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A THEORY OF LEGAL STRATEGY

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ABSTRACT

By the conventional view, case outcomes are largely the product of courts' application of law to facts. Even when courts do not generate outcomes in this manner, prevailing legal theory casts them as the arbiters of those outcomes. In a competing "strategic" view, lawyers and parties construct legal outcomes in what amounts to a contest of skill. Though the latter view better explains the process, no theory has yet been propounded as to how lawyers can replace judges as arbiters. This article propounds such a theory. It classifies legal strategies into three types: those that require willing acceptance by judges, those that constrain the actions of judges, and those that entirely deprive judges of control.

Strategies that depend upon the persuasion of judges are explained through a conception of law in which cases and statutes are almost wholly indeterminate and strategists infuse meaning into these empty rules in the process of argumentation. Such meaning derives

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from social norms, patterns of outcomes, local practices and understandings, informal rules of factual inference, systems imperatives, community expectations, and so-called "public policies." Constraint strategies operate through case selection, record-making, legal planning, or media pressure. Strategists deprive judges of control by forum shopping, by preventing cases from reaching decision, or by causing them to be decided on issues other than the merits. The theory presented explains how superior lawyering can determine outcomes, why local legal cultures exist, how resources confer advantages in litigation, and one of the means by which law evolves.

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> If the judges say a contract with your buyer that he will not resell below a certain price will be illegal, and not enforceable, if they are likely to fine you or send you to jail for making such a contract, but you still want your goods resold throughout the country at a single price—what can you do? That is a problem for invention, for ingenuity; the problem of inventing a method of action which will keep you free of difficulty and will produce the results you want in spite, if you please, of what the judges in a case of dispute may be expected to do.
>
> Karl N. Llewellyn[1]

INTRODUCTION

In the conventional view of the legal process, courts determine facts and then apply law to those facts to generate outcomes.[2] In the strict, formalist version of the conventional view, the law consists principally of rules in which the outcomes of cases are already im-

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1. THE BRAMBLE BUSH 14 (1960). Llewellyn's reference was to statutes banning resale price maintenance contracts. In those contracts, retailers agreed not to sell the manufacturer's product for a price less than that specified in the contract. *See id.*

2. The conventional view is typically described in terms such as these:

> The common-law decisional process starts with the finding of facts in a dispute by a fact-finder, be it a jury, judge, or administrative agency. Once the facts are ascertained, the court compares them with fact patterns from previous cases and decides if there is sufficient similarity to warrant applying the rule of an earlier case to the facts of the present one.

RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 2-4 (1992).

The breadth of acceptance of the conventional view is illustrated in Marc Galanter's classic article on why the "haves" come out ahead. Although Professor Galanter ultimately argues for a partially strategic explanation of case outcomes, he begins by starkly assuming the conventional view as a frame of reference:

> This society has a legal system in which a wide range of disputes and conflicts are settled by court-like agencies which purport to apply pre-existing general norms impartially (that is, unaffected by the identity of the parties). . . . The rules applied by the courts are in part worked out in the process of adjudication (courts devise interstitial rules, combine diverse rules, and apply old rules to new situations). There is a living tradition of such rule-work and a system of communication such that the outcomes in some of the adjudicated cases affect the outcome in classes of future adjudicated cases.

Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 96 (1974). That the primary objective of a player in Galanter's model is to win rules of law favorable to its side suggests their centrality.

plicit.[3] In the more popular version, the law is a mix of fixed rules and flexible standards that sometimes permit courts to inquire into purpose and to exercise judgment and discretion.[4] In either version, the conventional view holds written law to be an important determinant of legal outcomes. To the extent that the conventional view acknowledges written law to be ambiguous or indeterminate, it assumes, as the original Realists did, that the effect is to lodge power in the judges.[5]

By any version of the conventional view, the role of lawyers is relatively minor. They gather facts, conduct research in the appropriate legal materials, and then attempt to persuade the courts to reach outcomes that favor their clients.[6] In most disputes, no litigation will be necessary; the written law will be sufficiently clear that the lawyers will agree on what the outcome of litigation would be. In the vast majority of the disputes that are litigated, the views of judges and juries will determine outcomes. Only in a small minority could lawyers determine outcomes, and then only by persuading the judges or juries.

3. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 426-38 (1985) (arguing that the textual language and precedent of the law limit its permissible interpretations). Bankman overstates the conventional view when he argues:

> [A]cademics believe that the vast majority of issues can and should be decided without recourse to legislative history or intent. Legislative intent or purpose becomes relevant, however, in those situations in which the seemingly "plain language" of a statute or rule admits more than one meaning, conflicts with the plain language of other statutes or a body of well-accepted doctrine, or produces a nonsensical result.

Joseph Bankman, *The Proposed Partnership Antiabuse Rule: Appropriate Response to Serious Problem*, 64 TAX NOTES 270, 271 (1994). But a substantial number of academics do hold these beliefs, and probably most judges believe that they act in accord with them.

4. *See, e.g.*, Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 623 (1999) ("'Standards' are laws that describe a triggering event in abstract terms that refer to the ultimate policy or goal animating the law."). Nearly all academics subscribe to one or the other version of the conventional view. *See, e.g.*, Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 620 (1999) ("To be sure, as Hart and Sacks recognized, there is much at stake in our age over whether the central products of our modern legal system—statutes—are read literally or purposively.").

5. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 842-47 (1935) (presenting a "theory of legal decisions" that assumes social forces are given effect through the judge).

6. *But see* Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 290-300 (1998) (rejecting formalism and proposing in consequence that law schools teach students to research judges, lawyers, and other participants in litigation).

Oddly, this conventional view coexists with another that sees the legal process as highly manipulable through legal strategy.[7] Star litigators—or "dream teams" of them—can regularly win judgments in cases that have no merit,[8] prevent meritorious cases from ever reaching trial,[9] turn victims into wrongdoers,[10] and make the system set the guilty free.[11] Though some might dispute the particular examples of manipulation that we give, the belief that strategies often determine legal outcomes is widespread and generally consonant with the reality of legal practice. Lawyers devote substantial time and energy to the

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7. *See, e.g.*, Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 566 (1999) (presenting six "familiar examples" of controversial legal strategy); *id.* at 595 (concluding that "[l]awyers routinely exploit law's formality").

As employed in this Article, "strategy" has been defined as "the art of devising or employing plans or stratagems toward a goal." MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 1162 (10th ed. 1996). A "stratagem" is "a cleverly contrived trick or scheme for gaining an end." *Id.*; *see also* 2 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY 1046 (1992) ("A strategy is a sequence of practices in which base values are utilized to influence outcomes and effects.").

8. For example, Dow Corning is settling the breast implant cases for over $2 billion even though the scientific evidence seems clear that silicon cannot cause the injuries claimed. *See* Gina Kolata, *A Case of Justice, or a Total Travesty? How the Battle over Breast Implants Took Dow Corning to Chapter 11*, N.Y. TIMES, June 13, 1995, at D1 (stating that there is no scientific evidence that implants cause serious disease). Securities class action lawyers have continued to win cases despite legislation intended to thwart them. *See, e.g.*, *America's Entrepreneurs Advocate Securities Litigation Reform*, BUS. WIRE, June 10, 1997 ("Congress in 1995 overwhelmingly passed a sweeping measure that was intended to stop the filing of abusive securities class action lawsuits in federal court. But some lawyers who specialize in these types of suits are thwarting the 1995 law by filing them in state courts.").

