existence of the gap).

In commenting on a draft of this Article, Professor Lawrence Ponoroff wrote:

> I practiced for many years with a large Denver-based firm, but in a branch office in Colorado Springs. I had a case in El Paso district court in which I had served requests for admissions. The other side failed to either respond or request, formally or informally, an extension of time to file prior to the expiration of the thirty-day period to respond. Therefore, in my pretrial statement, I indicated that, per the rules, each of these matters was deemed admitted at trial. The other lawyer called me, casually apologized for not contacting me earlier, and said he needed more time. I refused on the basis that I could no longer accommodate him when to do so would be materially prejudicial to the advantage my clients had gained as a consequence of his earlier, unexcused dilatoriness. He expressed outrage at my refusal on the basis, among other things, that I was trying to practice "Denver-law" in Colorado Springs. To make a long story short, the judge saw it the same way, even though the rules were crystal clear on the point.

Letter from Lawrence Ponoroff, Professor of Law, Tulane Law School, to the author 2 (Oct. 20, 1995) (on file with the author).

26 Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

27 Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 804 (1994). The earlier definitions offered by Church were simpler but less explanatory. Thomas W. Church, Jr., *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 181 (1978) (referring to "a stable set of expectations, practices and informal rules of behavior which, for want of a better term, we have called 'local legal culture' "); Thomas W. Church, Jr., *Examining Local Legal Culture*, 1985 L. & SOC. INQUIRY 449, 451 (1985) (referring to "the practitioner norms governing case handling and participant behavior in a criminal court").

also provide, if not the first, certainly the most developed description of mechanisms by which local legal cultures affect legal outcomes.[28]

The mechanisms Sullivan, Warren, and Westbrook discovered are mechanisms by which judges, lawyers, and other officials influence debtors' decisions whether to file for bankruptcy relief and, if they file, under which chapter.[29] For example, Sullivan, Warren, and Westbrook found that in some instances judges awarded more generous fees to attorneys who filed cases under the chapter the judge preferred and embarrassed lawyers in front of their clients when they did not.[30] They present dramatic evidence of differences from district to district in the percentages of people filing bankruptcy and in the relative proportions of Chapter 7 liquidations and Chapter 13 debt adjustment proceedings.[31]

In a study of payments by debtors to their unsecured creditors in cases under Chapter 13 of the Bankruptcy Code, Professor Jean Braucher found that "[C]hapter 13 trustees and judges in the four cities effectively deter 0% plans and keep most plans above a floor percent that is known to local practitioners."[32] The floor percentages for routine confirmation she discovered were as follows:

Austin	25 to 33 percent
Dayton	10 percent
Cincinnati	70 percent
San Antonio	100 percent[33]

What makes these findings particularly interesting is that the written law requires that the court consider repayment proposals on a case-by-case basis,[34] that debtors be required to pay only what they can afford,[35] and that debtors be permitted to file even if they can afford

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28 Prior to the publication of *The Persistence of Local Legal Culture*, many commentators regarded the theory of local legal culture as a mere tautology or category for residual phenomena not explained by other theories. Mary L. Luskin & Robert C. Luskin, *Why So Fast, Why So Slow?: Explaining Case Processing Time*, 77 J. CRIM. L. & CRIMINOLOGY 190, 212 (1986) ("[F]or local legal culture to be more than a residual or catch-all variable, it must consist of clearly specified norms and expectations. To date, the norms and expectations in local legal culture remain largely unspecified.") (citation omitted); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 530 (1989) ("At this level, the legal culture hypothesis is irrefutable but, regrettably, tautologous.").

29 Sullivan et al., *supra* note 27, at 839-57.

30 *Id.* at 844-45.

31 *Id.* at 817-27.

32 Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 532 (1993).

33 *Id.* at 532.

34 *In re* Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982) ("[B]ankruptcy courts should determine a debtor's good faith on a case-by-case basis, taking into account the particular features of each Chapter 13 plan."); *In re* Rimgale, 669 F.2d 426, 432 (7th Cir. 1982) (requiring consideration on a case-by-case basis with substantiality of repayment one of many factors to be considered).

35 11 U.S.C. § 1325(b)(1)(B) (1994) (requiring that all of debtor's "disposable income" be devoted to payments under the plan).

to pay nothing at all.[36] Thus the very existence of these rules of thumb[37] arguably violates the written law.[38]

These two studies, like the story that opened this Part, demonstrate systematic differences in legal outcomes between cities.[39] Nothing apparent in the written law, in the kinds of cases that arose, or in the nonlegal cultures of the cities plausibly explains the extent and systematic nature of the differences. I argue below that differences such as these are a product of shared mental models of the law.

Shared mental models affect settlements as well as adjudications. They can cause settlements to deviate, not only from the written law, but also from the leverages the parties would have in litigation. In our study of the bankruptcy reorganization of large, publicly held companies, Whitford and I documented that settlements almost uniformly deviated from the legal entitlements of the parties as specified in the "absolute priority rule."[40] The rule entitled creditors to absolute priority over shareholders in distributions under the plan. Yet creditors routinely agreed to plans that permitted distributions to shareholders worth millions of dollars, even though the plans did not provide for full payment of their own claims. Thus the settlements deviated from the formal legal entitlements.

These bargains did not occur strictly in the shadow of the likely outcome in litigation. In interviews, the lawyers who negotiated these settlements asserted that the deviations were necessary to obtain consensus and that consensus was necessary because the size of these cases made them impractical to litigate. Whitford and I found, however, that in the first three cases that were not settled, the litigation

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36 *See In re* Greer, 60 B.R. 547 (Bankr. C.D. Cal. 1986) (holding that zero-repayment plans are legally permissible); *see also supra* note 35.

37 Some may object to the expression "rule of thumb" because of its putative origins. *See* State v. Oliver, 70 N.C. 60, 60 (1874) (asserting the prior existence of a legal doctrine "that a husband had a right to whip his wife, provided he used a switch no larger than his thumb," but providing no citation and referring to the putative doctrine as a "barbarism"). It is, however, the only expression likely to trigger in many readers an association with the broad array of informal norms to which I refer.

38 In the first years after adoption of the Bankruptcy Code, the bankruptcy courts formally established rules of thumb regarding the percentages of repayment that were acceptable. The appellate courts responded by striking those rules down. *See supra* note 34.

39 Differences in legal outcomes between cities that cannot be accounted for on the basis of written law frequently occur outside the United States as well. *See, e.g.*, Theodore Eisenberg & Shoichi Tagashira, *Should We Abolish Chapter 11? The Evidence from Japan*, 23 J. LEGAL STUD. 111, 155 (1994) (describing regional variations); THEODORE EISENBERG, CREATING AN EFFECTIVE SWEDISH RECONSTRUCTION LAW 61-62 (1995) (describing sharp regional variations in the use of national reconstruction and bankruptcy laws in Sweden).

40 Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 142 (1990) (showing that creditors routinely consented to equity holders, sharing in the distributions of insolvent companies despite creditors' clear legal entitlement to the contrary, because of various practical leverages generated in reorganization proceedings).

proved easily manageable. Underwater shareholder interests could be "zeroed out."[41] We concluded that another dynamic was driving the settlements:

> Although these cases were spread throughout the United States, most of the lawyers who played key roles in them were members of the same legal community. They could expect to be involved in future cases with their current adversaries and were to various degrees dependent on those adversaries for professional respect and advancement. They were not entirely free to ignore the conventional wisdom that consensual plans were the responsible, appropriate means for accomplishing reorganization and that despite the absolute priority rule, everyone at the bargaining table was entitled to a share.[42]

Had it not been for the existence of a shared mental model that predicted that litigation was impractical, many more of the cases might have been litigated and the litigation might have gone more smoothly. In the complex web of a major bankruptcy reorganization, the law and the actual bargaining leverages of the parties may be less important than the shared understanding of the community as to the law and the bargaining leverages of the parties.[43]

The examples I present here are only a small sample from a large body of empirical studies showing deviation of the law in action from the law on the books.[44] I refrain from presenting more only because the existence of substantial deviations is not in dispute.

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41 *Id.* at 144-46.

42 *Id.* at 195 (citations omitted).

43 To illustrate, assume that on a given set of facts, the law creates no entitlement for shareholders and all lawyers understand the law that way. However, all lawyers other than Smith believe litigation to that result would cost several millions of dollars in expense and delay, so the only reasonable solution is a settlement that gives shareholders one million dollars. Smith believes that the difficulty of this kind of litigation is overrated, and once a case has been litigated, the myth of difficulty will disperse. Smith, as attorney for the Unsecured Creditors' Committee, nevertheless may not be able to litigate, because (1) the lawyers for individual members of the Committee will reject his proposal to buck the conventional wisdom, (2) the first challenges to the conventional wisdom are likely to be hotly contested *because* they seek a result contrary to the shared mental model, so they are likely to be much more expensive than otherwise necessary, and (3) Smith may suffer reputational damage if Smith attempts to raise the issue and is not successful *in this case.*

44 *E.g.*, Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1320-22 (1992) (reporting anecdote in which a judge approves an "attitude ticket" in accord with practice and admittedly in violation of Supreme Court decisions); ROBERT E. RODES, JR. ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 85 (1981) (finding an "all or nothing" approach to the imposition of discovery sanctions, rather than the "scheme of increasingly severe sanctions" contemplated by written law); Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 556, 557 (1986) ("Much environmental legislation is absolutist in language, but more lenient in administration. . . . [Sophisticated firms] comprehend that the 'real' law, the law in action as opposed to the law on the books, is the accumulation and extension of actual decisions reached by agencies, rather than the absolutist language of the statutes themselves.").

B. Mental Models

Mental models are a central concept of modern cognitive theory.[45] That is, "human beings understand the world by constructing working models of it in their minds."[46]

The leading theories differ in their assertions as to the types of models constructed, the manner in which information is stored in them, and the ease with which humans can revise or reconstruct their mental models. But all seem to agree that our mental models are not simply text, beliefs, images, or schemata in the narrow sense of mere visual images.[47] They are representational maps of the world in which we live. They form a model in that their parts are integrated to form a usable whole. Cognitive theorists assert that the relationships among the parts of such a model mimic the relationships understood by the modeler to exist among the parts of the world.[48] What we know subjectively as the experience of understanding is, in objective terms, the process of modeling. Understanding is not in the parts, but in the relationship among the parts.

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45 The concept of "mental models" originates in the literature of cognitive psychology, *see, e.g.*, JOHNSON-LAIRD, *supra* note 21, and the closely related field of artificial intelligence, *see, e.g.*, MARVIN MINSKY, THE SOCIETY OF MIND 303 (1985). Dominant theory in cognitive psychology postulates that the human mind works by constructing models that have similar "relation-structures" to the processes they imitate. These models are *working* models in that they are dynamic and at least purport to work in the same way as the processes they parallel, but they are not necessarily *workable* in that they may contain inaccuracies or internal contradictions. JOHNSON-LAIRD, *supra* note 21, at 3-4, 8-9. "[M]odels of reality need neither be wholly accurate nor correspond completely with what they model in order to be useful." *Id.* at 3. JOHN H. HOLLAND ET AL., INDUCTION 12 (1986) ("In common with many recent theoretical treatments, we believe that cognitive systems construct models of the problem space that are then mentally 'run,' or manipulated to produce expectations about the environment.").

46 JOHNSON-LAIRD, *supra* note 21, at 10. For the use of a similar model in jury research, see Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (arguing from empirical studies that jurors decide cases by constructing coherent stories from evidence and matching the stories to permissible verdicts).

47 The literature of cognitive psychology contains a wide variety of theories of the nature of the mental structures employed in thinking. Words such as "schemata" are assigned a variety of meanings. *See* Blasi, *infra* note 50, at 339 ("The relation between the concepts of schemas and mental models [in the cognitive science literature] is less than precise."). I do not mean to endorse one to the exclusion of another. But the idea of a working mental representation of a portion of the world is essential to my concept of mental model. *See infra* note 50 and accompanying text.

48 J.A.W. Kamp, A Theory of Truth and Semantic Representation, Report of Center of Cognitive Science, University of Texas at Austin (unpublished), *cited in* JOHNSON-LAIRD, *supra* note 21, at 439 ("A text represented in a discourse model is true provided that there is a mapping of the individuals and events in the discourse model into the real world model in a way that preserves their respective properties and the relations between them."). *See also id.* at 399-406 (contrasting the cognitive process of modeling with the "cognitive" process of automatons).

C. *Law as Mental Models*

The subjects of mental models include not only the physical world, but also abstractions of the kinds dealt with in law[49] and, I argue here, the abstractions of law itself. That is, a person who can demonstrate an understanding of a particular legal subject or concept has, in his or her mind, a working mental model of the subject or concept. The model "works" in that the person can apply the model to fact patterns to reach the appropriate conclusions.[50] What tells us the mental manifestation is an integrated model rather than merely a collection of facts or rules is that, using the model, the person quickly and easily can state conclusions about the subject that were not express in the facts and rules from which the person constructed the model.[51]

Written law is invariably expressed in words. The law in mental models is not. I have in mind a mental model of the election available to creditors under Bankruptcy Code § 1111(b).[52] I could explain the election in my own words (perhaps correctly, perhaps not), but I could not tell you what words are used in the statute. If I explained the election more than once, I probably would use different words each time.[53] What I would explain would be the sense of the election. I would tell you why I think Congress put it there, how a creditor makes the election, what legal concepts are employed in the model, and what effect the election might have on the electing creditor's recovery.

Based on the interactions of nearly thirty years as a lawyer and then a law professor, I believe that essentially most lawyers and law students mentally model law this way.[54] Though we remember many phrases and sometimes entire statutes word-for-word, we know and

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49 *See, e.g.*, JOHNSON-LAIRD, *supra* note 21, at 416-19 (describing the concept of "ownership" in lay terms).

50 The model need not be "correct" in any absolute sense. Nor does it have to be in the mind of a lawyer. For examples of mental models of law in the minds of lay people see Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 670 (1986) (Shasta County laymen's model of law governing trespass by cattle); JOHNSON-LAIRD, *supra* note 21, at 416-19 (cognitive theorist's model of the effect of ownership). The key, salient characteristic of the model is that it "run." *See* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL ED. 313, 318 (1995) ("[T]he schematic knowledge enables experts to construct mental models that capture much of the complexity of the situation, and to 'run' the mental models in simulation in order to evaluate the likely consequences of alternative courses of action.").

51 *See* Blasi, *supra* note 50, at 344-45 (discussing the relationship between speed and expertise in legal problem solving).

52 11 U.S.C. § 1111(b) (1994).

53 One of my explanations appears in LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS § 12.9.4 (2d ed. 1991).

54 Duncan Kennedy, for example, describes his understanding of the relationship among case holdings as "fields" and describes them as graphics. Kennedy, *supra* note 11, at 538-44; *e.g.*, GETTING GRAPHIC: VISUAL TOOLS FOR TEACHING AND LEARNING UCC AND BANKRUPTCY LAW (Corinne Cooper ed., 1993) (reproducing the graphics used by dozens of law professors).

confidently use much law we cannot recite. Quite clearly, the law in our mental models is not the literal texts from which we learn it.[55] In examining the contents of my own mental models of particular provisions of law, I find simple fact patterns together with their stock solutions,[56] graphics, and sometimes the size and location on the page of the text that would answer my question—though I may have only the vaguest recollection of the content of that text. I remember from practice some twenty years ago the phrase "could have or might have" in connection with the qualification of expert medical witnesses to testify to the cause of an injury. Though I do not remember either the antecedent or the consequence of the rule, I remember enough of the context in which the rule was applied to reconstruct them in my own words.

In particular areas I am aware that I know more than I can bring to consciousness without considerable effort.[57] Underlying these fragments is a strong sense that all these pieces are related to each other to form a coherent structure. Using this structure, I can produce roughly the same solutions to legal problems as others in my field.[58] Portions of both the process and the information I use are subconscious, by which I mean that I cannot describe them to you, even after I have used them.[59]

The salient characteristics of these "mental models" of law are as follows: (1) not all information included in the model is text, (2) the model "works" in that it can be used to solve problems and answer questions, including novel ones,[60] and (3) items of information are not merely memorized, but related to other items of information in such a way as to give the model a structure.[61] The nature of these models can be further elaborated by consideration of the concept of the "reason for the rule."[62] All but the dullest students of law understand that

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55 I have encountered students for whom I think the situation may be otherwise. They seem obsessed with the precise wording of rules and rely heavily on memorization. They seem to constitute not more than about one percent of the students I have taught.

56 Blasi identifies such patterns as the primary manifestations of legal expertise. *See* Blasi, *supra* note 50, at 335-38.

57 *See infra* note 59.