9. *See generally, e.g.*, JONATHAN HARR, A CIVIL ACTION (1995) (demonstrating that financial pressures on plaintiffs' attorneys made it virtually impossible for them to take a case to trial).

10. *See, e.g.*, William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 46 (1996) (referring to the American legal strategy of "attacking the victim's character while keeping the defendant's prior record away from the jury").

11. Only an omniscient observer could attest that a guilty person had been set free. But skilled defense lawyers have freed defendants against whom the evidence could hardly have been more compelling. *See, e.g.*, W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1077 (1996) (arguing that O.J. Simpson's lawyers did not act unethically in obtaining his acquittal even though the evidence suggested guilt); Jay Mathews, *DeLorean Acquitted of All Eight Charges in Drug-Scheme Trial*, WASH. POST, Aug. 17, 1984, at A1 (reporting that John Z. DeLorean was acquitted of all charges even though he was "caught on videotape discussing cocaine deals with government agents posing as drug dealers"); John Needham, *The Lure of Fame, Fortune; Bruce Cutler Defended a Mob Don; Now a High-Profile Case Brings Him West*, L.A. TIMES, Apr. 28, 1992, at E1 (noting that John Gotti, the head of the Gambino crime family, was acquitted all three times that Bruce Cutler defended him but convicted in a case in which the court barred Cutler from representation).

development of legal strategies and regard them as capable of determining outcomes across a wide spectrum of cases. Even though the best strategies are case-specific and must of necessity remain secret, entire publications are devoted to those that are general and that lawyers are willing to divulge.[12]

This Article argues that the strategic view captures the reality of the legal process while the conventional view misses it. The unpleasant implications that follow from the strategic view[13] explain in part why the conventional view has continued to dominate.[14] But perhaps an even greater impediment to recognition of the importance of legal strategy has been the lack of a coherent theory to explain how lawyers[15] can overcome both law and judicial discretion to generate the pattern of legal outcomes.

Legal strategy is curiously absent from the realm of legal theory.[16] Extensive accounts of the adversary process do not even mention it.[17] The law-and-society literature has explored differential case out-

12. *See generally* DAVID B. BAUM ET AL., ADVANCED NEGLIGENCE TRIAL STRATEGY 83-98 (1979) (providing a sample opening statement presented in an actual products liability case); XAVIER FRASCOGNA, NEGOTIATION STRATEGY FOR LAWYERS (1984) (providing "a comprehensive treatment of the various patterns, principles and techniques that govern negotiation in the context of a law practice"); SIMON N. GAZAN, ENCYCLOPEDIA OF TRIAL STRATEGY AND TACTICS 75 (1962) (describing the importance of a trial lawyer's knowledge of psychology to defense jury selection strategy); CHARLES ROTHENBERG, MATRIMONIAL LITIGATION: STRATEGY AND TECHNIQUES (1972) (discussing strategies for selecting a jury that would likely be more favorable to a plaintiff seeking divorce). There are also entire periodicals devoted to legal strategy. *See generally, e.g.*, BANKRUPTCY STRATEGIST, COMPUTER LAW STRATEGIST, CORPORATE TAX STRATEGY, THE JOURNAL OF STRATEGY IN INTERNATIONAL TAXATION, DEPOSITION STRATEGY: LAW AND FORMS, EMPLOYMENT LAW STRATEGIST, and INTELLECTUAL PROPERTY STRATEGIST.

13. *See infra* Part IV.

14. Another part of the explanation is the understandable reluctance of lawyers who engage in strategy to admit that they do so. The use of strategy is often condemned as unethical, *see infra* Part V, and the articulation of strategy tends to destroy its effect, *see infra* note 210 and accompanying text. Together, these two factors remove practicing lawyers—the persons most knowledgeable about strategy—from the discussion of its role in the legal system.

15. Sophisticated parties sometimes devise and manage the execution of legal strategies, but the large majority are devised and executed by lawyers. Our references solely to lawyers as the initiators throughout this Article should be understood to include parties to the extent of their participation.

16. *But see* 2 LASSWELL & MCDOUGAL, *supra* note 7, at 1067-73 (listing strategic decisions made by lawyers during litigation); Katz, *supra* note 7, *passim* (arguing that strategy operates in the realm of law in essentially the same manner that it operates in the realm of morality).

17. *See, e.g.*, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (distinguishing vigorous advocacy from "muddy[ing] the headwaters of decision"). *But see* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 82-90 (1949) (describing adversarial presentation in terms of strategy and tactics).

comes extensively,[18] but aside from the exploration of case-selection strategy initiated by Galanter,[19] has not attempted to explain how legal strategy could generate them.

Strategy plays a central role in three methodologies employed in law and economics: economic modeling, game theory, and gaming. But the strategy explored by law-and-economics scholars is fundamentally different from that practiced by lawyers. The economic actor either yields to the rule of law and seeks maximum advantage under it, or violates the rule and accepts the consequences.[20] The legal strategist, by contrast, often seeks to defeat the rule of law in a manner that avoids the penalty as well. To make the same point another way, the economic model treats the lawmaker—like the game designer—as omnipotent.[21] In that model, players cannot challenge the rules; they can only seek advantage under them. Yet a central thrust of legal strategy is to control legal outcomes despite the contrary intentions of legislators or judges.[22]

This Article seeks to explain the relationship between law, judges, and legal strategy, and in so doing, to offer a theory that explains what lawyers do when they strategize. The principal task, as we see it, is to generalize from what seems to be an infinite number of imaginative, clever, fact-specific maneuvers to a theory of what strategy is and how strategy can defeat both the rules of law and the judges who interpret those rules. As part of that task, we attempt to distinguish the strategic perspective from competing perspectives, to identify the materials from which lawyers construct their strategies,[23]

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18. *See* Donald Farole, *Reexamining Litigant Success*, 33 LAW & SOC'Y REV. (forthcoming Sept. 2000) (reviewing the literature). This literature often refers to "legal strategy" as the means by which skilled lawyers influence outcome, but it does not attempt to explain what the skilled lawyers *do* to influence outcome. *See, e.g.*, Steven C. Tauber, *The NAACP Legal Defense Fund and the U.S. Supreme Court's Racial Discrimination Decision Making*, 80 SOC. SCI. Q. 325, 326 (1999) (referring to "skillful legal argument" and "compelling legal argument").

19. *See supra* note 2; *infra* Part III.B.1. Legal strategy is not, of course, the only thing that may be in the black box driving outcomes.

20. Professor Cynthia Williams has dubbed this view the "law as price" view of law and criticized it as an attitude toward compliance. Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1267-68 (1998). The point we make here is unaffected by hers.