58 The ability of the model to generate the same results in the minds of different people is the acid test of a shared mental model of law. *See, e.g.*, Kennedy, *supra* note 11, at 561 ("[D]eciding how to apply [a rule] involves a social, hence in some sense a subjective process. . . . I've many times had discussions with others in which we formulated rules together, seemed to agree about their terms, then engaged in a series of applications, and found that once we'd agreed on the formula we came up with the same answer to the question: how does the rule apply *here*?").

59 *See* John F. Kihlstrom, *The Cognitive Unconscious*, 237 SCIENCE 1445 (1987); Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know*, 84 PSYCH. REV. 231 (1977).

60 *See supra* notes 45, 47.

61 HOLLAND ET AL., *supra* note 45, at 29-39.

62 *See, e.g.*, Ketelson v. Stilz, 111 N.E. 423, 425 (Ind. 1916) ("One of [English common law's] oldest maxims was that where the reason of a rule ceased the rule also ceased."); 1 WILLIAM

one cannot derive legal outcomes by applying a rule of law, whether derived from case law or statute, literally and mechanically to a set of facts. For example, Bankruptcy Code § 362(a) provides in part that "a [bankruptcy] petition . . . operates as a stay, applicable to all entities, of . . . any act to . . . recover a claim against the debtor that arose before the commencement of the [bankruptcy] case."[63] Read literally, this provision would bar a secured creditor from asking the debtor to reaffirm a debt that would be discharged in the bankruptcy case. From the creditor's point of view, the sole purpose of reaffirmation is recovery of the claim. The legislative history starkly supports the literal reading.[64] Yet adoption of the provision did not change practices.[65] When practices contrary to the literal reading and the legislative history have been presented to the courts, the courts uniformly have affirmed the practices, provided the request for reaffirmation was polite and reasonable.[66] Despite the necessity to interpret the provision in a highly non-literal manner to keep the system worka-

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BLACKSTONE, COMMENTARIES *70 (This asserts that "[t]he law is the perfection of reason, . . . it always intends to conform thereto, and . . . what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely aligned; but it is sufficient that there be nothing in the rule flatly contradictory to reason."); KARL N. LLEWELLYN, THE BRAMBLE BUSH 157-58 (1951) ("The rule follows where its reason leads, where the reason stops, there stops the rule.").

The concept of the "reason for the rule" dominates common-law jurisprudence. A LEXIS search for that phrase discovers use in more than 11,000 legal opinions. Nearly all of these uses are by judges who assert that they know the reason for the rule they were applying in a particular case. They appear to agree with Oliver Wendell Holmes that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 187 (1920).

63 11 U.S.C. § 362(a)(6) (1994).

64 The legislative history provides that "[c]reditors can no longer independently contact debtors to encourage them to reaffirm debts because such contact is prohibited by the Code." S. REP. NO. 65, 98th Cong., 1st Sess. 11 (1983).

65 As a private practitioner representing consumer debtors in the first year Bankruptcy Code § 362(a)(6) was effective, I routinely received requests for reaffirmation from secured creditors' attorneys. In their landmark study of consumer bankruptcy cases, Warren and Westbrook

> found evidence highly inconsistent with the view that debtors sought out their creditors for reaffirmation. The debtor who reaffirmed an agreement to pay for four tires on a car that had already been repossessed, the dozens of reaffirmations in one city to a particular department store and no reaffirmation to any other similar store, and other such episodes suggested to us that creditors contact their debtors for reaffirmations.

ELIZABETH WARREN & JAY L. WESTBROOK, TEACHER'S MANUAL, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES AND MATERIALS 116 (2d ed. 1991).

66 *See, e.g., In re* Brown, 851 F.2d 81 (3d Cir. 1988) (credit union did not violate stay by sending a letter to debtor stating that future services would be denied unless debtor reaffirmed); *In re* Murray, 89 B.R. 533 (Bankr. E.D. Pa. 1988) (a mildly worded letter from creditor's counsel to debtor's counsel stating creditor's intention to foreclose unless debtor reaffirmed the debt did not violate the automatic stay).

ble, the provision does not seem to cause readers any confusion.[67] The reason for the rule seems to flow from the context, the manner in which the bankruptcy system operates, or some combination of the two.[68]

One does not know the reason for a rule of law as a result of learning it along with the rule.[69] Probably few bankruptcy experts have ever noticed that Bankruptcy Code § 362(a)(6) literally bars creditors from contacting their debtors to seek a reaffirmation, let alone memorized a reason for the provision. Yet, were it brought to their attention, nearly all would derive the same conclusion: the statute does not bar a single polite contact by a secured creditor and there would be no point in arguing to the court that it does. Law students not yet exposed to the shared mental model or the realities of system operation often draw the contrary conclusion: once a bankruptcy case is filed, there is *nothing* the secured creditor can do to obtain a reaffirmation.[70] What this demonstrates is that the reason for this rule is found not in another rule, in legislative history, or any other articulated source. It is found in the relationships among the parts of the lawyer's working—that is, functional—mental model.[71]

Conceiving of law as a mental model in lawyers' heads suggests three characteristics relevant to understanding its function. First, the law in lawyers' heads will be both different from and simpler than written law.[72] We know that it must be different because much of it is

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67 While this provision has been in effect, several "technical amendment" bills have been enacted by Congress to correct errors in the Bankruptcy Code. Apparently, the wording of Bankruptcy Code § 362(a)(6) has not been considered an error.

68 For a conclusion so obvious, it is remarkably difficult to specify the reason. The existence of a reaffirmation procedure in Bankruptcy Code § 524(c) certainly implies that reaffirmations are contemplated. But the intent could have been to rely on debtor-initiated reaffirmations. The probable explanation is that reaffirmations can only be accomplished before discharge. *See* Bankruptcy Code § 524(c)(1) (1994). Without prompting from creditors, debtors who would benefit from reaffirmation might miss the deadline.

69 Blackstone suggests that one might be unable to know the reason for the rule until the rule is encroached upon. He states (supposedly relating an ancient observation of British Law) "that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broke in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation." 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

70 This statement is based on numerous class discussions of a hypothetical that raises the issue. *See* WARREN & WESTBROOK, *supra* note 65, at 295-96 (stating the hypothetical in problem 20.4).

71 Minsky's "bridge definition" is a definition that bridges highly general "purposeful definitions" and specific "structural definitions" in the human mind. By connecting the two kinds of definitions of a chair, for example, the bridge definition renders the concept of a chair adjustable to context and therefore functional. *See* MINSKY, *supra* note 45, at 131.

72 This proposition might be tested empirically by presenting the facts of cases to lawyers who are members of the community and to a control group that has full access to the written law but not to the model. The analyses of community lawyers should be more similar to those of

not expressed verbally. We know it is simpler because the human mind is incapable of ingesting and storing the massive detail that has collected in our law libraries. The need for efficiency that compensates for the limitations of human memory underlies much of the theory of cognitive systems.[73] Cognitive systems constantly revise and generalize to represent the world with a more effective combination of accuracy and efficiency.[74] To illustrate, a lawyer whose practice will be affected by a court opinion may read it in its entirety, but more likely will read only a short summary of it in advance sheets or digests. If the written opinion seems to accord with the lawyer's mental model, the lawyer likely will consider it uninteresting. If the written opinion conflicts with the lawyer's mental model, the lawyer will analyze the conflict and determine how to incorporate this new information into the model.[75] To achieve cognitive efficiency, the lawyer may simplify it to what amounts to a single, simple sentence: "This case stands for the proposition that . . . ."[76] Because many written opinions are expressed such that, when read literally, they are unlikely to apply to any significant number of future cases, the process of incorporation may include generalization on the case by analogy. In both respects, the process of incorporation of the written opinion into the lawyer's mental model distorts the opinion.[77]

Second, errors can exist and persist in mental models, including both mapping errors and internal inconsistencies.[78] Much of the oper-

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other community lawyers than to those of the control group, and the analyses of community lawyers should employ fewer distinctions.

73 *See, e.g.*, HOLLAND ET AL., *supra* note 45, at 31 ("In general, the cognitive system will attempt to construct various simplified models adequate for achieving certain goals. This can be accomplished by aggregating environmental states and system outputs into useful categories and ignoring details irrelevant to the purposes of the model.").

74 *See, e.g., id.* at 36 ("The need for more accurate prediction favors the addition of further specialized rules, whereas the need for efficient prediction favors the addition of general rules to replace a larger number of specialized rules.").

75 The lawyer may work with the lawyer's community in deciding what adjustment to make. *See infra* subpart I.D.

76 Lawyers and judges commonly speak of "points of law" even though there seems to be nothing in the logic of written law that naturally would reduce it to points. Marjorie Murphy deserves credit for this insight.

77 West keynotes are a system, popular among lawyers, that facilitates both aspects of this process. Though marketed as a way of deciding which cases to read, it is routinely used as a way of avoiding the necessity to read cases. Other publications include only summaries of the cases. *See, e.g.*, BANKRUPTCY LAW REPORTER (BNA).

78 Arthur T. Denzau & Douglass C. North, *Shared Mental Models: Ideologies and Institutions*, 47 KYKLOS 3, 25-26 (1994) (discussing examples and some of the literature); ROBERT NOZICK, THE NATURE OF RATIONALITY 75-78 (1993) (explaining the benefits individuals obtain from maintaining inconsistent beliefs). For an interesting argument that all models of reality, though not necessarily inconsistent, are incomplete, see GERALD M. WEINBERG, AN INTRODUCTION TO SYSTEMS THINKING 110-22 (1975).

ation of mental models is subconscious,[79] so the person in whose mind the model exists can examine and correct it only indirectly.[80]

This second characteristic gives rise to a third. Mental models can be resistant to change by written law. Most obviously, the person in whose mind the model exists must be aware of written law that would change it before that law can have any effect.[81] Less obviously, because mental models may represent law nonverbally and operate largely subconsciously, a person may be exposed to law that conflicts with the person's mental model without the person recognizing the conflict. At a minimum, some event must highlight the conflict for change to occur. The new information then must be integrated into the model through a process of revision.

These characteristics of mental models of law—simplicity, error, and resistance to correction—suggest that the promulgators of new written law should concern themselves not just with the content of the law, but also with the effectiveness of its communication.[82] Laws impact legal outcomes to widely differing degrees.[83] When a law fails to

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79 *See, e.g.*, JOHNSON-LAIRD, *supra* note 21, at 465 ("Although there is much that you can be aware of, there is also much that is permanently unavailable to you. Indeed, you can never be completely conscious of how you exercise any mental skill. Even in the most deliberate of tasks, such as the deduction of a conclusion, you are not aware of how you carried out each step in the process.").

80 The process for determining errors in one's own mental model is, in essence, to generate conclusions from the model, compare the conclusions with data generated externally, and note inconsistencies.

81 The volume of written law has exploded to the point where an awareness of all of it is impossible. *See, e.g.*, PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 25 (1994) (noting that Federal Register increased from 15,000 pages in the final year of John Kennedy's presidency to over 70,000 pages in the last year of George Bush's presidency). Computers have made it possible to produce binding law far more rapidly than human beings can read, resulting in substantial amounts of law that have never been read by anyone. For example, most employee health and pension plans are machine-produced documents intended to be identical to the form, except as modified by the drafter for the particular client. The drafter may not read the plan because the drafter is confident in its method of preparation. The employer may not read boilerplate provisions of the plan because the employer considers them the responsibility of the drafter. Employees may be given only nonbinding summaries of the plan, and not even have access to the plan itself. The same phenomena may be occurring with regard to government regulations, producing a new strategic environment with unpredictable consequences. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (fashioning a "standard for standards" for administrative rules); Richard Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2428-38 (1995) (describing the complexity and obscurity of modern environmental law); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992).

82 The dissemination to which I refer is within the legal community. Galanter has noted the overwhelming importance of communication of the actions of courts to the broader community. Marc Galanter, *Justice in Many Rooms*, *in* ACCESS TO JUSTICE AND THE WELFARE STATE 157-61 (Mauro Cappelletti ed., 1981).

83 *See, e.g.*, THE IMPACT OF SUPREME COURT DECISIONS (Theodore L. Becker ed., 1969) (assessing the practical consequences of decisions of the United States Supreme Court).

have impact, commentators are quick to assume conscious resistance. But the explanation may be nothing more than a failure on the part of the lawmaker to make its point clearly and concisely. The danger of such failure explains why a legislature would specify a new crime that is entirely encompassed within the definition of a previously specified crime[84] and why vivid legislative history would have impact even if the formal rules for statutory interpretation ascribe to it no weight whatsoever.

D. Sharing Mental Models of Law

Most lawyers work in communities. Often these communities are geographically local, but communities may be based on the subject matter with which the lawyers deal or the forum in which they work. Community results from more frequent interaction among the lawyers in a particular population than with lawyers outside the population. Examples of these communities would include lawyers processing the bankruptcy reorganizations of large, publicly held companies in nationwide practices,[85] lawyers doing transactional real estate work in Gainesville, Florida, or lawyers participating in the revision of Article 9 of the Uniform Commercial Code. Most of these communities are loosely defined in the sense that appropriately licensed outsiders can participate in the work, but more central members of the communities dominate. Not all lawyers work in communities of these kinds. A criminal defense attorney with a national practice might encounter the same judge or opponent only rarely. The lawyer would continually encounter communities, but be a member of none of them. The theory I propose here would apply to such a lawyer only by suggesting that the lawyer will experience the written law as relatively ad hoc and fraught with misunderstanding.[86]

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84 *See, e.g.*, Kathleen F. Brickey, *An Introduction to the Kentucky Penal Code: A Critique of Pure Reason?*, 61 KY. L.J. 624, 635-39 (1973) (discussing the problem of legislation creating new crimes entirely encompassed by the definitions of existing crimes); Rosenn, *supra* note 9, at 530 ("Brazilians commonly refer to laws in much the same manner as one refers to vaccinations. There are those which take, and those which do not.").

85 *See* LoPucki & Whitford, *supra* note 40 and accompanying text.

86 Commentators link the decline in "civility" in the legal profession to the decline in communities. *See, e.g.*, Charles H. Wilson, *Planes, Trains and . . . Civility*, 76 A.B.A. J. 77, 77-78 (Jan. 1990) (blaming the lack of civility in part on lawyers who maintain national practices and "have no roots in the communities in which they occasionally practice"). Those commentators assert as the operative fact that lawyers fail to practice civility because they do not expect to encounter today's adversaries tomorrow. But part of the problem may simply be the difficulty of communicating across legal cultures. When a lawyer from outside the culture enters a case, the efficiency of case processing can be expected to decline. *See, e.g.*, WILLIAM M. KUNSTLER, DEEP IN MY HEART 55-56 (1966) (describing a case in which an out-of-town civil rights lawyer defended a charge of breach of the peace by challenging the jury panel for racial bias).

The lawyers within a community forge and share a mental model of the community's work.[87] That shared mental model includes representations of law, appropriate ways of interpreting events or processing cases, and other kinds of knowledge.[88] Sharing a mental model increases the efficiency with which the community processes cases by facilitating communication among its existing members and speeding the socialization of new members.[89] Members of the community are, of course, free to maintain private models in addition to the shared model in their minds. By doing so, they may gain strategic advantage,[90] but that may require effort unwarranted by the return. Law is, at bottom, the formulation of consensus. Propositions are true when the relevant community agrees that they are true. In such an environment, there is great advantage in seeing things the way others do, and lawyers invest heavily in that skill. The easiest way to get along is to see things as other members of the community see them.

The process of incorporating written opinions into the shared mental model is typically interactive within the community. In conversation, written commentary, and continuing legal education sessions, lawyers discuss what the opinion or statute "means" and eventually arrive at something of a consensus.[91] The process of incorporation has both distorted the opinion or statute and altered the shared mental model. But the model nevertheless remains essentially the same from the mind of one member of the community to another, because each has made the same adjustment.[92]

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87 For an introduction to the concept of shared mental models and their use in institutional economics, see Denzau & North, *supra* note 78, at 4 ("Some types of mental models are shared intersubjectively. If different individuals have similar models they are able to better communicate and share their learning. . . . But the social aspects of these models are of crucial importance in human society, and these cultural links are only now being explored in this literature."). The shared mental models described here are more specific in their content than what Bourdieu describes as habitus. *See* Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field, Translators Introduction*, 38 HASTINGS L.J. 805, 811 (1987) (defining "habitus" as "the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social 'fields,' and from our particular trajectory in the social structure"). The shared mental models are principally beliefs as to what the law requires in specific instances.

88 Singer emphasizes "orientation of thought" as an element of the type of knowledge from which lawyers and judges construct their legal reality. The orientation results from concepts such as the corporation as a private entity or the employee as someone other than the owner. *See* Joseph W. Singer, *The Player and the Cards*, 94 YALE L.J. 1, 21 (1984).

89 *See* Denzau & North, *supra* note 78, at 18 ("[The shared mental model] provides those who share it . . . with a set of concepts and language which makes communication easier."); *infra* note 217.

90 Private mental models may enable them to identify situations in which the written law will strongly support a challenge to the shared mental model. *See infra* subpart III.A.

91 Judges frequently discuss cases with law clerks, in part to recheck and adjust their understanding. In these sessions, judges and clerks forge shared mental models.

92 *See supra* note 65.

The shared mental model includes significant amounts of "law" neither included in, nor derived from, written law.[93] These are the "rules of thumb" that seem to arise spontaneously and supplant the exercise of discretion in the mass processing of cases. Courts processing substantial numbers of cases are incapable of considering cases on a case-by-case basis. Where the appellate courts mandate such treatment, lawyers or lower court judges who are processing significant numbers of similar cases quickly develop shortcuts.[94] Rules of thumb such as those described in Part I.A. are ubiquitous in the processing of consumer bankruptcy cases. These rules of thumb are not simply derivative of written law. The rule of thumb adopted may be contrary to written law, as where a bankruptcy judge routinely approves all fee applications in the absence of objection, or fixes a top limit on hourly rates that can be exceeded only with a great deal of hassle.[95] Eventually such rules of thumb may themselves become law, as occurred when Congress required that the states adopt guidelines for fixing the levels of child support[96] and when courts became confident enough of the rules of thumb they were using to distinguish true leases from secured transactions to include them in written opinions.[97] But such rules often persist over long periods of time without formal recognition, and despite contrary law.[98]

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93 *See, e.g.*, Nicholas S. Zeppos, The Professional Construction of Interpretive Theory: The Legal Profession and Statutory Interpretation 38 (unpublished manuscript on file with the author) (showing with the example of section 92 of the National Bank Act, that "there can be shared agreement about legal meaning that arises apart from and indeed despite statutory text").

94 This proposition could be tested by interviewing lawyers and judges who are processing substantial numbers of cases for which case-by-case processing is required. The theory predicts that those lawyers and judges will, after processing a significant number of cases, be able to state the rules by which they are making decisions. They will not collect or consider facts irrelevant to determination under those rules. *See, e.g.*, Blasi, *infra* note 146 (describing practice in the landlord-tenant court in Washington, D.C. by which appearing tenants were asked "Do you owe the rent?" as soon as their cases were called and "[o]nly those tenants responding with an unequivocal 'No' were ever allowed to reach the front of the courtroom").

95 Bankruptcy Judge Leif Clark follows the practice of holding a hearing to scrutinize any fee application that exceeds $250 per hour. He approves lesser rates without hearings. As a result, attorneys who practice before him generally apply for fees at rates not exceeding $250 per hour. The effect is essentially to limit fees to $250 per hour, even though bankruptcy judges have no authority to impose a top dollar limit on fees. Judge Clark's rule of thumb is contrary to written law. *See In re* Boddy, 950 F.2d 334, 337 (6th Cir. 1991) ("[T]he establishment of a maximum amount for attorney's fee awards resembles the practice of the courts under the pre-Code Bankruptcy Act, when economy of the debtor's estate was a paramount concern. This notion that economy of the estate should govern the award of attorney's fees was expressly repudiated by the Code.").

96 *See* 42 U.S.C. § 667(a) (1994).

97 *See* Corinne Cooper, *Identifying a Personal Property Lease Under the UCC*, 49 OHIO ST. L.J. 195 (1988) (showing that two of the three tests developed by the courts generate the wrong results in some cases).

98 *See* Weyrauch & Bell, *supra* note 9 (discussing autonomous law made by Gypsies that conflicts in some respects with law made by the state, yet appears to persist indefinitely).

The shared mental model of law, like the private mental model of law and the written law,[99] is principally a set of condition-action rules. The rules specify that if particular conditions exist, particular actions should be taken. The community that shares the model is a production system in which the input consists of problems of a legal nature, the situs is the courtroom, the office, or anywhere else members of the community interact,[100] and the output is legal outcomes.[101] From community to community, the shared mental model interacts with the written law to varying degrees.[102] It does not, however, include the written law. It is more useful to think of the model as competing with the written law for control of case outcomes.[103]

In this competition, the shared mental model has three critical advantages over written law. First, as lawyers process cases in the courtroom, the conference room, or alone in their own offices, the shared mental model is constantly and immediately available to them. To access the complexity of the written law, even in a superficial manner, requires minutes; to derive from it a definitive answer to even the narrowest question typically requires hours of work. Second, even if there is written law on a particular point, the parties are unlikely to discover it if it is not part of the mental model of at least one of them.

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99 The idea that all legal rules can be reconstituted as if-then logical propositions without altering their meaning originated with Layman Allen. It is the foundation of the process of "normalization" of statutes. Normalization is a process that eliminates structural ambiguity from statutes. *See* Layman E. Allen & C. Rudy Engholm, *Normalized Legal Drafting and the Query Method*, 29 J. LEGAL EDUC. 380, 402-03 (1978) (describing normalized statutes as if-then statements); Grayfred B. Gray, *Reducing Unintended Ambiguity in Statutes: An Introduction to Normalization of Statutory Drafting*, 54 TENN. L. REV. 433 (1987) (providing examples of statutes expressed as if-then statements).

100 *See* Galanter, *supra* note 82, at 147.

101 Thus viewed, the legal system is closely analogous to cognitive systems such as the human mind or an expert computer system. *See, e.g.*, HOLLAND ET AL., *supra* note 45, at 14-15 ("Condition-action rules underlie much important work in artificial intelligence, including problem solvers . . . and most expert systems. . . . [T]he activity of a rule based system (or *production system*) can be described in terms of a cycle with three steps: (1) matching facts against rules to determine which rules have their conditions satisfied; (2) selecting a subset (not necessarily a proper subset) of the matched rules to be executed, or 'fired'; and (3) firing the selected rules to take the specified actions."). I do not intend to assert, however, that this relationship between the functioning of the legal community and the human mind is anything more than an analogy. Shared mental models would not lose their significance if they were shown to be social rather than cognitive phenomena.

102 Resort to written law is more common in practices where the importance of the issues and the wealth of the parties are sufficiently high to support it. Because unanswered arguments are highly persuasive, resort by one side to the written law forces resort by the other. In high stakes corporate practice, the mental model itself calls for resort to written law on the "important" issues in every case.

103 Written law may trump in the case of an appeal outside the community, but that is a rare occurrence. *See infra* note 159.

The model typically presents the starting point for research.[104] Even when one party discovers written law, it may be difficult for that party to demonstrate its relevance in argumentation. For example, the case disposition called for by the shared mental model initially may have been the product of a long chain of reasoning. Once that disposition became part of the model, the chain of reasoning may have been forgotten. The relevance of written law that breaks a link in the forgotten chain may not be easily apparent. Anyone who has attempted to bring a new idea into a group satisfied already with a prior, highly integrated view of the world should find this point easy to understand. Third, basic aspects of the written law have already been incorporated into the shared mental model. In circumstances where members of the community feel the need to access written law not yet so incorporated to dispose of a matter, the written law is likely to be indeterminate, making resort to it relatively unproductive.[105] If the written law calls, as it frequently does, for the exercise of discretion, it will be trumped by the disposition called for in the shared mental model.[106]

This concept of shared mental models makes it possible to account for the differences in legal outcomes between communities noted in subpart A. Law is necessarily simplified and distorted in the process of incorporation into a shared mental model. The process of simplification and distortion may take different directions in different communities, but must occur in all. While continued interaction between the shared mental model and the written law will tend to "correct" the model, the correction is necessarily incomplete.[107] The result, in the language of institutional economics, is that the development of shared mental models is "path dependent." That is, what model prevails in a community at any given time is largely a product of historical events peculiar to the community.[108]

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104 For example, in 1993, a small software company sold Revlon a computer program for inventory and distribution control. When Revlon failed to pay for the program, the software company hacked into the system and disabled it. That action might be defensible on the theory that the software company had the right to "render equipment unusable . . . on the debtor's premises." U.C.C. § 9-503 cmt. However, unless their mental model suggested such a defense, lawyers for the software company would be unlikely to discover it through research.

105 This proposition could be tested by observing a community processing cases and asking members, before they resort to written law, to specify the issue, and asking them, after they resort to written law, whether the written law resolved the issue. The proposition suggests that written law will tend to have its greatest impact when a party takes the issue outside the community for resolution, as often happens when a party appeals.

106 I have referred to the informal rules requiring such dispositions as "rules of thumb."

107 *See supra* notes 65-74 and accompanying text.

108 To say that an outcome is path dependent is to say that it lacks inevitability, that is, the outcome depends on the path followed to reach it. The theory of path dependency challenges the basic assumption of classical economics that systems move toward inevitable equilibria. *See, e.g.*, M. MITCHELL WALDROP, COMPLEXITY 17-18, 37, 50, 255 (1992) (asserting that the concept of equilibrium is central to neoclassical economics). While the lack of inevitability of our institu-

The law in shared mental models is more determinate than the written law.[109] The shared mental model is forged in the context of case disposition,[110] typically in the trial court, in settlement discussions, and in deal making.[111] Cases repeat, so that even if participants in the process attempt to lie to themselves or each other about what they are doing, the truth soon becomes apparent. The written law, by contrast, is promulgated largely by appellate courts. Their primary focus is on expounding law. They need only dispose of the issue before them, not even the entire case and certainly no other cases, making it easy for them to pass the buck.[112] Cases do not repeat with sufficient frequency to embarrass them for empty utterances in prior cases, or to show a pattern in their actual dispositions.

Another factor promoting determinacy is that cognitive systems have difficulty representing indeterminacies. This is particularly true when the model is affected by more than one indeterminacy at the same time.[113] The most effective response for the modeler may be to construct a determinate model based on plausible assumptions.[114] In the crush of case processing, such tentative determinacies are easily converted into permanent ones, as occurs when broad discretion resolves into a rigid "rule of thumb."[115] This more determinate nature of shared mental models forms the basis for the theory of legal strategy I present in the next two Parts.

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tions and forms of social organization seem obvious to most people, it is far from obvious to a neoclassical economist. *Id.* at 50 ("[N]eoclassical theory, if really taken seriously, says that history is irrelevant."). A neoclassical economist views economic forces as compelling institutions and forms of social organization toward an equilibrium at which maximum efficiency would be achieved. *Id.* at 34-35. Regardless of the particular path by which the economy proceeds, given time it would reach the same equilibrium. *See, e.g.*, Denzau & North, *supra* note 78, at 27 ("The presence of learning creates path-dependence in ideas and ideologies and then in institutions.").

109 The empirical test proposed *supra* note 72 could be used for this proposition as well.

110 This theoretical framework is similar to the one presented by Stanley Fish. *See* Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1327-30 (1984) (attributing agreement on what a rule "is" to the constraints of the context in which it is applied because "knowledge informs rules rather than follows from them"). Fish nevertheless insists on seeing the processing of cases as an interpretation of the "text" of the written law. But the link back to written law is inappropriate when, as is usually the case, the lawyers applying the law neither know nor consult the "text" they supposedly are "interpreting." By insisting, Fish misses the largely independent nature of the law in lawyer's heads.

111 Although appellate court lawyers often practice in communities and forge shared mental models, those models deal only with the matters those communities address repeatedly. The most prominent is appellate procedure. As to the merits of particular cases, their mental models are likely to be empty.

112 *See, e.g.*, the discussion of *Johnson v. Home State Bank*, *infra* note 175 and accompanying text.

113 JOHNSON-LAIRD, *supra* note 21, at 408 (stating as "[t]he principle of economy in models" that "[a] description of a single state of affairs is represented by a single mental model even if the description is incomplete or indeterminate").

114 *Id.*

115 *See supra* notes 94-97 and accompanying text.

II. VULNERABILITY TO STRATEGIC MANIPULATION

In what should prove to be a seminal article, Weyrauch and Bell recently presented a theory of the role legal strategy plays in accommodating autonomously generated informal law to a system of state-made law that purports to be exclusive.[116] They list interpretation, the exercise of discretion, and innuendos "hard to refute and impossible to review" as strategies that introduce informal law into legal decisionmaking.[117] Strategies of all these types appear to be operating in the interface between shared mental models of law and formal, written law. The remainder of this discussion is, however, limited to a particular kind of legal strategy—altering one's conduct to gain the benefit of determinate rules.

Law is by nature a set of condition-action rules.[118] That is, the system ostensibly stands ready to take particular action when certain conditions are met. The mental models that communities use to process cases tend to accept the facts of the cases as given and, as described in the previous Part, to process the cases determinatively. The effect is that the model is vulnerable to strategic manipulation of those facts.[119]

Any change in conduct that the legal system intends to reward or inadvertently encourages fits within this definition of strategy.[120] For example, if an insolvent debtor favors one of its unsecured creditors over others by granting a security interest, the system intentionally allows the disfavored creditors strategically to file an involuntary bankruptcy petition against the debtor.[121] One effect is to enable the

116 *See* Weyrauch & Bell, *supra* note 9, at 382-85.

117 *Id.* at 383 (arguing that strategies "permeate the law . . . and cannot be eliminated").

118 *See supra* note 99 and accompanying text.

119 As decisionmakers become aware of strategic manipulation of the facts of the cases that come before them, their tendency to accept them as given may decline. For example, provisions of Chapter 13 of the bankruptcy code require that debtors pay all of their disposable income to unsecured creditors. The requirement is, however, vulnerable to the debtor strategy of buying expensive consumer goods on secured credit before filing and proposing a plan that devotes the bulk of the debtor's disposable income to payment of this new debt. The effect is to avoid the necessity of making payments to unsecured creditors. As courts became aware of this strategy, they began to inquire into such prepetition purchases and employ the "good faith filing" doctrine to combat it. *See, e.g.*, *In re* Rogers, 65 B.R. 1018, 1021-22 (Bankr. E.D. Mich. 1986) (refusing to confirm a Chapter 13 plan because the debtor sold the less expensive of two cars before bankruptcy and kept the more expensive one).

120 The creators of a law-related system are likely to have had a wide variety of intentions. Some readers may be skeptical of any theory that regards such a system as intending anything in particular. Though I share that skepticism, I nevertheless choose to treat law-related systems as goal-seeking. Only by glossing over the many subtle differences in intention that go into the making of a law-related system is it possible to make sense of such a system. Triantis and I elaborate on this point in Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267, 269-72 (1994).

121 *See* 11 U.S.C. § 303 (1994).

bankruptcy trustee to avoid the preferential grant and distribute the value pro-rata among all unsecured creditors of the debtor.[122] Because the system intends that disfavored creditors file involuntary bankruptcy petitions to set aside preferences, those who do so are engaged in "system-intended" strategy.

Systems intended to encourage one strategy may inadvertently encourage others. To continue with the same example, instead of filing an involuntary bankruptcy petition, the disfavored creditors may seek preferential treatment for themselves by *threatening* to file an involuntary bankruptcy petition and offering to settle the threat with the debtor or the favored creditor. This strategy is system-unintended because, if it succeeds, the strategist gets more than a pro-rata share of the distribution. Practitioners are generally aware that the strategy is available,[123] and presumably they use it when it is in the interests of their clients. The system could have countered this strategy by prohibiting the settlement, as the system did with regard to settlement of objections to discharge in a roughly analogous situation.[124] But the involuntary threaten-and-settle strategy would be more difficult to eradicate than the discharge object-and-settle strategy; the former occurs in the absence of a bankruptcy case, so there is no court readily available to enforce any prohibition Congress might enact. In any event, this example illustrates that system-unintended strategies can persist for extended periods without provoking corrective action.

Systems of law embedded in shared mental models are vulnerable to manipulation by system-unintended strategy.[125] Participants can

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122 *See, e.g.*, LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS § 2.8 (2d ed. 1991); Lawrence Ponoroff, *Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute*, 65 IND. L.J. 315, 317 n.15 (1990) ("The circumstance most frequently motivating involuntary filings is the making by the debtor of a large, preferential transfer of property to a single creditor, resulting in a net depletion of assets available to satisfy the claims of remaining creditors.").

123 I first wrote about the strategy in 1985, *see* LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS § 2.14.4 (1st ed. 1985), thinking that its exposure would lead to remedial action, *id.* at xxx. It has not.

124 *See* Bankruptcy Rule 7041, providing that dismissal of an adversary proceeding that raises an objection to discharge must be "on order of the court containing terms and conditions which the court deems proper." 11 U.S.C. app. Rule 7041 (1994). The avowed purpose of this rule is to assure that the plaintiff has not received anything in settlement of the case. *See id.* Rule 7041 advisory committee's note; *In re* Moore, 50 B.R. 661 (Bankr. E.D. Tenn. 1985) (refusing to approve compromise where plaintiff dropped suit in exchange for settlement of claim).