21. *See* Kaushik Basu, The Role of Norms and Law in Economics: An Essay of Political Economy 15-17 (Dec. 10, 1997) (unpublished manuscript, on file with the *Duke Law Journal*) (arguing that judges should be regarded as players in the economic game).

22. *See, e.g.*, Meacham Corp. v. United States, 207 F.2d 535, 544 (4th Cir. 1953) ("[T]hey employed the New York lawyers to find a way through the stone wall of the statutes . . . .").

23. *See infra* Part II.

to catalogue the variety of legal strategies they construct,[24] and to explore the implications of our theory.[25]

Our theory can be summarized as follows: "Law" has direct effect through the rendition and enforcement of judgments in actual cases and indirect effect through the anticipation of such rendition and enforcement in hypothetical cases. Each such case is a complex undertaking that may require hundreds of strategic decisions by the parties and generate an indefinite number of actual or potential legal issues and extra-legal problems. The "merits" of the case, as conventionally conceived, may be only one among them.[26] Each of those decisions, issues, and problems is potentially outcome-determinative. The odds that any one will determine the outcome are small. But cumulatively, the odds that some combination of these decisions, issues, and problems will determine the outcome are large. The legal strategist manipulates those odds in a game of skill, expanding and developing the array of decisions, issues, and problems in a manner calculated to confuse and ultimately overwhelm the opponent.[27] Even if the "merits" should ever reach a decisionmaker, it will be a decisionmaker identified by the game, and the "merits" will reach that decisionmaker in a form determined by the game.

We assume that courts are generally hostile to legal strategy and will seek to nullify it when they can. In contrast to prominent scholars who consider formalism a precondition to strategy,[28] we assume a thoroughly realist concept of law that leaves to judges a broad range of freedom in their decisionmaking. Still, we conclude that, within the wide range of what is culturally acceptable in legal outcomes, legal strategies are the primary determinants of who will decide cases, un-

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24. *See infra* Part III.

25. *See infra* Part IV.

26. Whether an issue constitutes the merits or is merely procedural or tangential is itself frequently the subject of legal strategy.

27. *See, e.g.*, Ann Davis, *How a Lawyer Turned Tables in Tobacco Case*, WALL ST. J., Oct. 4, 1999, at B1 (noting a speech by tobacco company lawyer William Hendricks III "about how prosecutors can be 'mortally wounded' when they decide to skirmish over legal and factual issues in court before indictments are handed up"); John Gibeaut, *Another Broken Trust*, A.B.A. J., Sept. 1999, at 40, 41 (describing the Indian trust case as "spinning out of control" as a result of discovery decisions and missed strategic opportunities). To the extent that cases are decided on the merits, they cannot "spin out of control" before their conclusion. Nor can an agreement to *give* discovery compromise them in any way.

28. *See, e.g.*, Daniel A. Farber, *Legal Formalism and the Red-Hot Knife*, 66 U. CHI. L. REV. 597, 604 (1999) ("A formalistic system puts a great premium on people (particularly lawyers) who are able to invent clever ways to manipulate the rules to produce desired outcomes."); Katz, *supra* note 7, at 595 ("Lawyers routinely exploit law's formality.").

der what constraints, and with what consequences. Written law is just one of several kinds of normative material the system uses, and it is not even the most important.

Part I of this Article uses the Texaco-Pennzoil case[29] to illustrate how the strategic perspective we advocate differs from the conventional perspective and then distinguishes our strategic perspective from that employed in law and economics. Part II of this Article begins by defining the terms we use to refer to various concepts of law and strategy. Part II then describes the fluid nature of legal doctrine that renders it displaceable by social norms and the prejudices of the decisionmaker and explains how the strategist exploits those norms and prejudices. Lastly, Part II notes the residual role of legal doctrine in a world dominated by strategy. Building on the theory propounded in Part II, Part III employs three main categories to catalogue the wide variety of activities referred to as "legal strategy": strategies that seek to persuade the judge, strategies that seek to constrain the judge, and strategies that seek to strip the judge—and the law—of all power over case outcome. Part IV identifies the principal implications of the theory we propose. Our theory explains why strategy can so dramatically affect legal outcomes, how strategy drives changes in law, the source and mechanisms of the set of variations in law commonly referred to as "legal culture," and why ingenuity and resources together are so effective in determining legal outcomes. Part V concludes that strategy, not law, is the principal determinant of legal outcomes, that awareness of strategy is likely to increase with growing public access to data on legal outcomes, and that legal systems should be redesigned consciously to minimize strategic opportunities.

At the same time, the theory we present does not depend upon a high level of indeterminacy in legal rules. Merely assuming that there is indeterminacy on *some* issues provides the flexibility necessary to render the ultimate outcomes of nearly all cases indeterminate. Small amounts of indeterminacy on each of the numerous issues that constitute a case combine to generate large amounts of potential variance in outcomes.[30]

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29. Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768, 784-87 (Tex. App.), *rev'd*, 481 U.S. 1 (1987).

30. One of us has argued elsewhere that "[t]he 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." Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1527 (1996). This "whole-case realism" puts a damper on what can be accomplished through legal strategy. It is also worth

I. THE STRATEGIC PERSPECTIVE DISTINGUISHED

The first step in understanding the strategic perspective we promote is to distinguish it from both the conventional perspective and the strategic perspective sometimes employed in law and economics.

A. The Texaco-Pennzoil Case as Illustration

To frame the conflict between the strategic and conventional views of the legal process, consider their application to the struggle between Texaco and Pennzoil over Getty Oil. Recall that, in the conventional view, legal problems are resolved by the application of law to the facts of cases. That view recognizes that legal procedures are necessary to make the application, and reluctantly acknowledges that such procedures can be outcome-determinative. But it assumes that judges control outcomes and that they decide the vast majority of cases on their "merits."[31]

A conventional account of the Texaco-Pennzoil case would proceed something like this: Pennzoil negotiated an "agreement in principle" to purchase Getty Oil. That agreement in principle was approved by Getty's board, but while the remaining terms of the written agreement were being negotiated and drafted, Texaco persuaded Getty to sell to Texaco rather than Pennzoil.[32] The legal theory of the Houston, Texas, action that resulted in the $10.53 billion judgment[33] was tortious interference with contract. After the parties presented the facts to the jury, the court charged the jury to decide whether Getty and Pennzoil "intended to bind themselves" to an agreement, whether Texaco interfered with that agreement, and if so, the amount of Pennzoil's damages.[34] The jury concluded that Getty and Pennzoil did intend to bind themselves to an agreement, that Texaco interfered with that agreement, and that Pennzoil was damaged in the amount of $7.53 billion dollars.[35] The jury assessed an additional $3 billion in pu-

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noting that the predictions of whole-case realism referred to are not made from law, but from community expectations regarding outcomes.

31. *See* authorities cited *supra* notes 3-5.

32. *See Texaco*, 729 S.W.2d at 784-87 (describing the facts of the case).

33. The amount of the jury verdict was $10.53 billion. The amounts of the verdict, judgment, and bond are referred to below in amounts that range from $10 billion to $12 billion. The variation results from a reduction in amount by the Texas Court of Appeals, an increase in the amount through the accrual of interest, and rounding by various commentators.