125 In an indeterminate legal system, system-unintended strategies would be ineffective. With the freedom to do what they wanted in individual cases, judges would reward system-intended strategies and thwart system-unintended ones. As Atiyah put it, in attempting to explain why Holmes's "bad man" theory of law never took off, "judges do not like bad men." P.S. Atiyah, *The Legacy of Holmes Through English Eyes*, 63 B.U. L. REV. 341, 369 (1983). Atiyah's implication is that we need not worry about strategic manipulation in the American legal system because judges have sufficient latitude to ensure that system-unintended strategies don't work. *Id.* Almost anyone who has practiced law with responsibility at the case strategy level knows that (1)

reap rewards not intended by designers of the system by meeting the conditions of condition-action rules. Because the system is determinate, the system has no ability to resist strategy once the case is brought. The system can only change the rule applicable to future cases. In its adoption of a determinate form, the law proclaims itself disinterested in who may use it and for what purpose. Vast areas of tax planning, estate planning, and the newer discipline of bankruptcy estate planning[126] are based on this principle.

Recently adopted federal sentencing guidelines provide another example of the vulnerability of a determinate system of law to strategy. The purpose of the guidelines was to render sentencing outcomes more determinate; judicial discretion in sentencing was to be "tightly structured."[127] Those who adopted the guidelines system were aware from the outset that the system might be vulnerable to strategic manipulation by prosecutors through plea bargaining:

> The Sentencing Reform Act and the guidelines promulgated in response to its mandate focus on prescribing similar sentences for similar defendants convicted of the same offense. To the extent that the offense for which the defendant is convicted varies with the discretionary decisions of individual prosecutors and the same offense conduct does not always result in the same set of conviction charges, unwarranted disparity may be reintroduced into the federal criminal justice system. To illustrate, defendants *convicted* of bank robbery under similar circumstances may all receive the same sentence (say, forty-one months), but defendants who *commit* bank robbery under similar circumstances may receive different sentences (from probation or six months to forty-one months) if they are convicted of radically different offenses as a result of the plea bargaining process.[128]

The manipulation of sentences through the manipulation of convictions appears to be a system-unintended strategy.[129] Yet, as demonstrated by empirical research, the system has not yet been successful in containing it.[130]

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most judges in fact don't like bad men and (2) dislike isn't sufficient to prevent strategic manipulation. *See infra* section IV.B.1.

126 *See, e.g.*, Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets On the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235 (1995); Kevin A. Shacter, *Bankruptcy Estate Planning: Grounds for Denial of Discharge Under Section 727(a)(2)(A)*, 7 BANKR. DEV. J. 199 (1990).

127 Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 501 (1992).

128 *Id.* at 502 (emphasis in original).

129 *Id.* at 504-12 (describing the guidelines and the Justice Department's efforts to prevent strategic manipulation); *see* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993) (arguing that adoption of the guidelines did not reduce disparity in sentencing but merely shifted the power to create disparity from judges to prosecutors).

130 Nagel & Schulhofer, *supra* note 127, at 534 (showing that guideline circumvention in one district probably exceeded 25% of the cases). For one district, the authors list ten cases out of a

Shared mental models of law contain mechanisms for defending against their manipulation. Like rules of written law, the condition-action rules of the shared mental model operate at varying levels of generality. Some of these rules are highly specific and capable of use in series with other condition-action rules,[131] making them particularly vulnerable to strategy. Others are more general, providing the system with an escape from the particular when the latter produce patently inappropriate results.[132] For example, the Bankruptcy Code specifies in detail who is eligible to file a bankruptcy petition.[133] But if a clearly eligible debtor files a petition that is part of a manipulative strategy, the court can resort to the doctrine that permits dismissal of filings not made "in good faith." Mental models probably tolerate such inconsistencies to a lesser degree than written law,[134] but such inconsistencies are sometimes present.

Mental models of law include another type of condition-action rule rarely seen in written law. This type of rule links fact situations to legal outcomes in a direct, intuitive way. Its function is to alert system participants to particular applications of the rules that "prove too much." The community expects certain case outcomes from the legal system embedded in its shared mental model, and this overlapping system of rules and expectations makes it likely to get them. For example, the shared mental model of a community may incorporate a view of mortgages as reliable, indestructible rights in property, in the nature of ownership.[135] Such a community will be highly skeptical of strategies that might void a mortgage for failure to respond to notice and defend it, even if the rules on which the strategy was based were explicit. The expectations regarding results limit the effectiveness of strategies that challenge them and reduce the vulnerability of the system to manipulation.

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sample of 111 in which the length of sentences actually given were only 18% of the minimum sentences required by the guidelines. *Id.*

131 Holland refers to the use of condition-action rules in such sequences as "coupling." HOLLAND ET AL., *supra* note 45, at 376 ("Coupling is the mechanism that makes rule sequencing and association possible. A rule R_1 is *coupled* to rule R_2 if the message specified by R_1 satisfies at least one of the conditions of R_2.").

132 Probably the most general rules in Anglo-American law are those referred to as equitable maxims. Examples include the maxims that "equity abhors a forfeiture" and "one who seeks equity must do equity." Though rarely used as the sole basis for decision, they commonly serve as make-weights and are available for use in emergencies.

133 *See, e.g.*, 11 U.S.C. § 109 (1994).

134 *See, e.g.*, Singer, *supra* note 88, at 17 ("Even if a specific rule exists that has no exceptions and that everyone agrees how to apply, . . . there is always a more general rule or principle that could plausibly nullify it . . . .").

135 *See, e.g.*, Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (ignoring statutory language in the 1978 Bankruptcy Code authorizing the voiding of liens to the extent they exceed the value of the collateral, based on the supposed pre-Code "rule that liens pass through bankruptcy unaffected").

For example, as adopted in 1978, the Bankruptcy Code provided for the discharge of all debts that arose before the bankruptcy case, except those specifically excepted from discharge.[136] No exception was made for debts secured by mortgages.[137] Bankruptcy Code § 524(a)(2) provided that discharge operated "as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, *or from property of the debtor* . . . ."[138] In the case of a debtor entitled to retain homestead property, this language clearly prohibited the holder of a discharged mortgage debt from attempting to collect from either the debtor or the homestead after bankruptcy.

Anyone familiar with the system by which home mortgages are made and enforced would be shocked by this result. To discharge the debtor from liability for the mortgage debt yields a plausible result, but to render the mortgage unenforceable against the home after bankruptcy would destroy something the shared mental model views as indestructible. *Everybody knows* that a debtor cannot free his or her home of a mortgage simply by filing bankruptcy. The interesting part, for our purposes here, is that they can continue to know that even when Congress has clearly and explicitly said the opposite.[139]

Such a set of expectations can protect the system from drafting errors, as it did with regard to Bankruptcy Code § 524(a). But the process does so by blinding the system to arguments based on the otherwise valid condition-action rules of the shared mental model. The process can just as easily blind the system to any argument based on written law.[140]

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136 11 U.S.C. § 727(b) (1978).

137 11 U.S.C. § 523(a) (1978).

138 11 U.S.C. § 524(a)(2) (1978) (emphasis added).

139 Six years later, Congress amended Bankruptcy Code § 524(a)(2) to delete the words "or from property of the debtor" to "clarif[y] that valid liens survive the discharge." BANKRUPTCY CODE 289 (Collier Pamphlet Edition, Asa S. Herzog & Lawrence P. King eds., 1985). No court appears to have been confused by Congress's "error" during those six years. *See, e.g., In re* Weathers, 15 B.R. 945, 951 (Bankr. D. Kan. 1981) (permitting enforcement of a mortgage against property of the debtor after discharge because liens "survive discharge"). *But see In re* Penrod, 50 F.3d 459 (7th Cir. 1995) (holding that a lien had been extinguished by confirmation of a plan that mentioned the debt but did not state that the debt was secured). The court added wryly that "like most generalizations about law, the principle that liens pass through bankruptcy unaffected cannot be taken literally." *Id.* at 462.

140 For example, in the Gainesville, Florida legal community of the 1970s it was understood that "punitive damages are hard to get." The understanding gave content to the otherwise meaningless standard. *See, e.g.*, Arab Termite and Pest Control of Fla., Inc. v. Jenkins, 409 So. 2d 1039, 1041 (Fla. 1982) ("A legal basis for punitive damages exists where torts are committed in an outrageous manner or with fraud, malice, wantonness or oppression."). The understanding was enforced through a variety of other doctrines, including tight restrictions on what evidence had to be introduced to provide the basis for an award of punitive damages.

The dialectic that occurs between largely determinate rules of the shared mental model of a legal community and the legal community's expectations as to case outcomes produces a phenomenon that I will call Whole-Case Realism. The outcome of a case can be predicted more accurately at the level of the whole case than at the level of the case-dispositive decisions within the case that supposedly produce the outcome. Consider, for example, the case of a business that cannot pay its debts but is nevertheless viable and capable of reorganizing under Chapter 11 of the Bankruptcy Code. The shared mental model of the bankruptcy reorganization community holds that such a business should be permitted to reorganize, because reorganization will increase the total wealth available for distribution to the parties to the case. There are, however, numerous provisions of law that theoretically might prevent the business from doing so. Among them, the business is not entitled to retain possession of property necessary to the reorganization unless the business provides "adequate protection" to any creditor holding a security interest in the property.[141] At the whole-case level, one can predict that the bankruptcy court will hold some act within the debtor's power to constitute adequate protection even in circumstances where one cannot predict what that act might be.[142] One can just as surely predict that the court will not decline to confirm the plan of reorganization because earlier in the case the proponent of the plan failed to comply with some applicable provision of the Bankruptcy Code.[143] Professor George Triantis and I have argued elsewhere that the law of reorganization in both Canada and the United States is driven not by written law, but by functional imperatives such as these.[144] The shared mental model embodies the community's understanding of what functional imperatives exist.

Whole-Case Realism is not based on an assumption that judges will commit deliberate treachery or ignore legal doctrine to ensure expected outcomes.[145] The assumption is only that judges see doc-

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141 *See* 11 U.S.C. § 362(d)(1) (1994).

142 *See, e.g., In re* BBT, 11 B.R. 224 (Bankr. D. Nev. 1981) (holding that the value of railroad cars would increase in the future and that expected future increase provided adequate protection to an undersecured creditor).

143 *See* 11 U.S.C. § 1129(a)(2) (1994) (providing that "[t]he court shall confirm a plan only if all of the following requirements are met: . . . (2) The proponent of the plan complies with the applicable provisions of this title.").

144 LoPucki & Triantis, *supra* note 120, at 304-05.

145 However, they might. For example, in Sweatt v. Painter, 339 U.S. 629 (1950), the Supreme Court ruled that blacks were entitled to admission to law schools on the same basis as whites. In 1949, the University of Florida College of Law denied admission to black applicant Virgil Hawkins. For nearly a decade thereafter, the College of Law and the Florida courts succeeded in denying blacks admission. They continued in the face of a clear mandate to the contrary from the Supreme Court of the United States. *See* Hawkins v. Board of Control, 350 U.S. 413, 414 (1956) (holding that "[T]here is no reason for delay. [Blacks are] entitled to prompt admission under the rules and regulations applicable to other qualified candidates."). Based on findings of

trine through the lens of their own mental model of it, that the doctrine itself is largely indeterminate, and that the judges will tend to perceive it as consistent with functional imperatives and their own expectations. Human cognitive systems tend to generate consistency even where it does not exist.

Whole-Case Realism acts as a brake on legal strategy, but in doing so renders the system inherently conservative and resistant to change even through formal law. Statutes intended to change case outcomes by reversing the law on a particular issue may be ineffective because Whole-Case Realism causes the parties intended to benefit from the statutes to lose on other issues. A common strategy for avoiding the operation of Whole-Case Realism is to attempt to divide the case between two or more decisionmakers. For example, a party might seek to have the facts decided by a jury, particular issues by the trial judge, and other issues on appeal. When available, appeal to a court outside the community can operate as a kind of "legal arbitrage." A case already decided according to the shared mental model of one community can be redecided according to the shared mental model of another.[146]

III. LAWYER-BASED LEGAL CHANGE

Law changes over time. A principal task of legal scholarship has been to explain how.[147] A purely Formalist view asserts that law, as a command of the sovereign, can be changed only by the sovereign. In the United States, that ordinarily means the legislatures. Early For-

"fact" by Circuit Judge J.A. Murphree, the Supreme Court of Florida nevertheless concluded that admission would "result in great public mischief" and, exercising its self-proclaimed discretion, denied Hawkins admission until such time as Hawkins could show that "his admission can be accomplished without causing great public mischief." State v. Board of Control, 93 So. 2d 354, 360 (Fla. 1957). Hawkins never managed to obtain admission. Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. U. L. REV. 59, 69 (1984). Thus the Florida legal community managed to perpetuate a result in accord with their own mental model, despite clear and repeated decisions by the Supreme Court of the United States. *See also* DAVID C. FREDERICK, RUGGED JUSTICE 83-88 (1994) (discussing corruption of Alaskan district judge by gold miners who secured his appointment).

146 *See, e.g.*, Gary L. Blasi, Creative Expertise, Law and Slums: A Cognitive/Historical Account of Innovation in Lawyering for Social Change 33-52 (Feb. 1, 1996) (unpublished manuscript, on file with the author) (contrasting the culture of the local landlord tenant court where the landmark case, Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), originated with the culture of the D.C. Circuit).

147 *See, e.g.*, J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) (arguing for a dialectic model of legal evolution); Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981) (arguing for the use of scientific methods to search for principles of legal evolution); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983) (describing several theories of legal evolution and attempting to reconcile them).

malists asserted that judges did not make law, but only found it.[148] Legal Realists introduced the idea that judges made law through legal fictions, such subterfuge as calling a pickaxe a case knife.[149] But within a few decades, Legal Process theorists had persuaded the legal profession that, although judges did make law, they did it within a structural framework and with constraints that rendered it democratic and legitimate.[150] Laws had purposes that could never be completely captured in the words; the courts were simply discovering the true nature of those purposes under varying circumstances. All of these theories, however, sought to explain changes in the written law and therefore focused on the work of the legislatures and appellate courts.[151] In the next subpart, I propose two partial theories of legal change that occur outside the legislatures and appellate courts and, in significant ways, beyond their control.[152] They are what Dean Robert Clark has referred to as "motors" of legal change.[153]

A. Change by Issue Selection

As experienced lawyers work with clients, judges, and other lawyers, they make relatively little use of written law. For every point they research, they make hundreds of applications of their shared mental model.[154] This is especially true of groups repetitively processing routine matters, such as divorces, criminal prosecutions, bankruptcies, or real estate closings.[155] But even when the stakes are high and

148 *See, e.g.*, Commissioner of Internal Revenue v. Hallock, 102 F.2d 1, 5 (6th Cir. 1939) ("It is the province of the courts to construe, not to make laws."); Pickett v. McGavick, 19 F. Cas. 588, 588 (W.D. Ark. 1876) (No. 11,126) ("[I]f a remedy is wanting under the law, it is not with the court (which does not make laws, but construes and administers those already made), but with the law-making power.").

149 The example is Roscoe Pound's. Pound, *supra* note 26, at 12-14.

150 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Primarily, principles and policies are used and useful as guides to the exercise of a trained and responsible discretion."). *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 711-31 (1991) (describing the shift in thinking from Formalism to Realism to Legal Process Theory); *id.* at 728 (asserting that "Hart and Sacks reconceptualized law as dynamic").

151 *But see* Clark, *supra* note 147, at 1253 (recognizing that lawyers play a role in legal change without specifying how).

152 The theories I present are merely examples of such lawmaking. They are cumulative to the theory of autonomous lawmaking presented by Weyrauch and Bell. *See* Weyrauch & Bell, *supra* note 9, at 394-95 (describing autonomous lawmaking in a group outside the legal system).

153 Clark, *supra* note 147, at 1257.

154 The young lawyer starting out is generally encouraged to watch and listen to more experienced lawyers at work and cautioned not to rely too heavily on written law. *See* Weyrauch & Bell, *supra* note 9, at 374 ("A person who comprehends only written law would be inadequately prepared to practice law.").

155 *See, e.g.*, DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING (1984) (discussing plea bargaining between prosecutors and public defenders).

clients wealthy enough to support a fight, the shared mental models of the lawyers usually remain sufficiently strong to move matters along with relatively little reference to the written law. Considering the tremendous number of legal issues potentially involved, there is remarkably little disagreement.[156]

Disturbance of the tranquillity of case processing may result from any of several causes. Lawyers within the community may differ over a case because their mental models differ in relevant respects. A lawyer from outside the community may initiate the challenge. In extreme cases, it may be obvious that the shared mental model yields an inappropriate result. Lawyers may introduce norms from the society at large. The disturbance may come for reasons completely unrelated to the merits of a case, as when a lawyer scrutinizes a case for any issue that might obtain delay, impose expense, or punish an opponent or when an interest group launches a concerted effort to change the law.[157] It is in these moments, when members of the community decide to challenge the shared mental model, that law takes on its dynamic character. If the challenge is credible, members of the community resort to written law and engage in intense examination of some minor aspect of a subject that may or may not yet be represented in their shared mental model.[158] The ultimate challenge is an appeal outside the community, for example, to an appellate court in another city, but that route is expensive, often restricted, and rarely taken.[159]

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156 For an example of what happens when a lawyer raises every issue that comes to mind, see VINCENT BUGLIOSI, HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS 400 (1974) (expressing the opinion that if Irving Kanarek, a lawyer with a reputation for raising every objection that came to mind, were permitted to represent Charles Manson the trial that was expected to last four months "could last several years"). Kanarek did represent Manson and made thousands of objections during the trial. *See, e.g., id.* at 435-36 ("Reporters keeping track of Kanarek's objections [to the testimony of Linda Kasabian] gave up on the third day, when the count passed two hundred."). Nevertheless, Vincent Bugliosi, who was both the prosecutor and chronicler of the trial, acknowledged that Kanarek was effective. *See, e.g., id.* at 441 ("Given a choice of defense attorneys [the reporters] quoted Fitzgerald, whose questions were better phrased. But it was Kanarek, in the midst of his verbosity, who was scoring.").

157 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the use of interest group litigation to change law).

158 Duncan Kennedy's description of the resort to written law captures the process brilliantly. Like Franz Kafka's Mr. K, who contemplates his upcoming trial through nearly the entire length of *The Trial*, Kennedy's hypothetical liberal judge muses endlessly about the possible implications of what he might find on his upcoming resort to written law governing a labor protest. The article ends with Kennedy's judge closer to a final decision on what to do than he is to the books that will tell him the written law. *See* Kennedy, *supra* note 11.

159 For example, during the 12 months ending December 31, 1991, 217,656 cases were commenced in the U.S. District Courts. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 32 (Dec. 31, 1991). Only 44,465 appeals were commenced in the U.S. Court of Appeals. *Id.* at 20. The latter figure is 20.4% of the

Members of the community, particularly the most influential ones, use their ability to challenge sparingly.[160] To gain efficiency, a legal community must discourage overly frequent challenges. For that reason, both formal and informal limits abound.[161] Rules of procedure often require the lawyer who would raise an issue to provide an extensive memorandum; the effect is to make the challenge expensive. Pretrial orders require impractical advance notice for the making of a wide variety of challenges, leaving the courts free later to prohibit or allow them as the courts see fit. Behavioral norms constrain the number of objections a lawyer may make during trial and limit the number of issues that may be raised in a single case.[162] The principal sanction for ignoring these norms is to be ignored—the decisionmaker rejects the multitude of challenges without considering any of them. If the violation is egregious, the sanction can extend beyond the particular case, and the lawyer becomes ineffective in that community.[163]

When a credible challenge is carried through to decision, the likelihood that the law of the shared mental model will change or an exception be made is high. This results in part from the generally indeterminate nature of written law and in part from the very charac-

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former. Corresponding figures for the bankruptcy courts are considerably more dramatic. During the 12 months ending December 31, 1991, 943,987 cases were filed in the bankruptcy courts. *Id.* at 11. Only 4362 bankruptcy appeals were commenced in the District Courts during that year. *Id.* at 32. The latter figure is only 0.4% of the former. In assessing these figures it is important to realize that appeals typically address only one or a few issues in the underlying case. That case may have involved dozens of issues that were actually litigated and thousands of issues that could have been litigated.

160 This proposition could be tested by ranking the influence of community members who represent opposing parties in the same case and then counting the number of motions, objections, or other types of challenges they raised during litigation. My theory would predict that lawyers ranked highly in the Martindale-Hubbell Law Directory would object less frequently than those lower ranked.

161 Bugliosi provides several examples of the informal sanctioning of lawyer Irving Kanarek, a lawyer with a reputation for making too many objections. Bugliosi referred to him in open court as "a professional obstructionist," BUGLIOSI, *supra* note 156, at 400, and another judge criticized his questions of a witness as "obviously stupid" and "ill-advised," *id.* at 379. One can only imagine the effect on Kanarek's clients.

162 This proposition could be tested empirically by asking lawyers whether they raise all objections they think may ultimately prevail and, if not, why not. In commenting on a draft of this article, Professor Jean Braucher wrote:

> In Cincinnati . . . the [public defenders] . . . are extremely reluctant to make use of written criminal procedure precedents on behalf of their clients; their mental models may erase this law. The acquiescent attitude of public defenders in turn spills over to the private criminal defense bar, many of whose members fear being treated as troublemakers by the judges. This Cincinnati culture came as a real shock to me because I moved here from Seattle, where the local legal culture expected vigorous use of written law on behalf of criminal defendants.

Letter from Jean Braucher, Gustavus H. Wald Research Professor of Law, University of Cincinnati College of Law to the author 2 (Oct. 20, 1995) (on file with the author).

163 *See supra* note 147. Walter O. Weyrauch, *Gypsies*, AMER. J. COMP. L. 53-63 (forthcoming 1996) (describing the implications of informal law for the process of advocacy).

teristics of the case that caused the lawyer to select it for challenge. The key to change by issue selection is not that the law may change where challenged, it is that it will not change where not challenged.

Some decisions represent communicable changes in the judges' mental models. In those cases, the judges may wish to communicate the changes to members of the community so they can make the same alteration in their mental models and efficient processing of cases can resume. A judge might do that formally, by issuing an opinion, or informally by explaining the change to the lawyers in an order, in chambers, or in continuing legal education. Because other decisions, even decisions that deviate from the shared mental model, will not require a change in the model,[164] no explanation will be necessary.

One might suppose that changes to the shared mental model of a legal community that occur in response to exposures to written law would, over time, conform the mental model to the written law. Such changes probably do tend to align the mental model more closely with the written law. But the process is subject to constraints. First, the cases in which the community is most likely to resort to written law are the close cases with regard to which the written law is least likely to be determinate.[165] Second, the cognitive limits of the human mind prevent the community from conforming the shared mental model to the far more complex pattern of the written law. The written law can respond to its own failure by introducing finer and finer distinctions among fact situations,[166] but the shared mental model must respond by reorganizing categories at roughly the same level of complexity. Thus the shared mental model tends not to change from simplistic rule to true rule, but from one simplistic rule to another.[167] Such wandering probably accounts for the difference in the rules applied to loans from relatives in Gainesville and Kansas City.[168]

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164 The shared mental model is a blueprint for dealing with future cases. Unless a particular kind of case is likely to repeat with sufficient frequency, no change in the model is warranted. Thus lawyers and judges may be surprised by the same aberration more than once.

165 If we spread the universe of cases and issues along a continuum from the most difficult and uncertain to the easiest and most predictable, resort to written law is most likely to occur near the difficult end of the continuum. Even if there are, as Schauer asserts, "easy" cases where law is determinate in a Formalistic sense, *see* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985), they will tend not to be the cases that cause lawyers to resort to the written law.

166 *See, e.g.*, Duke of Norfolk's Case, 2 Swans. 454, 468; 3 Chan. Cas. 14, 36 (1681) ("Lord Nottingham said: 'It hath been urged at the bar, where will you stop if you do not stop at Child and Bayly's case? I answer, I will stop everywhere when an inconvenience appears, nowhere before'.").

167 This proposition could be tested by the method described *supra* note 72.

168 *See supra* subpart I.A.

B. Change by Strategic Manipulation

Part II described the vulnerability of shared mental models to strategic manipulation. While written law can claim to provide unique treatment appropriate to each case, shared mental models must create coarse categories and "treat likes alike." Most legal strategy consists of efforts to qualify a person or situation for inclusion in categories that trigger desirable condition-action rules.[169] For example, the lawyer for a creditor may attempt to qualify the creditor as a secured creditor to gain the benefit of the condition-action rule that gives secured creditors priority over other creditors. The strategy can be employed at the time the loan is made, simply by contracting for security and filing a financing statement in the public records. The strategy can be employed at the time of collection, by negotiating for a similar grant of security at that time.[170] In a plausible case, it can be employed at the time of adjudication, by arguing that earlier events had rendered the creditor secured.[171]

When a strategy is successful, others adopt it and its use spreads. If the strategy is system-intended, its spread makes the system more effective in achieving the system's goals. To continue with the example of the secured creditor, the strategy of initially making the loan on a secured basis and perfecting it by public filing is, with regard to most kinds of loans, a system-intended strategy. The public filing gives notice to others who contemplate lending to the debtor and facilitates private ordering.

When system-unintended strategies are successful—that is, when the step-by-step logic of the strategy overcomes the community's expectation that the outcome was unreachable—they too spread.[172] If success of the strategy is visible to members of the community, the community will have to change its expectations regarding outcomes. That change in expectations may reverberate through other parts of the system.

This sequence of events is illustrated by the controversy over "Chapter 20" bankruptcy. The Bankruptcy Code enacted in 1978 gave consumer debtors a choice between liquidation under Chapter 7 and debt adjustment under Chapter 13. For most debtors, the principal advantage of Chapter 7 was the complete absence of any obligation to repay unsecured debt. For many debtors, the principal advantage of Chapter 13 was that it enabled them to retain their

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169 *See, e.g.*, Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423 (1993) (describing the development and implementation of the "poison pill" strategy in corporate takeovers).

170 *See* LOPUCKI, *supra* note 53, § 2.16.3.

171 The variety of cases in which secured or other preferred status is plausible is large. *See id.* § 6.6.4.

172 *See* Powell, *supra* note 169, at 439-46 (describing the spread of the "poison pill" strategy).

homes while curing arrearages in monthly payments over a reasonable period of time. The legislative history made clear that the purpose was to put home-owning debtors to a choice between the two Chapters, and by doing so to encourage the choice to repay unsecured debt under Chapter 13.[173] The initial ambiguity as to whether debtors with the ability to make some repayment to unsecured creditors had to do so as the price of Chapter 13 relief was resolved by amendment in 1984. The amendment required Chapter 13 debtors to devote "all of [their] projected disposable income" during the three-year period of their plan to payments under the plan.[174] By the end of 1984, it appeared that to save his or her home through bankruptcy, a debtor had to file under Chapter 13 and pay unsecured creditors what he or she could, for a period of three years.

Aggressive debtors' lawyers responded with a strategy that became known as "Chapter 20." The debtor first filed for bankruptcy liquidation under Chapter 7 and discharged the debtor's unsecured debt. Then the debtor filed under Chapter 13 to cure arrearages on the debtor's home mortgage in monthly payments. The theory of this strategy was that the debtor would not have to repay the unsecured debt in the Chapter 13 case because it had been discharged in the Chapter 7 case. By purporting to enable any debtor to save the debtor's house without applying the debtor's disposable income to the payment of creditors for three years, the Chapter 20 strategy threatened to prove too much. But the strategists counted on the strength and clarity of the two rules on which they relied: (1) debtors are not prohibited from filing sequential cases under Chapters 7 and 13, and (2) a debtor need not pay debts discharged in a prior bankruptcy case.

The bankruptcy courts divided over the effectiveness of this strategy. More than six years after the amendment, a Chapter 20 case made its way to the Supreme Court of the United States. Probably because of the strength and clarity of the two rules on which the strategy relied, the opponents of the Chapter 20 strategy did not challenge either. Instead, they found a technical issue that a sympathetic court might use to defeat the strategy. The issue was whether the home mortgage was a "claim" repayable under a Chapter 13 plan in light of

173 *See, e.g.*, H.R. REP. No. 1195, 96th Cong., 2d Sess., pt. 1, at 25 (1980) ("Chapter 13 is designed to induce eligible debtors to repay their just obligations from future income as a means of avoiding . . . liquidating bankruptcy proceedings under chapter 7. The principal statutory inducements to chapter 13 debtors include . . . the retention by the debtor of property . . . during the extension period. These and other important legal and economic advantages are afforded to chapter 13 debtors but not to chapter 7 debtors."); *see also* Lynn M. LoPucki, *"Encouraging" Repayment Under Chapter 13 of the Bankruptcy Code*, 18 HARV. J. ON LEGIS. 347 (1981) (arguing against requiring debtors to repay unsecured creditors as the price of Chapter 13 relief).

174 11 U.S.C. § 1325(b)(1)(A) (1994).

the fact that it, too, had been discharged in the Chapter 7 case.[175] The Court held that the mortgage was such a claim. In support of its decision, the Court noted that the Bankruptcy Code expressly prohibited successive filings of some kinds of cases, without expressly prohibiting a Chapter 7 followed immediately by a Chapter 13. The opinion cleared the way for use of the Chapter 20 strategy, at least in appropriate cases. But the Court also noted the existence of the "good faith" requirement for a Chapter 13 plan, which still might be used to defeat the Chapter 20 strategy in inappropriate cases. The written law remained indeterminate.

The theory I present here would predict an empirical finding that the Supreme Court's opinion made only small changes in the geographical pattern of success and failure of the Chapter 20 strategy. Despite its apparent success in the Supreme Court, Chapter 20 would not spread to other districts because the Court had addressed only issues of law and not the existing pattern of expectations as to case outcomes.[176] Had the Court instead ruled that a discharged mortgage was *not* a claim modifiable in a later Chapter 13 case, my theory would predict a similarly minor effect on outcomes; in districts where Chapter 20 was in accord with the shared mental model, the community would have found another doctrinal peg on which to hang its hat.[177] Fiddling with the written law typically has little effect on legal outcomes.[178]

Assume that the lawyers in a community pressed Chapter 20 cases for the first time and were successful in enabling clients to retain homes without making any payment to unsecured creditors. Other lawyers in the community presumably would do the same, and the amounts paid by Chapter 13 homeowners in the community to unsecured creditors would fall. Members of the community would adjust their shared mental model to recognize the effectiveness of the strategy. They might also adjust the model to change their expectations regarding payments to unsecured creditors in consumer bankruptcy

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175 Johnson v. Home State Bank, 501 U.S. 78, 80 (1991).

176 *See, e.g.*, Braucher, *supra* note 32, at 533 (noting that "[a]fter Johnson v. Home State Bank, chapter 20 could also be used to make an end run around an expectation of high percentage repayment of unsecured debts in chapter 13" but that lawyers "may be reluctant to seize upon this aggressive technique" for "fear [of] annoying local trustees and judges").

177 For example, debtors might have adopted the strategy of waiving discharge of the mortgage debt. *See* 11 U.S.C. §§ 523(a)(10), 524(c) (1994). If the courts permitted waiver over the objection of the mortgage holder, the mortgage debt would remain owing and be a claim in the later Chapter 13 case.

178 I do not mean to imply that legal outcomes are unchangeable. My point is that change requires community action at the level of the shared mental model, as opposed to mere legislative or judicial pronouncements. *See supra* notes 85-108 and accompanying text.

cases generally.[179] If they did the latter, the change might affect the levels of repayment to unsecured creditors in Chapter 13 cases *not* preceded by Chapter 7s. That is, the lawyers' expectation that debtors could use Chapter 20 to save their homes without paying unsecured creditors would be dissonant with the Bankruptcy Code § 1325(b) requiring such repayment under Chapter 13. The community might resolve this dissonance by generally lowering the expectation of repayment to unsecured creditors. Such a lowering might be accomplished indirectly, for example, by an increased readiness on the part of bankruptcy judges to accept budgets in which the debtors report no "disposable income" that would trigger the obligation to make payments to unsecured creditors. The system would experience a ripple effect as it sought a new equilibrium that incorporated and adjusted to the Chapter 20 strategy, matched condition-action rules to the new expectations, and still met the overall system requirement of administrative simplicity.

If Congress or the Court somehow managed later to abolish the Chapter 20 strategy, it is highly doubtful that the system would return to its former equilibrium. Reversal would have complex implications for lawyers and clients who had, in the interim, relied upon the acceptance of Chapter 20.[180] Restoration of the mental model accompanying the former equilibrium could be difficult for the simple reason that no one might recall it.[181] Through a process analogous to web effects in institutional economics, at least some of the effects of the Chapter 20 strategy have become irreversible.[182] Strategy has brought about change in the law, with only grudging acquiescence by judges.

Strategy-based legal change is not confined to the interstices of written law. The field of commercial law is replete with examples of situations where legal strategies have forced the hands of courts or even legislatures and effected grand-scale change. Lawyers dramatically altered the balance of power in litigation through the invention

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179 This second adjustment is problematic because it is possible for the community to adopt a more complex expectation toward repayment to unsecured creditors: that Chapter 20 debtors will not repay, but Chapter 13 debtors will. Adoption of this more complex expectation would be more likely if there were legal or practical limits on a debtor's ability to file Chapter 20 that might seem to the lawyers to have some policy basis.

180 For example, debtors will have borrowed money and lawyers will have advised clients and filed bankruptcy cases in an environment where Chapter 20 was the expectation.