34. THOMAS PETZINGER, JR., OIL & HONOR 391-92 (1987).

35. *See Texaco*, 729 S.W.2d at 784.

nitive damages.[36] On appeal, the court reduced the punitive damages to $1 billion but upheld the remainder of the judgment.[37] The judgment supposedly bankrupted Texaco, which was then able to survive only by settling with Pennzoil for a cash payment of $3 billion.[38] The bankruptcy and $3 billion payment were the consequences of the application of law to the facts of the case.

The strategic view provides a markedly different account of the Texaco-Pennzoil litigation. In the strategic view, legal outcomes are the product of complex strategic interaction designed to control outcomes by manipulating the environments in which the outcomes are determined. Strategically-minded lawyers devise and execute plans for reaching their goals. The lawyers' roles are, in the strategic view, primary; they decide when, by whom, and under what constraints legal issues are resolved. The judges' roles are secondary; they decide only what they are asked to decide, and within the constraints imposed by the strategists.[39] Finally, the strategic view is phenomenological; it seeks to explain outcomes by examination of the strategies employed.

A strategic account of Texaco-Pennzoil would proceed something like this: Pennzoil initially brought three legal actions seeking to block Texaco's deal with Getty Oil. First, it sued Texaco and Getty in the Delaware Chancery Court seeking an injunction against the deal.[40] Second, while that lawsuit was pending, Pennzoil filed an antitrust action against Texaco in Tulsa, Oklahoma.[41] The Tulsa filing was remarkable because neither Texaco nor Pennzoil was incorporated or headquartered in Oklahoma. Commentators speculated that Pennzoil chose Tulsa because the atmosphere there had been poisoned against takeovers by Occidental Petroleum's recently completed takeover of Tulsa-based Cities Service Company,[42] or because of the political and economic connections of Pennzoil CEO Hugh Liedtke's family to

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36. *See id*.

37. *See id.* at 866.

38. *See* Allanna Sullivan, *Texaco's War with Pennzoil Ends Officially*, WALL ST. J., Mar. 24, 1988, at 3.

39. We do not discuss the strategic manipulation of juries because the conventional view already acknowledges it. On jury manipulation in *Texaco*, see Walter O. Weyrauch, *Unwritten Constitutions, Unwritten Law*, 56 WASH. & LEE L. REV. 1211, 1232-37 (1999).

40. *See* PETZINGER, *supra* note 34, at 241-42.

41. *See id.* at 248.

42. *See id.* ("[Pennzoil's] lawyers figured that the loss of independence by one of Tulsa's biggest and most-loved companies might dispose the judiciary unfavorably toward Texaco's megadeal.").

Tulsa.[43] (At the same time, Pennzoil surreptitiously financed another antitrust action against Texaco—this one by a small heating oil and gasoline distributor in a federal court in Providence, Rhode Island.[44]) Probably none of the parties thought that any of these cases would go to trial; they were "tactical cases" filed to generate leverage, what one commentator called "the inevitable postscript to a high-stakes merger game."[45] From a strategic perspective, Pennzoil was searching for a court receptive to its goal—unraveling Texaco's deal with Getty. Each new case Pennzoil filed was another chance to find a court inclined to grant Pennzoil a remedy. The particular cause of action was of secondary importance. If one lawsuit seemed promising, Pennzoil could pursue it and dismiss or abandon the others.

Pennzoil's third legal action sought an injunction in the Houston, Texas, court; it was this action that eventually gave Pennzoil its $10.53 billion dollar verdict against Texaco. The Houston court was a strategic afterthought, selected in a conversation between Pennzoil CEO Hugh Liedtke and his friend Joe Jamail, a Texas personal injury lawyer, after Pennzoil had filed the same cause of action in Delaware.[46] To file that cause of action in Texas, Pennzoil first had to dismiss the Delaware action. Pennzoil could dismiss as of right if it did so before Texaco filed an answer.[47] If Pennzoil did not dismiss before Texaco filed an answer, Pennzoil could have dismissed only with leave of court, which probably would not have been granted.[48] Had Texaco anticipated that Pennzoil would decide to switch courts, it could easily have filed that answer.[49] Texaco's failure to file that answer became known later as the "10 billion dollar boo boo."[50]

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43. *See, e.g.*, Walt Harrington, *Born to Run: On the Privilege of Being George Bush*, WASH. POST MAGAZINE, Sept. 28, 1986, at W16 (noting that Liedtke's father was Gulf Oil's chief counsel in Tulsa and that Liedtke raised money in Tulsa for an investment with George Bush).

44. *See* STEVE COLL, THE TAKING OF GETTY OIL 383 (1987) (referring to the Oklahoma and Rhode Island suits as "sponsored private antitrust suits"); PETZINGER, *supra* note 34, at 249 (reporting that Pennzoil had given Fairlawn Oil Service $50,000 to file the Rhode Island case).

45. COLL, *supra* note 44, at 384.

46. *See id.* at 385-86.

47. *See* PETZINGER, *supra* note 34, at 261.

48. Leave probably would not have been granted for two reasons. First, Texaco would have filed an answer before the hearing, thereby joining the issue. Second, Pennzoil's dismissal was merely for the purpose of refiling in another court after losing the initial hearing in the Delaware court—an obvious instance of forum shopping.

49. *See* COLL, *supra* note 44, at 387 (discussing the failure to file the answer and noting that an experienced attorney could have dictated it in thirty minutes).

50. *Id.* at 386.

Pennzoil made the strategic decision to capitalize ruthlessly on Texaco's error. Deliberately ignoring a local custom that required Pennzoil to give Texaco notice of its intent to dismiss and an opportunity to prevent dismissal by filing the answer, Pennzoil dismissed without prior notice to Texaco.[51] Fifteen minutes later, Pennzoil refiled in Texas.[52]

The strategic perspective recognizes the pivotal importance of Pennzoil's decision not to give notice. If Pennzoil had given notice, Texaco almost certainly would have filed an answer. If Texaco had filed an answer, the case would have remained in Delaware where Pennzoil probably could not have won[53] and certainly could not have won more than about $800 million.[54] The conventional perspective regards Pennzoil's decision as a matter of little or no importance to the outcome. Under the conventional perspective, the decision permitted Pennzoil to proceed in a different court, but that court would, under conflicts rules, be bound to apply the same law.[55]

The Texas case was assigned to Judge Anthony Farris.[56] Two days after the assignment, Joe Jamail, then Pennzoil's lead counsel in the case, donated $10,000 to Judge Farris' reelection campaign.[57] Texaco's motion to recuse on the basis of the contribution was denied.[58]

51. *See* PETZINGER, *supra* note 34, at 261 (referring to the rule permitting dismissal without notice as "seldom-used").

52. *See id.* at 384 (characterizing the decision to bring the Texas case as virtually an afterthought).

53. Pennzoil's case has generally been acknowledged to have been weak on the merits and to have succeeded only because it was tried to a populist Texas jury. *See, e.g.*, Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 834-40 (1990).