181 The mental model knows its own state. That is, it necessarily contains the information necessary to predict what it will do in any situation. But it does not necessarily know how it reached that state. Members of the community may have forgotten. Members of the community may never have been conscious of the changes they were making in their own mental models. Even if individual members of the community remember how the changes came about, their advocacy of restoration may seem self-serving to new members of the community who never experienced the old order.

182 *See, e.g.*, Stuart A. Kauffman, *The Evolution of Economic Webs*, *in* THE ECONOMY AS AN EVOLVING COMPLEX SYSTEM 125 (1988).

of the contract provision for the payment of attorneys fees and costs incurred in litigation. Lawyers invented the concept of property standing as "security" for a debt[183] and won grudging acceptance of it from the courts.[184] Perhaps the greatest tribute to the lawyers' tenacity is the argument of Professor James J. White that the abolition of security is beyond the power of the law, because creditors and their lawyers would develop alternative strategies for accomplishing the same thing.[185]

One more example may help to illustrate the possibility of strategy-based change that occurs at a level of generality and importance that transcends judicial decisionmaking. The example is an ongoing decline in the ability of unsecured creditors to collect money judgments from encumbered property in the absence of bankruptcy. That ability is central to the operation of the coercive collection system. Nearly all property of financially distressed debtors is encumbered.[186] Debtors who find advantage in doing so can easily encumber the rest. If unsecured creditors cannot recover from encumbered property, they have no legal remedy by which they can coerce payment from their debtors.[187]

To date, no statute or court opinion addresses this ability directly.[188] In fact, the issue is of such breadth that if any court were to address it in its totality, that court probably would be vulnerable to a claim that it had attempted to decide much more than the case before it. Such broad issues are not the stuff of statutes or opinions. They are the stuff of shared mental models that tell us how the world works.

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183 An apocryphal history of the construction of security from existing legal concepts appears in LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 27-29 (1995).

184 The hostility of the courts to the developing concept of security is recounted in RICHARD E. SPEIDEL, ROBERT S. SUMMERS, & JAMES J. WHITE, SECURED TRANSACTIONS: TEACHING MATERIALS 27-35 (1987).

185 James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473, 502 (1984) ("It is not clear that Congress would or could enact a law that would successfully deprive secured creditors—or their proxies under a new system—of priority. It is my thesis that if Congress indeed were successful in constitutionally abolishing security, then formerly secured creditors would search for security alternatives.").

186 *See* Lynn M. LoPucki; *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1931-38 (1994).

187 Courts order the payment of debts and use their contempt powers to enforce their orders only in a narrow range of cases. *See* LOPUCKI & WARREN, *supra* note 183, at 20.

188 For recent cases addressing it indirectly, see Security Pacific Bank v. Haines Terminal & Highway Co., 869 P.2d 156, 158 (Alaska 1994) (stating in dicta that "the trial court properly held that [the judgment creditor] could not 'attach property that is subject to a security interest when that security interest is larger than any of the debtor's interests' "); Grocers Supply Co. v. Intercity Inv. Properties, Inc., 795 S.W.2d 225 (Tex. Ct. App. 1990) (holding a judgment creditor who did not notify the secured creditor before levying against collateral liable for secured creditor's damages in recovering the property from the judgment creditor).

My experience practicing in Gainesville, Florida was under what I will call the "old" model.[189] Under that model, a judgment creditor has the right to a writ of execution directing the sheriff to seize the debtor's property, whether or not encumbered. Seizure of property results in its sale, subject to the encumbrance. The secured creditor has the right to foreclose against the property in the hands of the buyer, but has no right or ability to prevent the execution levy or the sale.[190] Nor does the debtor, except by paying the judgment debt in full or commencing a bankruptcy case. Under the old model, the debtor that wants to continue operating its business outside bankruptcy without paying the judgment debt is at the mercy of its judgment creditor.

I first learned of the competing "new" model in interviews with lawyers practicing in Madison, Wisconsin in the mid-1980s. With considerable unanimity, the Madison lawyers believed that execution was an ineffective remedy because a creditor holding a security interest in property had the right to block execution against the property by so notifying the sheriff.[191] Because Wisconsin sheriffs generally shared that belief, it was a self-fulfilling prophecy. The sheriffs refused to levy, leaving the judgment creditors with no remedy short of a petition for mandamus. The lawyers might well have doubted that mandamus would be granted, because the new mental model was shared in the communities that would process the mandamus case as well. The beliefs of all of these participants combined to produce a single result: the ineffectiveness of execution. That result was beyond challenge by judgment creditors.[192]

The difference in the practices in those two cities can arguably be attributed to a difference in law between the two jurisdictions. Although both models were grounded in provisions of the Uniform

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189 By this, I mean to imply only that I encountered it first. Whether the law now moves from the "old" model to the "new" model may depend on the strategies employed by the lawyers involved.

190 The basis in law for this claim is found in U.C.C. § 9-311 (1994), which provides that "[t]he debtor's rights in collateral may be . . . involuntarily transferred (by way of sale . . . levy . . . or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer . . . ." The purpose of the section is "[t]o make clear that in all security transactions under this Article, the debtor has an interest (whether legal title or an equity) which . . . his creditors can reach." U.C.C. § 9-311 cmt. 1.

191 The basis in law for this claim is found in U.C.C. § 9-503 (1994), which provides that "a secured party has on default the right to take possession of the collateral." The lawyers recognized the formal limitations that the debt to the secured creditor had to be in default and the secured creditor might have to feign a desire to exercise its own remedies against the collateral. The lawyers seemed to presume that these things would be easy for a debtor and secured creditor to accomplish and that, if a judgment creditor took the hostile step of executing, they would accomplish them.

192 *See supra* notes 141-46 and accompanying text (discussing "Whole-Case Realism").

Commercial Code that were identical in the two states,[193] those provisions had, at the time of my observations, been interpreted differently by courts of the two states in written opinions.[194] The Supreme Court of Wisconsin had held that a secured creditor whose debt *was not* in default did not have the right to possession of the collateral from a sheriff who held it pursuant to execution, implying that a secured creditor whose debt *was* in default did.[195] A Florida Court of Appeals had held the existence of a security interest in property did not exempt the property from forced judicial sale.[196] But neither of the two opinions was inconsistent with the perfectly reasonable rule laid down by the Eighth Circuit Court of Appeals in 1988 that (1) a secured creditor did have the right to possession from the sheriff under U.C.C. § 9-503, but (2) only if the secured creditor sought possession to exercise its own remedies against the debtor, not merely to preserve the debtor's possession.[197] Given that the Florida and Wisconsin opinions could comfortably coexist in a perfectly reasonable system, their mere existence does not explain the sharply different shared mental models in the two legal communities.[198]

Against this background, Lincoln Brooks, a lawyer practicing in Palo Alto, California, developed a strategy that seems to have the power to determine the future of execution against encumbered property. Brooks represents Silicon Valley high-technology companies in financial distress. Those companies usually have unsecured debts in substantial number and amount. Brooks's strategy is directed against dissenting unsecured creditors who obtain judgments and threaten to disrupt operations of the company by execution. The conventional understanding is that dissenting creditors have the right to do so.[199]

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193 *See supra* notes 190-91.

194 Interpretation may serve as a means of incorporating norms from unwritten law into the written law. *See* Weyrauch & Bell, *supra* note 9, at 398.

195 First Nat'l Bank of Glendale v. Sheriff of Milwaukee County, 149 N.W.2d 548, 550-51 (Wis. 1967).

196 Altec Lansing v. Friedman Sound, Inc., 204 So. 2d 740 (Fla. Dist. Ct. App. 1967).

197 *See* Frierson v. United Farm Agency, 868 F.2d 302, 304-05 (8th Cir. 1988). A Florida Court of Appeals later held a secured creditor entitled to reclaim collateral from a sheriff who had taken it on execution, somewhat disingenuously confining the earlier Florida decision to cases where the debt owing to the secured creditor was not in default. *See* Brescher v. Associates Fin. Serv. Co., 460 So. 2d 464, 467 (Fla. Dist. Ct. App. 1984). *Brescher* is perfectly consistent with the law of Wisconsin as expounded in *First National Bank of Glendale*, which it cited; if the *Brescher* court is to be believed, *Brescher* effected no change in Florida law.

198 This proposition could be tested by presenting hypothetical fact patterns to lawyers who are not familiar with the practices of either community, but who have access to the law of all states, and asking them what results they would predict if the hypotheticals were decided by the courts of the two states.

199 *See, e.g.*, MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY 10 (1995) ("Out-of-court workouts are entirely voluntary from the creditors' point of view and require almost unanimous creditor support to succeed. Only creditors who agree to the workout agreement are bound by it; even if 99 out of 100 creditors agree to it, the one dissenting creditor

Brooks's strategy is to have his client, a debtor in financial distress that is about to enter into negotiations with its creditors, grant a security interest in all of the company's assets to all of the company's unsecured creditors. By prearrangement with the Credit Manager's Association (CMA), a reputable, independent organization of credit managers, the grant names CMA as trustee on behalf of the unsecured creditors as a group. Neither Brooks nor CMA seeks authority from the unsecured creditors for CMA to act on their behalf. CMA accepts the grant, usually as secretary to an informally organized committee of creditors and then assists in negotiations with the debtor for an out-of-court workout. If a judgment creditor attempts to levy, CMA, in its capacity as a secured creditor, intervenes with the sheriff to demand return of the property to the debtor.

While the law on the books today is sharply divided as to CMA's right to block execution, Brooks's strategy presents the secured creditors' side of this issue in the best possible light. The strategy appears to have been uniformly successful. Brooks reports that judgment creditors have levied against property protected by these CMA security interests at least fifty times. Each time, CMA has filed a third-party claim to the property.[200] In all but four or five instances, the judgment creditors have released their levy prior to hearings on the third-party claims. In the four or five instances in which Municipal or Superior Courts have decided the third-party claim, they have ruled in favor of CMA.[201] None of these cases has been the subject of an opinion, reported or unreported. So far, the strategy has won Brooks's clients most of the benefits of a bankruptcy stay or an assignment for the benefit of creditors,[202] without having to file bankruptcy or make an assignment.[203]

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can demand full payment and pursue legal remedies. The debtor will typically pay that dissenting creditor to avoid the disruption that would be caused if the dissenter exercised its state law creditor's rights.").

200 *See* CAL. CIV. PROC. CODE § 720.210 -.230 (West 1995).

201 *See, e.g.*, Order Granting Third Party Claim, Alliance Financial Capital, Inc. v. Peripheral Land, Inc. (No. 080265) (Municipal Court of California, County of Alameda, Apr. 5, 1995) (granting CMA's third party claim to debtor's money in a bank account in which CMA held a security interest).

202 In an assignment for the benefit of creditors, a debtor irrevocably assigns all of its property to a trustee, who undertakes to liquidate the property and distributes the proceeds to creditors. *See* WARREN & WESTBROOK, *supra* note 65, at 175-76. Debtors are sometimes willing to make such assignments because assignment blocks execution by individual creditors giving the trustee time to liquidate the property for the most advantageous price. Using Brooks's strategy instead of an assignment, the debtor can block execution without giving up possession and control of the business or committing to its liquidation.

203 Brooks reports that the "stay" has been effective for as long as 18 months after the grant of security, in some cases even against post-workout levies. Telephone interview with Lincoln Brooks, bankruptcy attorney with Brooks and Raub, Palo Alto, California (May 30, 1995).

Until such a strategy has altered the expectations of a legal community, it would be vulnerable to nullification by act of the legislature or the ruling of an appellate court. But the expectations of the legal community may change before the legislature or an appellate court intervenes. Once the community becomes accustomed to the idea that a "disgruntled" judgment creditor cannot upset negotiations for an out-of-court workout and this new balance of power has been absorbed into the shared mental model of the community, the legislature or court may find it more difficult to overturn. The legislature or court could establish written law hostile to the strategy, but its intervention might be seen as an attempt to change established law and the community may confine it narrowly. At that point, the legislature or court might have to employ considerable skill and effort to effect any change in outcomes.

Brooks's efforts to collectivize the nonbankruptcy remedies of unsecured creditors also illustrates the ephemeral nature of legal strategy. Today Brooks's strategy would strike most lawyers as manipulative, but that is only because it threatens to produce a result that differs from their expectations.[204] If he is successful, others will imitate him. Eventually, the results of his strategy will no longer seem surprising. Then the procedures by which lawyers implement it will no longer seem strategic. The recruitment of a reputable representative for unsecured creditors, the grant of a security interest to the creditors at large, and the subsequent appeal to the sheriff not to levy while negotiations continue will first become routine, then perfunctory. Eventually the written law may dispense with the need for these "formal vestiges" and instead directly proclaim the outcome: judgment creditors may not levy while the majority of unsecured creditors are engaged in workout negotiations with a debtor.[205] Legal change brought about through strategic manipulation will seem in retrospect to be merely an act of a court or legislature to modernize the law.[206]

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204 *See* SCARBERRY ET AL., *supra* note 199, at 14 ("Dissenting creditors cannot be bound in a workout, but they can be bound in chapter 11.").

205 Pound gives examples from both Roman and Anglo-Saxon law of evolutions in which the law in action first split from the law on the books—perhaps through legal strategy—and the law on the books was later conformed to the law in action. Pound, *supra* note 26, at 13-15. Pound described the process as "legal theory . . . yield[ing] to the pressure of lay ideas and lay conduct," but his examples suggest strategic manipulation. Resort to "a fictitious plea and fictitious ejectment" would have to begin with the pleadings—the strategy of a lawyer—before it could be adopted by a court. *Id.* at 14.

206 The process of legal change through strategic manipulation is in many ways analogous to the process of legal change through the use of legal fictions. Both strategies and fictions seem manipulative on first use. Both cease to seem so after repeated use, and the eventual elimination of either after it has served its purpose in bringing about a particular change is likely to be viewed as modernization. *See* LON L. FULLER, LEGAL FICTIONS 14-23 (1967).

IV. IMPLICATIONS

A. Explanatory Implications

1. Law as Psychological Phenomena.—Oliver Wendell Holmes, generally credited as the founder of the Legal Realist movement, posited that law is "what the courts will do in fact."[207] Karl Llewellyn, a leading realist of the 1930s and 1940s, expanded Holmes's definition to include not only judges, but "officials," a term in which he expressly included lawyers.[208] The law expressed in shared mental models better fits these definitions than the law on the books.[209]

The first implication of shared mental models of law, then, is that the "law" that drives case outcomes is principally a psychological phenomenon.[210] It exists in human minds, and the process of change occurs in human minds. The cognitive limits of the human mind will operate as limits on its complexity.[211] Those limits might explain the powerful legal impetus toward the illusion of equality in law and the treatment of "likes" in a like manner. Every case *is* different. Why

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207 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

208 KARL LLEWELLYN, *supra* note 62, at 12. The full passage reads:

> This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*

Id.

209 Shared mental models also better fit these definitions than does the law in action. The law in action includes outcomes not imposed by officials, making it somewhat different from the law referred to by Holmes and Llewellyn. *See* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 466-71 (including within the concept of "contract law in action" sanctions imposed by trading partners).

210 The idea that law's only real existence is in the minds of participants in the legal system is a tenet of Scandinavian Legal Realism. *See, e.g.*, KARL OLIVECRONA, LAW AS FACT 42-49 (1939) (explaining that laws are "imperative statements about imaginary actions" and that the written law is merely a way of reminding people about notions that their minds consider only intermittently). "In reality, the law of a country consists of an immense mass of ideas concerning human behavior accumulated during centuries through the contributions of innumerable collaborators." *Id.* at 48. Olivecrona states that "[t]he written text—in itself only figures on paper—has the function of calling up certain notions in the mind of the reader. That is all." *Id.* at 48; *see also* ALF ROSS, ON LAW AND JUSTICE (1959).

211 The mental model may call for a "look up," as when the members of a legal community understand that child support is to be set by looking up the dollar amount on a table, and then perhaps adjusting it in some manner. Such a look up is merely a memory device that supplements the mental model, it is not written law that supplants it. A particular body of law may also achieve considerable complexity in the minds of a small community expert in it, as occurs in various areas of tax law. But the tradeoff for that complexity is that the expert community is fully absorbed with it and has less time to devote to understanding how the law they have mastered relates to the rest of the world. Additionally, legal expertise that goes beyond a certain level of complexity is of little use because it cannot be communicated to others, which ordinarily is a prerequisite to application.

attempt to treat them alike?[212] The reason may be the cognitive efficiency thereby achieved. If one can safely gloss over "minor" differences, such as whether the plaintiff is a widow or a great corporation, one need maintain only a single mental category rather than a thousand.

2. The Inevitability of Local Legal Cultures.—The existence of local legal cultures, all supposedly "governed" by the same written law but generating markedly different outcomes, is not only possible, but inevitable. Written law can be applied only through the medium of a mental model. Most of those models are produced interactively in local communities.[213] The community's shared mental model does not exist in complete isolation from the written law; to the contrary, members of the community usually study the written law for useful ideas. They may confuse it with the shared mental model and be intent on reproducing it in their own minds. The effort is, however, futile because the written law is too complex. Because the shared mental model of a given legal community is in no sense a replica of the written law and because communities work to some degree in isolation from other communities, it is inevitable that they will produce shared mental models that differ from community to community.[214]

3. The Facilitation of Communication.—A shared mental model provides those who share it with a set of concepts and language that makes communication easier. When speaker and listener have common concepts or features in their mental models, single terms can stand for substantial pieces of implicit analysis.[215] Discussion can pro-

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212 *See* Peter Westin, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (demonstrating that the legal idea that likes should be treated alike is tautological and arguing that the idea should be banished from moral and legal discourse). Equality may be defensible as a moral concept if one considers the entire situations of the persons compared. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (employing the concept of the least well off in society); LARRY S. TEMKIN, INEQUALITY (1993) (discussing the bases for making such comparisons). But the concept of equality employed expressly in legal decisionmaking does not attempt to consider the entire situations of the persons involved.

213 The "locality" need not be geographical because the community that processes cases may be national or even international. What is essential is that members of a community interact regarding cases with sufficient regularity to forge shared mental models of the process and appropriate outcomes. That can only occur in relatively small communities, where an individual's mental model can be forced to conform to that of other members through repeated application and adjustment.

214 *See, e.g.*, The Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 ARB. INT'L 86, 93-94 (1988) (asserting that diverse trade practices have produced a "micro" lex mercatoria which differs from place to place); Weyrauch & Bell, *supra* note 9, at 376-77; UGO DRAETTA ET AL., BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS 7-29 (1992) (describing the controversial concept that a "lex mercatoria" exists separate from the law of any of the states involved).

215 *See* Denzau & North, *supra* note 78, at 18-20.

ceed more quickly.[216] This suggests that in forums where the lawyer-participants are not members of the same community and therefore do not have a shared mental model of law, the lawyers will find it more difficult to communicate and misunderstandings will be more common.[217] If so, the production and application of shared mental models are essential to the work of the legal profession.[218]

Easy communication comes at a price. Freeing the lawyers from the necessity to work through the foundations of their arguments in each case has the side effect of reducing the likelihood that the lawyers will discover errors in those foundations.[219] The community will be prone to approve unjust outcomes on the mistaken assumption that they are required by "law." Here, too, the effect is to render the shared mental model resistant to correction or change.

B. Normative Implications

The theories presented in this Article suggest several changes in accepted practices. First, strategic analysis of the type proposed by Oliver Wendell Holmes should be taken seriously. Second, the written law should be simplified. Third, the law in lawyers' heads should

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216 The efficiency produced by shared understandings of the complexity of law have been commented on with some frequency. Maynard notes that "the 'routineness' of a case does not mean there is an absence of negotiation, but only that it is conducted so as to focus on *what* should be done and focus off *why* it should be done and *how* prosecution and defense view the case." *See* DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING 104-07 (1984). Weyrauch quotes a high-ranking German appellate judge:

> A selected group of specialized attorneys who constantly argue cases before us are not likely to waste our time. They know what we justices want to hear, and they bring just that. The out-of-town attorneys have no experience before a court of last resort. They talk too much.

WALTER O. WEYRAUCH, THE PERSONALITY OF LAWYERS 230 (1964) (citations omitted).

217 This proposition might be tested empirically by correlating the lengths of trials with the amount of experience trial participants have in working with one another. The theory would predict shorter trials when the participants are repeat players. The proposition has been asserted by others. *See, e.g.*, Manik Roy, *Pollution Prevention, Organizational Culture, and Social Learning*, 22 ENVTL. L. 189 (1991) (noting that specialized legal jargons in various environmental enforcement agencies resulting primarily from the use of different jargon in the laws being enforced "served to heighten [a particular agency's] employees' sense of uniqueness from the outside world. However, the jargons, unique to each division, isolated them from each other.").

218 Law schools are probably the principal situs of the production of shared mental models of law. Sensing students' frustration with the completely unwieldy and indeterminate nature of law, law professors often create for their students a simple, determinate model of the subject that will be acceptable on the final exam. Bar exams promote the creation of a similar set of models. In either context, knowing too much written law may be counter-productive because it can easily lead to misunderstanding between test-taker and grader.

219 Teaching law students and writing articles for submission to journals run by law students provide opportunities and incentives for legal scholars to re-examine the foundations of our arguments. Lawyers are subjected to the same discipline when they must present their arguments to an appellate court outside their legal community.

be recognized as a discipline at least as important as the study of written law.

1. Strategic Analysis of Law.—The idea that law could be analyzed strategically—by spinning out the consequences that a "bad man" could achieve through its use—goes back at least as far as Oliver Wendell Holmes.[220] Examining possible ways that a particular rule might be used in legal planning is a common technique in the Socratic classroom. Nevertheless, strategic analysis so far has failed to achieve academic respectability.

Strategic analysis probably lacks academic respectability because it depends ultimately on a view of law as determinate. Strategists can only manipulate legal outcomes if judges are bound by the rules. Legal scholars assume judges are not and that judges will respond to the strategies of bad men by nullifying them. Lon L. Fuller was one of the early voices arguing against the effectiveness of strategic analysis. He maintained that social and economic constraints prevented bad men from pursuing their strategies in the courts, and even where they did not, judges would simply rule against them. Agreeing with Fuller, P.S. Atiyah dismissed Holmes's bad man theory as failing "to take into account the simple fact that judges do not like bad men."[221]

Fuller and Atiyah are the ones who fail to account for reality. Legal strategy works. Today, it is one of the principal services the legal profession provides to its clients. Modern jurisprudential theory has no way to account for strategy, and so denies its existence. A

220 OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171 (1920) (observing that "if you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict"). For contemporary examples of strategic analysis, see Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986) (using strategic analysis to test the adequacy of existing institutions to deal with mass torts); Jeff Strnad, *The Taxation of Bonds: The Tax Trading Dimension*, 81 VA. L. REV. 47 (1995) (analyzing the rules for tax treatment of bonds issued at a discount by examining the tax strategies that a sophisticated bond trader might employ).

221 P.S. Atiyah, *supra* note 125, at 369; *see* LON L. FULLER, THE LAW IN QUEST OF ITSELF 92-95 (1940) (arguing that to understand what judges will do, Holmes's bad man would have to "look at the law through the eyes of a good man"). Fuller assumes in this passage that the judge is free, at the moment of decision, to distinguish between good and evil on the basis of natural law. FULLER, *supra*, at 92-95. The clear implication is that the judge is never bound by rules of law to afford Holmes's bad man like treatment with good men in any respect. Fuller's assumption is inconsistent with the experience of judges and lawyers. If his assumption were correct, career criminals and organized crime would find lawyers and legal strategy useless. Fuller would probably be bewildered by the modern bad man's prescription for problems with legal authorities, which is to "send lawyers, guns and money." *See, e.g.*, WARREN ZEVON, *Lawyers, Guns and Money*, *on* EXCITABLE BOY (Elektra/Asylum Records 1978). *See generally* William H. Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058 (1981) (acknowledging that Holmes's bad man theory of the law increases our understanding of the role of the legal advisor but cannot explain adjudication).

theory of determinate law resulting from the mass processing of cases in accord with shared mental models can fill the gap.

Strategic analysis will work only if it takes into account all aspects of the environment in which legal strategies must operate. Fuller is right about the ineffectiveness of strategic analysis that ignores the strategists' possible loss of friends and customers.[222] But the solution is not to abandon strategic analysis; it is to make realistic assumptions about the loss of friends and relatives and other considerations likely to affect strategy. The place to begin is with empirical study of the real environment as reflected in the strategies lawyers employ in it.

In our study of the bankruptcy reorganization of large, publicly held companies,[223] Whitford and I documented the fact that negotiated settlements of large reorganizations deviated from the legal entitlements[224] of the parties. We asked the lawyers who negotiated them for the reasons. Their answers were rich with information about the realities of the environment. We conducted the same kind of inquiry with regard to the rampant forum shopping we observed. We learned that debtors shopped at least in part to alter bargaining endowments and thereby alter outcomes.[225] In the world Fuller imagined, such forum shopping would have been futile. The judge at the destination would have been bound by the same federal law of bankruptcy, thought no better of the merits of the shopper's case, and perhaps penalized the shopper a little for the shopper's bad intentions. But in the world experienced by lawyers, there are local legal cultures and

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222 *See* FULLER, *supra* note 221, at 92-95.

223 Data from the study are reported in four articles. LoPucki & Whitford, *supra* note 40; Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 [hereinafter LoPucki & Whitford, *Venue Choice*]; Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993) [hereinafter *Corporate Governance*]; Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597 (1993).

224 We used the term "entitlements" only in a positive, not a normative sense. *See* Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993 (1996) (arguing that the concept of entitlements used in the law and economics literature is without normative force).

225 *See* LoPucki & Whitford, *Venue Choice*, *supra* note 223, at 29-33.

system constraints that alter results in even the largest cases.[226] Judges themselves have ambitions and strategies for pursuing them.[227]

Law-related systems[228] can be analyzed by examining the role of strategy within them.[229] Like Holmes's bad man, today's legal strategist probes for weaknesses and exploitable inconsistencies. By observing what strategies are employed and for what purposes, the empiricist can construct normative evaluations of particular aspects of the system and make realistic proposals for change.[230] The empiricist can also evaluate the effectiveness of legal reform by observing the strategies employed once the reform is in place.

As a method for analysis of legal systems, strategic analysis bears similarities to economic analysis. Both treat the law as establishing a pattern of incentives and seek to analyze the law by examining how persons in the system respond to those incentives. The crucial difference is in how they conduct that examination. Economists simplify the legal environment to just a few factors. They posit not a flexible strategist confronted with a situation responsive to imagination, skill, cleverness, and personal values, but a rigidly rational person whose "correct" response can be calculated from the model.[231] These sim-

226 *See, e.g.*, Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 835-36 (1990) (arguing that Pennzoil tested the waters in Delaware by filing its contract action there and then, based on a positive but lukewarm response, refiling it in Texas where a jury trial would be available); LoPucki & Whitford, *Venue Choice*, *supra* note 223, at 34-38 (discussing differences in federal bankruptcy courts that have led to rampant forum shopping); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (demonstrating from an analysis of outcomes in approximately three million federal cases that plaintiffs win 58% of cases overall but only 29% of cases in which venue is transferred).

227 *See* Kennedy, *supra* note 11, at 543 (examining the strategic considerations involved in the decision of a hypothetical judge and referring to judges' "strategies of execution"); LoPucki & Whitford, *Venue Choice*, *supra* note 223, at 30-33, 37-38 (arguing that the scheme of bankruptcy venue creates incentives for judges to favor venue in their own district and that some bankruptcy judges have responded to those incentives).

228 By a law-related system I mean the larger societal systems in which law operates, when viewed as goal-seeking. *See* LoPucki & Triantis, *supra* note 120, at 271-73.

229 *See, e.g.*, Ronald J. Mann, *Explaining the Pattern of Secured Credit from the Ground Up*, HARV. L. REV. (forthcoming 1996) (manuscript on file with author) (explaining the pattern of secured credit based on the explanations of debtors and creditors as to their choice of forum); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1 (1986) (analyzing the mass tort problem by examining strategies available to actors in the system).

230 Whitford and I concluded, for example, that the best means for dealing with forum shopping in the bankruptcy reorganizations of large, publicly held companies was to monitor the kinds of shopping that occurred and the reasons for them. Only when a pattern of forum shopping for system-unintended reasons developed was there a necessity for the system to respond. *See* LoPucki & Whitford, *Venue Choice*, *supra* note 223, at 44-51, 57-58.

231 To respond to this weakness in economic method, Denzau and North have proposed the substitution of shared mental models based on cognitive theory for what they call "the black box of the 'rationality' assumption used in economics and rational choice models." Denzau & North, *supra* note 78, at 5.

plifications enable economists to apply logic, mathematics, or game theory to derive solutions to "economic" problems. But the economic approach can tell us little about how real people respond to the complex environments in which they actually make decisions.[232]

Institutional economists[233] and some legal scholars[234] are attempting to replace the rational person of classical economics with shared mental models. Strategic analysis parallels this effort by attempting to chart complex environments by empirical observations of the reactions of real people to them. The most basic technique is to examine what those persons have done in particular environments, and then ask them why they did it.[235] The principal limitation of this technique is that real people may not have good analyses of their own actions or, if they do, may not be very good at explaining them. For example, lawyers may not raise particular objections during litigation because they have never thought of them or because others have not raised them. They may have little or no understanding of why others have not raised them or what the consequences would have been if they had. Another limitation on the technique is that lawyers engaged in strategic behavior may not report truthfully.

Gaming provides a method for overcoming both these limitations.[236] A computer program simulates the strategic environment. Players, usually working in teams, take on the roles of participants in the system and seek their own advantage in the play of the game. The experimenter's goal is to reproduce the dynamics of actual practice. When the strategic dynamics of the game differ from the strategic dynamics of actual practice, the experimenter adjusts the simulation. Gaming can examine environments far too complex for game theory.[237] A third technique, which shares characteristics of each of the

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232 Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79, 97-110 (1992) (arguing that economic analyses based on assumptions of perfect markets and zero transaction costs are of little or no value).

233 *See, e.g.*, Denzau & North, *supra* note 78, at 5 (asserting that obtaining an understanding of mental models is "the most important step that research in the social sciences can make to replace the black box of the 'rationality' assumption used in economics and rational choice models").

234 *See, e.g.*, Eisenberg, *supra* note 11 (arguing against basing economic analyses on the assumption of rational decisionmaking and describing alternative decisionmaking algorithms as "strategies"). *But see* Scott, *supra* note 11 (arguing against adjustments to consumer law to attempt to compensate for consumers' cognitive illusions).

235 *See, e.g.*, Mann, *supra* note 229 (basing analysis on interviews asking borrowers and lenders why loans were or were not made on a secured basis).

236 *See, e.g.*, CATHY S. GREENBLAT, DESIGNING GAMES AND SIMULATIONS: AN ILLUSTRATED HANDBOOK (1988); CATHY S. GREENBLAT & RICHARD D. DUKE, GAMING-SIMULATION: RATIONALE, DESIGN, AND APPLICATIONS (1975).

237 *See, e.g.*, LYNN M. LOPUCKI, PLAYER'S MANUAL FOR THE DEBTOR CREDITOR GAME (1985) (describing the environment simulated in the Debtor Creditor Game computer program).

two already discussed, is simply to describe legal environments and attempt to hypothesize how real people might respond to them.[238]

2. *Simplicity.*—As previously discussed,[239] written law of a complexity that exceeds the capacities of the human mind inevitably will be distorted in its routine applications. Its subtlety and refinement will be lost in application as courts invent their own manageable bright-line rules. Complex written law can produce a determinate system, but cannot control what it will be. A lawmaker who mandates that judges exercise discretion is likely to prompt only the generation of rules of thumb. Balancing tests and mandates to proceed on a case-by-case basis only invite local communities to invent their own rules.

In a landmark article published more than twenty years ago, Marc Galanter described the complex overlapping relationships that enable the "haves" to come out ahead in legal dispute resolution.[240] Among other things, Galanter noted the important role of strategy in the generation of legal outcomes, which he referred to as "restructur[ing] the transaction to escape the thrust of the . . . rule."[241] He recognized that the haves are more adept at strategy in part because they are better able to control the allegiances of their own lawyers.[242] He correctly concluded that "changes which relate directly to the strategic position of the parties . . . are the most powerful fulcrum for change."[243]

But in Galanter's model, the haves used their advantages not to play for the outcomes of particular cases, but to develop favorable rules of law through case selection. Such advantages are hard-won over long periods of time,[244] and as Galanter recognized, "the system has the capacity to change a great deal at the level of [written] rules without corresponding changes in everyday patterns of practice."[245] If the principal advantage of the haves were the ability to generate favorable, though largely indeterminate, rules of law through case selection, the have-nots would have relatively little of which to com-

238 *E.g.*, LoPucki, *supra* note 53 (speculating on strategies effective in bankruptcy proceedings).

239 *See supra* notes 72-80 and accompanying text.

240 Galanter, *supra* note 157.

241 *Id.* at 149.

242 *Id.* at 114-19.

243 *Id.* at 150.

244 *Id.* at 98-103.

245 *Id.* at 149. Probably the best example of a campaign of the type Galanter advocates is the attack of the NAACP on racial discrimination in the public schools. The campaign has been touted as a phenomenal success because it dramatically changed the written law. However, the persistence of racial separation in the schools suggests the possibility that the campaign changed legal rhetoric without changing practices. Strategies for maintaining racial separation in the schools prevailed over written law.

plain. In fact, their disadvantage far exceeds that portrayed by Galanter.