54. *See, e.g.*, Texaco Inc. v. Pennzoil Co., 626 F. Supp. 250, 255 (S.D.N.Y.), *modified*, 784 F.2d 1133 (2d Cir. 1986) ("This Court therefore believes that the compensatory damages which flow from this breach of contract, tortiously induced by Texaco, should in no event exceed $800 Million.").

55. Pennzoil's case against Texaco proceeded in Texas on the assumption that New York law applied. *See* Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768, 858 (Tex. App.), *rev'd*, 481 U.S. 1 (1987) ("In the instant case, there is no dispute that the governing substantive law was New York law."). The strategic view recognizes that conflict of laws is only a marginally useful concept. Texas courts might state that they apply New York law, but they respond principally to the factors described in Part II.B, which are local. *See* Weyrauch, *Unwritten Law*, *supra* note 39, at 1233.

56. *See* PETZINGER, *supra* note 34, at 282.

57. *See id.* Jamail contributed another $10,000 to the campaign of the administrative judge with supervisory power over Farris. Jamail's other contributions—to seventeen other judges—totaled less than $13,000. *See id.* at 288.

58. *See id.* at 290-91.

Jamail's generosity seemed to be rewarded with an almost continuous stream of rulings in Pennzoil's favor.[59] Because such contributions do not meet the doctrinal standards of a bribe, conventional theory maintains the fiction that they have no impact on outcomes,[60] but the actions of the parties show that they regarded the contribution as strategically important.[61]

Still considering Pennzoil's case weak as to liability at the close of evidence, Texaco chose not to dignify it by presenting evidence regarding damages.[62] Texaco's strategy was carefully considered[63] and is not without its defenders today.[64] But its effect was to leave the jury with only Pennzoil's evidence regarding damages once they had found liability.[65] Commentators generally regard the $7.53 billion compensatory portion of the verdict as grossly in excess of Pennzoil's actual damages[66] and attribute it to what can be seen in hindsight as Texaco's strategic error.[67] The conventional perspective, by contrast, would mask Texaco's strategic disaster with the homily that if each side in an adversary proceeding presents the evidence that is to its advantage, the truth will emerge.

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59. *See id.* at 285-374; *id.* at 289 ("[E]very single pretrial ruling that Miller [Texaco's lead attorney] could think of had gone Pennzoil's way.").

60. *But see generally* Daniel H. Lowenstein, When is a Campaign Contribution a Bribe? (1996) (unpublished manuscript, on file with the *Duke Law Journal*) (taking the position that the kind of campaign contribution made by Jamail and accepted by Farris is arguably criminal).

61. *See* PETZINGER, *supra* note 34, at 288-91 (describing the court fight over the contribution).

62. *See id.* at 388-89.

63. *See id.* at 384-85, 389 (discussing Texaco's cautious decision).

64. *See, e.g.*, Janet Elliott, *Lasting Impact; Legal Anomaly; A Look Back at the Real Trial of the Century*, TEX. LAW., Dec. 18, 1995, at 1 (describing and defending the decision).

65. *See* PETZINGER, *supra* note 34, at 403-04 (describing the jury deliberation on damages).

66. *See id.* at 321 (describing the illogic of Pennzoil's damage calculation and referring to it as "outrageous").

67. *See, e.g.*, Joseph Sanders, *From Science to Evidence: The Testimony of Causation in the Benedectin Cases*, 46 STAN. L. REV. 1, 56 n.248 (1993) ("In hindsight, Texaco's failure to present damages evidence was unwise and could only be justified by a particularly uncomplimentary view of the jury's decisionmaking capacity."); *How Texaco Lost Court Fight*, N.Y. TIMES, Dec. 19, 1985, at D1 (stating that Texaco attorney Richard B. Miller acknowledges that his decision not to put on damage evidence "has since drawn a torrent of criticism"); Tamar Lewin, *Pennzoil-Texaco Fight Raised Key Questions*, N.Y. TIMES, Dec. 19, 1987, at A44 (quoting Columbia law professor Harvey Goldschmid as saying that "[o]ne area that was obviously a mistake was Texaco's failure to deal with evidence of damages at trial"). *But see* Texaco Inc. v. Pennzoil Co., 729 S.W.2d 768, 859-63 (Tex. App.), *rev'd* 481 U.S. 1 (1987) (concluding that the damage evidence presented by Pennzoil was sufficient to support the verdict).

After the verdict, Texaco launched a media campaign seeking to convince the public that Texaco "could crumble under the weight of the history-making verdict unless [the Texaco trial judge] lifted the threat."[68] The obvious purpose of the campaign was to affect the courts' future rulings, even though the conventional perspective recognizes no means by which that could occur.[69]

As the court was poised to enter a judgment that would place liens on property owned by Texaco, Texaco transferred one of the world's largest refineries and a chemical plant to subsidiaries that would not be liable for the judgment.[70] The conventional analysis of such a transfer is that it is fraudulent and voidable if Texaco made it with the "actual intent to hinder, delay, or defraud" Pennzoil, or if Texaco made it in exchange for less than "reasonably equivalent value" while insolvent.[71] In a creditor's action, the court would declare it void. The conventional analysis was, however, of little relevance because the mere transfer itself accomplished Texaco's objective: to keep record title clear of the judgment lien that would automatically take effect on entry of the judgment, and thereby prevent Pennzoil from gaining potentially outcome-determinative leverage. Pennzoil would have to take some additional legal action to nullify the transfer before its lien could attach.

Texaco's remaining property in the state continued to be subject to the threat of such liens. As a result, Texaco again faced a crisis on the day the Texas judge was to decide whether to impose liens on Texaco's remaining property within the state. Fearing that the judge might issue an adverse ruling from the bench, Texaco put in place an elaborate mechanism to enable it to obtain an automatic stay of such a ruling by filing for bankruptcy in White Plains, New York, during the few minutes between the judge's announcement of his ruling and Pennzoil's recordation of it.[72] Imposition of the liens, which would

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68. PETZINGER, *supra* note 34, at 417.

69. The campaign appears to have made an impression on Chief District Judge Brieant. *See* Texaco Inc. v. Pennzoil Co., 626 F. Supp. 250, 252 (S.D.N.Y.), *modified*, 784 F.2d 1133 (2d Cir. 1986) (describing the court's receipt of numerous letters from Congressmen and Senators, along with amicus curiae briefs from several states).

70. *See* PETZINGER, *supra* note 34, at 430; *see also id.* at 434 ("A Texaco executive later swore in an affidavit that the refinery switch was a long-planned move intended as part of a plan to consolidate the assets of Getty Oil.").

71. *See* TEX. BUS. & COM. CODE ANN. § 24.005 (West 1999) (outlining, in the Uniform Fraudulent Transfer Act, situations in which debtors' transfers to creditors are fraudulent).