The most important advantage of the haves in securing legal outcomes is strategic manipulation at the level of the particular case. The haves can be more effective strategists because they start with better information, they can devote more time and greater skill, and they have more staying power when they meet resistance. If this is true, reform of the kind proposed by Galanter—forming organizations of "one shot" litigators that can employ the techniques of repeat players to develop favorable rules[246]—will be less effective than Galanter supposed. Even if those organizations were successful in controlling the written law, that would not easily translate into success in controlling case outcomes. To control outcomes, the strategy of the have-nots must be manifest in the shared mental models of numerous communities.

Reducing the complexity of written law might be an effective means for reducing this kind of strategic advantage. A sufficiently simple legal system could be incorporated into the shared mental model in its entirety. Rendering the written law and the shared mental model of it roughly congruent would open the shared mental model to scrutiny and analysis.[247] It might also cause changes in written law to have greater impact on the shared mental models. As Dean Roscoe Pound put it, "It is the work of lawyers . . . to make the law in action conform to the law in the books . . . by making the law in the books such that the law in action can conform to it."[248]

How to simplify law is far from obvious.[249] But if law is contained in shared mental models, the appropriate design of a legal system should be informed by cognitive theory. Such a system need not

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246 *Id.* at 141-44, 150-51.

247 Such an endeavor would not be without hazards. "We are told that when contact with the Romans taught Teutonic peoples that through the written page they could make and alter the law as well as record it, a great ferment resulted." Pound, *supra* note 26, at 24. Today, the ferment would doubtless be among the haves who benefit from the current, strategic state of affairs.

248 *Id.* at 36. *See* Roy, *supra* note 217, at 245 (advocating "the writing of readable regulations to make regulatory requirements comprehensible for the regulated community" and noting that "[g]enerally, state and federal environmental regulations are not written to be easily understood by the regulated community. Instead, regulations are written to withstand legal challenge.").

249 *See* articles cited *supra* note 81. For a bad example, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) (advocating a system in which there would be only six rules: individual autonomy, private property, freedom of contract, protection from aggression against person or property, limited privileges in cases of necessity, and just compensation for public takings). Epstein would, for example, make the ownership of all resources depend on first "possession," *id.* at 59-63, ignoring the fact that "possession" is merely a legal construct used to summarize complex rules. LOPUCKI & WARREN, *supra* note 183, at 382-87 (deconstructing "possession"); *see also* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995) (arguing that there is an optimal complexity for legal rules).

be mechanistic, because the human mind that will contain it is not. Possibly, the most efficient structure for such a system of law would be one that mimicked the structure of the human mind.[250]

3. Writing Unwritten Law.—As previously noted, the law in shared mental models differs from the written law in important respects. The law in shared mental models is simpler and more determinate. It addresses a different range of issues. The law in shared mental models also focuses more heavily on outcomes than does written law, rendering those outcomes more predictable.[251]

The function of a legal community is to deliver legal outcomes. Viewed from the perspective of the lawyers' clients, the particular mechanisms by which it delivers them—by settlement or by litigation, in proceedings under Chapter 7 or Chapter 13—does not matter. The client is interested in how much the system will cost, how long the system will take, what the system will require of the client along the way, and what the system will deliver in the end.

Those practical outcomes, which I will refer to as the *delivered law,* are sometimes the products of complex interactions[252] among various aspects of substantive and procedural law. By these interactions, the legal system calculates its "bottom line," the delivered law applicable to any particular category of conduct or situation. The delivered law typically is known to members of the community[253] and constitutes part of the community's shared mental model. It may be far simpler than the written law and bear only the remotest relationship to it.

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250 *See* MINSKY, *supra* note 45 (attempting to explain the structure of the human mind by explaining the structure of a computer program that could mimic it).

251 That is, shared mental models are more likely than written law to address the ultimate issues of what parties can or cannot accomplish through litigation. Written law facilitates the sequential determinations of issues, supposedly tolerating whatever outcome emerges from the process. Ultimately, shared mental models tend to prevail, through the mechanism of whole-case realism. *See supra* notes 141-46 and accompanying text (describing whole-case realism).

252 These interactions may be real or projected hypothetically in the minds of the legal strategists.

253 But this is not always the case. Members of the community may be unaware of the pattern of outcomes their interaction generates. *See* Paul Brest, *In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1 (1976) (discussing "racially selective indifference"); Clark, *supra* note 147, at 1241 ("I am certain that both particular legal scholars and the entire legal culture can follow intellectual patterns without being aware of them and that it is both possible and useful to discover those patterns.") Walter O. Weyrauch, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 803-07 (1973) (documenting that seemingly neutral criminal sentencing procedures produce surprising racial disparities). Members of the legal community that process the bankruptcy reorganizations of large, publicly held companies were surprised by aggregate data showing management turnover in their cases to be almost universal. *See* Lynn LoPucki & Whitford, *Corporate Governance*, *supra* note 223, at 723-37 (1993).

For example, the written law of bankruptcy proclaims generally that bankruptcy is "only for the honest debtor"[254] and specifies numerous types of dishonest conduct as bases for denial of bankruptcy discharge.[255] The delivered law on the discharge of dishonest debtors is far different than what those provisions would suggest. A discharge is denied only when some interested party files an adversary proceeding objecting to it.[256] The system pointedly fails to provide incentives for either creditors or trustees to bring the necessary proceeding.[257] Although the pressures of unmanageable debt often drive debtors to conduct that provides bases for objections to their discharge, objections are rare.[258] In most communities, the *delivered* law is precisely the opposite of the substantive written law: a dishonest debtor can almost certainly obtain a bankruptcy discharge.

Delivered law usually emanates from adjudication or the threat of adjudication. Settlements of litigation may be nothing more than agreements to accept what the parties think courts would award.[259] But projected results in adjudication are not the only possible basis for settlement. When parties do not consider adjudication a viable option, settlement negotiations emerge from adjudication's shadow. Routine case processing may establish a pattern of settlement that

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254 *See, e.g., In re* Hunter, 771 F.2d 1126, 1130 (8th Cir. 1985) ("Congress established a fraud exception to discharge 'to discourage fraudulent conduct and to ensure that relief intended for honest debtors does not inure to the benefit of the dishonest.' "); Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474, 1477 (11th Cir. 1985) ("Congress sought to discourage fraudulent conduct and ensure that relief intended for honest debtors does not inure to the benefit of dishonest ones.").

255 *See* 11 U.S.C. § 727(a)(2) (1994) (fraudulent transfers of property), 11 U.S.C. § 727(a)(4) (fraudulent testimony or withholding of information), 11 U.S.C. § 727(a)(5) (failure to explain loss or deficiency of assets), 11 U.S.C. § 727(a)(6) (failure to cooperate with the court), or 11 U.S.C. § 727(a)(7) (fraud in connection with another bankruptcy case).

256 *See* 11 U.S.C. § 727(c)(1) (1994).

257 A creditor usually is better advised to object to discharge of only the debt owing to the creditor, not to discharge of the debtor generally. Winning a denial of discharge rarely leads to the payment of the debt, because it is a rare debtor who has resources to pay a substantial portion of his or her debts, yet files bankruptcy. Settling an objection to discharge in return for payment is prohibited by Bankruptcy Rule 7041. 11 U.S.C.A. Rule 7041 (West Supp. 1995).

The trustee has a duty to "oppose the discharge of the debtor" if advisable. 11 U.S.C. § 704(6) (1994). But neither the trustee nor the trustee's lawyer can be paid for litigating the objection unless there are assets in the estate from which to make payment. In approximately 95% of the cases, there are no assets. *See* U.S. GENERAL ACCOUNTING OFFICE, CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS 1-2 (July 1994); *see supra* note 124.

258 A study of almost 1600 bankruptcy court files failed to discover even a single objection to discharge. TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 265-66 (1989) ("We could not detect any cases of fraud, nor did we find any creditor objections to a debtor's discharge based on an allegation of fraud."). Their findings are consistent with my experience in representing debtors or serving as a bankruptcy trustee in approximately 400 cases.

259 Such settlements are usually said to occur "in the shadow of the law." *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

deviates systematically from legal entitlements and produces an independent pattern of delivered law. Earlier, I presented the example of plans of bankruptcy reorganization that provide for distributions to creditors and shareholders that deviate from entitlements under the absolute priority rule.[260] In the largest bankruptcy reorganizations, the rule seems to be that everyone at the bargaining table gets something.[261] In the smallest cases, the absolute priority rule stands on its head; equity nearly always retains 100% ownership of the company and only the creditors' rights are diminished, giving shareholders absolute priority over creditors.[262] Parties offered less than their entitlements in adjudication may not be free to test those entitlements in court; violation of the distributional norm that requires settlement may cause the group to impose punitive sanctions.[263]

The concept of delivered law is similar to, but different from, the broader concept of "law in action." Many of the best examples of the gap between law in action and law on the books result from disputants' ignorance of the law or reluctance to employ it.[264] But they are not examples of delivered law diverging from law on the books. A legal outcome qualifies as delivered law only if the disputant to whom it was delivered pressed for the best result the system would give. Differences in delivered law are differences in the coercive effect of law through the imposition of sanctions, not merely differences in local preferences, customs, or culture.

People affected by the legal system want to know what the system will *do*, not what the written law *says*. Nevertheless, few attempts have been made to reduce delivered law to writing. The principal impediment seems to be that delivered law differs from community to

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260 *Supra* note 40 and accompanying text.

261 *See* LoPucki & Whitford, *supra* note 40, at 142 (documenting that distributions to equity holders are the norm in reorganizations in which creditors receive more than approximately 15% of their claims).

262 *See* LoPucki, *supra* note 24, at 264-65 (finding that owner-managers retained full ownership and control of 9 of 12 surviving businesses and that only 4 of the 41 businesses studied underwent a change in ownership and control).

263 For example, members of the group may disparage the dissenter as having acted unprofessionally or irresponsibly and thereby interfere with the dissenter's other business relationships. A party's violation of settlement norms also may prevent the party from forming otherwise available alliances in the continuing litigation. LoPucki & Whitford, *supra* note 40, at 154-58.

264 *See, e.g.*, Ellickson, *supra* note 50, at 668-73 (finding that cattle ranchers in Shasta County neither knew of their rights to compensation from neighbors for trespass by cattle nor wished to exercise those rights); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1326 (1986) ("One half of the rule 11 opinions in the first two years came from two large urban districts . . . [that together] . . . accounted for only 7.8% of the federal court civil filings during the period beginning July 1, 1983 and ending June 30, 1985."); HERBERT JACOB, DEBTORS IN COURT 87 (1969) (rate of garnishment of only 2.1 per thousand in Green Bay, Wisconsin, compared with 30.7 per thousand in Racine, Wisconsin).

community, making the markets for publication narrow. But there are other impediments as well. Reduction of the delivered law to writing tends to embarrass members of the community, particularly judges, because it demonstrates that they are administering a system not mandated by written law and sometimes in contravention of written law.[265] Only a member of the community is likely to be qualified to author a work about the delivered law of a legal community, yet by doing so the member may compromise his or her position in the community.

Attempts to reduce delivered law to writing generally have suffered from the failure of the editors and contributing lawyers to distinguish it from the written law.[266] On particular points, however, some attempts have succeeded brilliantly. For example, the following passage is the answer of a Missouri lawyer to the question "What is your jurisdiction's position on . . . [contractual devices designed to prevent a debtor from filing bankruptcy]":

> There are no reported decisions on this subject. [Such contractual devices] are not being used in Missouri due to the belief that the bankruptcy court will not enforce the contract.[267]

The passage distinguishes the written law (there are no reported decisions) from the delivered law (bankruptcy proofing devices are ineffective in Missouri). Use of the word "belief," without identification of the believer, suggests reference to the shared mental model of the legal community.

The process of drafting opinions causes judges to engage in careful examination of particular cases. For that reason alone, opinions serve an important function in a common-law system. But opinions are highly case-specific and for that reason are an inefficient way for trial court judges to communicate what they are doing.[268] Judges occasionally break from the traditional form by reciting delivered law in administrative orders or opinions, typically referring to the rules as guidelines or rules of thumb.[269] Judges and lawyers can make law

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265 Weyrauch states, "Disclosure of bias may be felt to be embarrassing. One of the many functions of law may be to minimize this embarrassment by giving a tranquilizing appearance of objectivity . . . while participating in a process that still has retained much of its ancient flavor of naked power." WEYRAUCH, *supra* note 216, at 244.

266 *E.g.*, SIDNEY A. KEYLES, FORECLOSURE LAW & RELATED REMEDIES (1995).

267 *Id.* at 341. Many of the answers in FORECLOSURE LAW & RELATED REMEDIES are simply citations to appellate cases that recite multi-part balancing tests that are of virtually no use in learning what officials do in response to cases.

268 Bankruptcy judges work at the trial court level, but most write numerous opinions, hardly distinguishable from those of appellate courts.

269 *See, e.g.*, *In re* Zwern, 181 B.R. 80, 86 (Bankr. D. Colo. 1995) ("Some Judges review each case individually; others informally use a 'rule of thumb' of $1,200. Judge Matheson has held that a fee of $1,000 is appropriate for the average Chapter 13 case without any unusual, troublesome or unique issues."); McCall v. Barnett Bank, 74 B.R. 666, 668 (Bankr. M.D. Fla. 1987) ("A rule of thumb used by many courts is that sale for less than 70 percent of value is avoidable

more accessible to the governed by writing the unwritten rules of delivered law as they exist in local legal culture.[270]

V. CONCLUSION

Decades of careful empiricism have demonstrated that the pattern of legal outcomes differs from one legal culture to another in ways not explainable by written law. This Article attempts to account for the differences as the product of mental models forged in and shared by legal communities. Like the more general mental models proposed by Johnson-Laird and Holland, these mental models of law consist of condition-action rules of varying levels of generality that provide the dialectic by which the community processes cases.

Shared mental models are also capable of explaining other legal phenomena that theorists have so far ignored. Among them are lawyers' abiding sense that the law is determinate, the development and use of "rules of thumb" in processing cases, and the success of legal strategy.

Support for the theories presented in this Article is largely anecdotal. I have attempted, however, to present the theories in terms sufficiently concrete that they can be operationalized[271] and tested empirically.

The concept of shared mental models of law has important implications for legal theory and legal practice. Law exists principally in the minds of members of the legal community. Because the law in lawyers' heads is a simplified version of the law on the books, it will necessarily differ from it. Because it is manufactured in the local community and path dependent, it also can be expected to differ from community to community. The process is functional because it renders legal outcomes predictable and makes the local legal community a more efficient processor of cases than it otherwise could be.

Continuing legal education is now discovering the rich, important realm of delivered law that currently exists only in the shared mental models of legal communities. Once judges and lawyers recognize that the law on the books and the law in their shared mental models are

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under § 548(a)(2) [as a fraudulent conveyance]."); *In re* Access Equip., Inc., 62 B.R. 642, 646 (Bankr. D. Mass. 1986) ("If the option price amounts to 25% or more of the total list price, then the 'lease' is not one intended for security."). Informative as these rules are, because of the way they were derived, they are not legitimately part of the written law.

270 Explication of the law in lawyers' heads is unlikely to delegitimate written law. Official law already shares power with various systems of indigenous law. *See* Galanter, *supra* note 82, at 161-64. The identification of one more type—even one so powerful—is unlikely to bring the system down. The advantage in explicating the law in lawyers' heads is that it is sufficiently simple that lay persons could understand it. Law might become an effective communication between lawmaker and subject.

271 *See supra* note 22.

two different things, they can see the latter for what it is and more accurately reduce it to written form.[272] The pattern of Balkanization inevitably produced by an oral legal tradition suggests that such a tradition is not well suited to the governance of a society as large and well integrated as the United States.[273] Reduction of the delivered law to written form would make the legal system more accessible to those governed by it. That in turn would foster civic debate, facilitate compliance, make the economy more efficient, and enhance individual autonomy. Reduction of the delivered law to written form would encourage strategic behavior, but not all strategic behavior is bad. To the extent it encouraged system-unintended behavior, the reduction ideally would act as a catalyst for reform.

The study of legal strategy potentially provides, for empiricists, a powerful tool for the evaluation of law-related systems. Strategists constantly probe the legal system searching for advantage and uncovering weaknesses. By charting their movements, empiricists can quickly identify systemic weakness and perhaps even prevent the kinds of system-unintended change that unchecked legal strategy can cause.

272 The reduction to writing may itself alter the "autonomous" law contained in shared mental models. The exploration of that possibility is beyond the scope of this Article.

273 *See* Weyrauch & Bell, *supra* note 9, at 377 (concluding that "oral systems do not address themselves to the needs of a mass society as such, even though they satisfy the needs of the smaller units that comprise a mass society").