72. *See* Thomas Petzinger et al., *High-Stakes Poker: Texaco and Pennzoil, with Truce Expiring, Again Talk of Settling*, WALL ST. J., Mar. 14, 1986, at A1.

have occurred immediately on recordation, might have severely disrupted Texaco's business, giving Pennzoil sufficient leverage to force Texaco to abandon its appeals.[73]

When the Houston, Texas, court entered judgment for Pennzoil (without imposing the liens), Texaco instead responded by filing a civil action in the United States district court in White Plains, New York. By that action, Texaco sought to remove authority over the case from the Texas state court and reverse the result.[74] The strategic theory was that the Texas courts were prejudiced in favor of Pennzoil (the Texas company) and Joe Jamail (a personal friend of the judge). In contrast, the New York courts would presumably be prejudiced in favor of Texaco (the New York company), and the petition would be presented by a lawyer who knew the New York judge personally.[75] Initially, the strategy worked. The New York judge reduced Texaco's appeal bond from $11 billion to $1 billion,[76] opined that the Texas judgment was several times larger than what was appropriate,[77] and suggested that if the Texas court did not set it aside, he might.[78] Pennzoil's appeal of the New York ruling to the Second Circuit was accompanied by another intense lobbying campaign in both the state capitals and Washington.[79] The Second Circuit affirmed the bond reduction.[80]

On April 6, 1987, the Supreme Court of the United States reversed, ruling that Texaco would have to comply with the Texas $11

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73. Bankruptcy would have been less effective if filed after imposition of the liens. For example, the liens would have constituted a default in some of Texaco's obligations, activating contractual default rates of interest.

74. *See Texaco Inc.*, 626 F. Supp. at 251-52; PETZINGER, *supra* note 34, at 438.

75. *See* PETZINGER, *supra* note 34, at 440.

76. *See Texaco Inc.*, 626 F. Supp. at 262.

77. *See id.* at 255 ("This Court therefore believes that the compensatory damages which flow from this breach of contract, tortiously induced by Texaco, should in no event exceed $800 Million . . . .").

78. *See* PETZINGER, *supra* note 34, at 448 ("If Texaco failed to reverse the actual judgment in the Texas appellate courts, the [New York federal judge] indicated he might do it himself, taking the entire case into his own hands."); *see also Texaco Inc.*, 626 F. Supp. at 259 ("[E]ven if the Judgment ripened into a final judgment in this vast amount of money, and assuming all decisions down the road go against Texaco, Texaco would still have the federal claims that are pleaded in this action, which it could litigate on the merits."). In the New York action, Texaco pled five constitutional and statutory bases for the district court to nullify the Texas judgment. *See id*. at 251. To concern oneself with whether the claims were "right" or "in accord with the law" is to miss the point. A technically adequate basis exists for virtually any action a court may choose to take. The only effective limit is the cultural acceptability of the results.

79. *See* PETZINGER, *supra* note 34, at 449.

80. *See* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986).

billion bond requirement to pursue its appeal further.[81] Although Texaco could have posted the bond[82] or waited for a ruling on the bond from the Texas Court of Appeals, it chose instead to file bankruptcy in White Plains, New York.[83] The immediate effect of the bankruptcy was to permit Texaco to continue pursuing its appeals without liquidating assets or posting the bond.[84]

Absent a bankruptcy filing, Texaco could have pursued its appeals only by posting an $11 billion bond; with the bankruptcy filing, Texaco was able to pursue its appeals without posting any bond at all. The conventional view justifies these starkly different entitlements with the theory that, first, bankrupt companies present different policy considerations that require different outcomes; and second, the courts control access to bankruptcy through the doctrine barring "bad faith filings."[85] To put it another way, Texaco did not have a choice between posting the bond and filing bankruptcy; if Texaco was not bankrupt, it had to post the bond, but if it was bankrupt, it did not.

That perspective obscures the strategic nature of Texaco's decision. Texaco was not "bankrupt" in any common sense of the term. Its net worth was probably in the range of $22 billion to $26 billion—easily enough to pay the $10 billion judgment.[86] To justify the bankruptcy, Texaco launched a public relations campaign that one ob-

81. *See* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 9 (1987) .

82. *See* KEVIN J. DELANEY, STRATEGIC BANKRUPTCY 137-41 (discussing Texaco's ability to post the bond). Although the amount of the bond exceeded world bonding capacity at that time, Texaco could have liquidated assets sufficient to post the bond in cash. And although those assets might not have fetched the best possible price under the circumstances, there is no suggestion that the proceeds of sale would have been insufficient to meet the full amount of the bond. *See infra* note 86. Texaco had 17 months from the verdict in November 1985 to the bankruptcy filing in April 1987 to initiate such sales.

83. *See* DELANEY, *supra* note 82, at 146 ("Texaco's favorable balance sheet left many performing 'linguistic contortions' trying to explain why the company was in bankruptcy.").

84. *See id.* at 144-46.

85. *See, e.g.*, Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 984-89 (1991) (discussing the doctrine barring bad faith filings and whether Texaco filed in good faith).

86. *See* Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1155 (2d Cir. 1986) ("In the present case there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full."); DELANEY, *supra* note 82, at 146 (projecting Texaco's liquidation value somewhere between $22 billion and $26 billion); PETZINGER, *supra* note 34, at 441 (estimating a $26 billion net worth); Thomas C. Hayes, *Pennzoil's Chances Unclear*, N.Y. TIMES, Apr. 14, 1987, at D1 ("Pennzoil and Texaco agreed in court documents filed in Houston last week that Texaco's total assets, more than $34 billion, were more than adequate to pay $10 billion to Pennzoil if Texaco loses its appeals.").

server dubbed a "linguistic strategy."[87] In that campaign, Texaco argued that it was financially *impractical* for it to post the bond, even though it was financially *possible* for it to do so.[88] For reasons never made public, but which may also have been of a strategic nature, Pennzoil did not raise the bad faith filing issue in the bankruptcy case.[89]

The substantive law of bankruptcy offered Texaco no advantage against Pennzoil; because Texaco was solvent, bankruptcy law entitled Pennzoil to payment in full.[90] The predominant and perhaps sole[91] purpose of the bankruptcy appears to have been to create a delay that would enable Texaco to pursue its appeals.[92] Bankruptcy's "automatic stay" prevented Pennzoil from enforcing its judgment while the case remained pending.[93] If it remained pending long enough, Texaco might be able to finish its appeals, and in the meantime, Pennzoil would get no money.[94]

It was also possible that something benefiting Texaco might happen during the delay, and something almost did. The Securities Exchange Commission "gave Texaco a big boost" in its position by announcing that it would file a brief in the Texaco appeal arguing that

87. DELANEY, *supra* note 82, at 167-68.

88. *See id.* at 167 ("Texaco continually argued that paying the damages was *not* financially impossible, but rather 'financially impracticable.'").

89. One possibility was fear that litigation over whether the filing was in good faith would itself delay the bankruptcy case. That appears to have occurred in the Manville bankruptcy. *See In re* Johns-Manville, 42 B.R. 654, 655 (Bankr. S.D.N.Y. 1984) (denying leave to take an interlocutory appeal regarding the issue of good faith filing because the appeal itself would further delay the case).

90. *See* 11 U.S.C. § 1129(b)(2)(B) (1994) (giving unsecured creditors absolute priority over shareholders as a condition for confirmation of a chapter 11 plan).

91. A second objective may have been to change fora, and with it, judges. But at this late stage of the litigation, there was probably little that a new judge could have done for Texaco except delay. *Cf.* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 24 (1986) (Marshall, J., concurring) ("[T]he odor of impermissible forum shopping . . . pervades this case.").

92. *See* DELANEY, *supra* note 82, at 146 ("Even Texaco admitted that the bankruptcy filing was mainly a strategic effort to delay paying the Pennzoil court award."); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295, 324-29 (1989) (suggesting that Texaco's managers sought delay in bankruptcy as a means of leveraging releases of their liability to Texaco's shareholders for the events leading to the judgment).

93. *See* 11 U.S.C. § 362(a) (1994) (providing that petitions filed under §§ 301, 302, and 303 of this title automatically operate as a stay).

94. *See* DELANEY, *supra* note 82, at 154-59 (explaining the leverage Texaco gained by its bankruptcy filing).

Pennzoil had broken SEC rules in its bid for Getty.[95] Ultimately, despite the SEC's support, the court ruled against Texaco.

The final resolution of the case—settlement for a cash payment of $3 billion—was precipitated by a procedural decision of the bankruptcy court. After the Texas Supreme Court upheld the verdict, the bankruptcy court modified Texaco's exclusive right to file a Chapter 11 plan. Such modification effectively permitted Pennzoil to settle the case with the creditors and equity committees if they could not settle it with Texaco's management.[96] Faced with the possibility that the case would be settled without them, Texaco's managers settled quickly. Even so, the settlement was well below the expected value of the judgment in litigation under an economic analysis,[97] suggesting that other, not-yet-revealed factors held down the amount.[98]

By condemning legal action taken solely for the purpose of delay—a behavior the courts have no practical means of controlling—the law conveniently escapes responsibility for Texaco's strategic success in delaying enforcement of Pennzoil's judgment. Either Texaco had some reason other than delay for filing the bankruptcy (which

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95. *Id.* at 149.

96. *See In re* Texaco Inc., 90 B.R. 622, 628 (Bankr. S.D.N.Y. 1988):

> The settlement was arrived at when this court permitted the equity holders committee and the creditors committee to negotiate directly with Pennzoil, with the understanding that if a settlement figure was mutually agreed upon, the court would terminate Texaco's exclusive right to propose a plan of reorganization and would entertain a competing plan proposed by the statutory committees and Pennzoil.

97. *See* Mnookin & Wilson, *supra* note 92, at 298 (noting that Texaco's only chance for reversal of the judgment was the Supreme Court of the United States, and noting that, "[a]ll things considered, it is difficult to see how either side could have thought that the odds of the Supreme Court granting certiorari were better than fifty-fifty"). Because Texaco could have been liquidated for enough money to pay all of its creditors in full, Pennzoil had the right under bankruptcy law to be paid the full amount of its judgment with interest. *See* 11 U.S.C. § 1129(a)(7) (1994) (establishing the "confirmation of plan" with respect to each impaired class of claims or interests); *id.* § 726(a)(5) (explaining that property of the estate shall be distributed "in payment of interest at the legal rate from the date" the petition was filed). Thus, the only way to derive an expectancy value for the judgment of less than half the more than $10 billion owed at the time of the settlement was to assume that the managers of Texaco could and would destroy the company before allowing it to pay the expectancy value of the company in settlement. *See* Mnookin & Wilson, *supra* note 92, at 324-29 (suggesting that Texaco's managers were willing to destroy the company because of their conflict of interest with it, but not explaining why the bankruptcy court would have allowed such action).

98. Another possibility is simply the fear that circumstances not yet known to Pennzoil would prevent its realization on the judgment. In a world where outcomes are determined by legal doctrine, that would be unlikely, but not in a world where outcomes are determined principally by strategy.

might be known only to Texaco)[99] or Texaco's success was achieved unethically and illegally (in which case Pennzoil is at fault for not making appropriate objections).[100] By contrast, the strategic perspective acknowledges that illegal strategies work in circumstances where the remedies available on paper do not.

The conventional view obscures the determinants of the outcome in Pennzoil versus Texaco by seeing the outcome as merely a question of the "proper" interpretation of ambiguous events—was the original agreement in principle between Pennzoil and Getty a contract?[101] The interpretation itself was an unverifiable process occurring in the minds of judges and jurors and hence was beyond effective examination or criticism.

By contrast, the strategic view demonstrates that the outcome in Pennzoil versus Texaco was highly serendipitous, and that each side had more than one opportunity to win by taking the right action at the right time.[102] Texaco might have won by answering the Delaware complaint and objecting to voluntary dismissal, by presenting damage evidence to the Texas jury, or by reincorporating in New York so it could remove the Texas action to federal court. Pennzoil might have won by persuading the court to dismiss Texaco's bankruptcy as a bad faith filing[103]—leaving Texaco at its mercy—or by demanding its right

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99. Texaco was having difficulty placing its commercial paper, but that liquidity crisis was one of its own making.

100. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 cmt. (1999) ("Delay should not be indulged . . . for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.").

101. Applying the conventional view, Professor Ansaldi determined that the case was incorrectly decided and blamed the error on the jury. *See* Ansaldi, *supra* note 53, at 834.

102. *See, e.g.*, DELANEY, *supra* note 82, at 158 (noting that Texaco's $10 billion judgment was "treated throughout the [bankruptcy] case as 'incorrect,' 'absurd,' and a bargaining chip").

103. *See id.* ("Whether Texaco ever belonged in bankruptcy remains a contentious issue."); Ponoroff & Knippenberg, *supra* note 85, at 938-39:

> The most notorious of the litigation tactic cases involve petitions filed with the evident intention to circumvent state law requirements regarding the posting of a supersedes bond as a condition to appealing an adverse judgment. Texaco's much-publicized Chapter 11 filing in the wake of Pennzoil's nearly $12 billion judgment against it is certainly the most striking example of this type of situation.

Panel Discussion and Question-Answer Session, 61 U. CIN. L. REV. 569, 574 (1992) (quoting the statement of law professor John D. Ayer that he could not "think of any conventional theory at all under which Texaco deserved to be in bankruptcy when you recognize that they could have paid every penny of that judgment as it was originally cast, and so there would have been money left over for equity").

to absolute priority for the full amount of its judgment in the bankruptcy court.[104]

Settlement of the Texaco-Pennzoil case for about a third of the amount awarded by the jury is consistent with the conventional view that Pennzoil had a weak case on the "merits"—the facts and the law. But the strategic analysis set forth here shows that to be mere coincidence. Pennzoil had overcome most of the conventional weaknesses of its case by winning the judgment and carrying it through the first two levels of appeal.[105] Had it pursued the bankruptcy case, it might have taken ownership and control of Texaco, a $26 billion prize.[106] The weaknesses in Pennzoil's case that remained and shaped the terms of settlement had little or nothing to do with the merits of its initial case as seen from the conventional perspective.

B. *Legal Strategy in Law-and-Economics Theory*

As noted in the Introduction, the kind of legal strategy we seek to explain—the kind practiced by lawyers—is curiously absent from current legal theory. Strategy does play a prominent role in three branches of economic theory: economic modeling, game theory, and gaming. Only in the third, little-used branch of the three applications, however, does the strategy employed at all resemble the type practiced by lawyers and explored in this Article.

Economic modeling is grounded in the conception of persons as "rational maximizer[s] . . . of 'self-interest.'"[107] The choices these rational maximizers make are often strategic—in the sense that they are plans for reaching goals—and they are commonly referred to as

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104. Pennzoil might have implemented this strategy during the bankruptcy case by asserting that Texaco was insolvent and by demanding, as the real party in interest, the right to control Texaco and thus determine its legal strategy during bankruptcy. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 742-47 (1993) (presenting empirical evidence that creditors succeeded in exercising hegemony over the management of insolvent debtors during reorganization). Texaco may have had difficulty arguing its solvency for this purpose because it had to argue substantially the opposite on the issue of bad faith.

105. By the time of the settlement, only a petition for certiorari to the Supreme Court remained pending. *See* Thomas Petzinger Jr., *Texaco Loses Appeal on Huge Judgment as Texas Supreme Court Refuses to Review Case*, WALL ST. J., Nov. 3, 1987, at A3 ("The Texas Supreme Court affirmed Pennzoil Co.'s $10.3 billion judgment against Texaco Inc., leaving Texaco one last forum—the U.S. Supreme Court—to reverse the devastating claim.").

106. *See supra* note 86 (discussing the liquidation value of Texaco).

107. RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW 3-4 (5th ed. 1998).

strategies.[108] But these models allow for only a single actor facing a choice among alternatives. Because the models lack interactivity—strategist against strategist—the strategies employed are simple and usually of limited interest in and of themselves.

To accommodate interactivity, law-and-economics scholars turn to a second methodology: game theory. Game theory posits the existence of two or more rational maximizers who compete with one another for desired outcomes.[109] The theorist "solves" the game by determining the optimal moves for each player and proving those moves to be optimal.[110] Economically-inclined scholars have used game theory extensively in studying the incentives that particular rule patterns create and the strategies that will best exploit them.[111] As Rasmussen states:

> Modern game theory has advanced law-and-economic analysis past the Coasian notion that parties, if they are well informed and transaction costs are low enough, will always reach the correct result. Any proposal for the creation of a default rule now has to be concerned with strategic obstacles that will impede a party from making the optimal choice.[112]

Game theory is effective in analyzing interactions involving two, or at most three, types of players in games where players can choose between only two, or at most three, alternatives.[113] To analyze more

108. *See, e.g.*, Basu, *supra* note 21, at 13 ("The standard view of law in economics and related social sciences is of something that changes the set of strategies open to an individual or the 'payoff function' of the individual."); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1834-35 (1998) (referring to opportunistic behavior of a party in an economic model as "strategic").

109. *See generally* ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1989) (describing game theory).

110. *See id.* at 26-27.

111. *See, e.g.*, DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW *passim* (1994) (outlining the various applications of game theory in the law).

112. Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 111 (1992) (footnote omitted). For examples of articles considering the strategic implications of rules, see Ian Ayers & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992) (showing how transaction costs affect the choice of default rules); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (analyzing strategic incentives in bargaining); Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 279 (1998) (discussing the problems of private information).

113. Multiple-player games are possible. *See* Barry E. Adler, *A Re-Examination of Near-Bankruptcy Investment Incentives*, 62 U. CHI. L. REV. 575, 583 (1995) (describing a five-player

complex interactions, a few economically-minded scholars turn to a third methodology: gaming.[114] That is, rather than attempt to discover a comprehensive solution to the game, the researcher conducts plays of the game and evaluates the strategies employed by the players. Thus, for example, even though game theorists cannot prove "tit for tat" to be an optimal solution to a repeated prisoner's dilemma game, the strategy has defeated all others in empirical trials.[115]

Though gaming holds considerable promise for doing so,[116] economic models have not yet managed to replicate the rich strategic interaction observable in legal practice. Almost invariably, economic models define in advance, with as little ambiguity as possible, both the goals of the strategists and the rules for interaction. That is, they adopt what we have referred to as the strictly formalist version of the conventional view.[117] Usually, the economist's purpose is not to understand the process of strategizing, but to determine the pattern of outcomes that the strategic interaction will generate. Though surprises can occur within the restricted confines of these models, they are uncommon.

By contrast, lawyers conceive and execute their strategies in an environment in which the rules[118] for interaction are unclear and constantly in flux. The challenge to the lawyers in *Texaco* was not to determine how best to respond to a rule pattern in certain conditions. It was to determine how best to respond in a context in which the rules were highly ambiguous and the conditions not entirely knowable. In practice, the strategist often succeeds by transcending what previously appeared to be the rules of the interaction. The emphasis is on crea-

game in the bankruptcy context). This is practical only if all additional players are identical to one of the two or three types.

114. *See generally* CATHY STEIN GREENBLAT, DESIGNING GAMES AND SIMULATIONS (1988); SIMULATION AND GAMING (journal devoted to the subject).

115. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520-22 (1994) (describing both theoretical and empirical research).

116. Gaming does not necessarily require complete specification of the model in advance. The model can permit human decisionmakers to do anything their human counterparts could, though the recordkeeping for such a game can be burdensome. *See, e.g.*, LYNN M. LOPUCKI, PLAYER'S MANUAL FOR THE DEBTOR CREDITOR GAME 5 (1985) (using human decisionmakers as judges).

117. *See supra* notes 2-3 and accompanying text.

118. "Rules" as we use the word here is a reference not to rules of law but to the rules ultimately governing the interaction.

tivity, imagination, and flexibility. Surprises are routine.[119] In addition, the environment in which the lawyers work is more complex than the environments of game theory and gaming because client goals are multifaceted, imperfectly known, and subject to change, in contrast to economic models in which the single goal is to maximize utility.[120] Consequently, economic models fail to capture the crucial strategic element of legal practice.

II. THE FOUNDATIONS OF LEGAL STRATEGY

A strategy is a plan for action intended to accomplish some goal.[121] It presumes some "field of play"—people, data, or things that can be rearranged. The chess strategist arranges pieces by sequences of moves. The war strategist arranges troops, weapons, and propaganda. In either arena, the first task of the strategist is to understand the people, data, and things the strategist can manipulate directly.

The legal strategist works with decisionmakers, facts, legal cultures and law. The decisionmakers are judges, juries, arbitrators, administrators, boards, commissions, lawyers, and parties. The facts are events, both past and future. Those events morph into statements of fact, evidence, testimony, records, and finally the "facts" stated in court opinions. Legal cultures are sets of practices, perceptions, and expectations that differ from group to group and are often outcome-determinative.[122] The "law" is perhaps the most difficult of the four elements to conceptualize for the purpose of a theory of legal strategy. Misunderstanding the nature of law has probably been the principal impediment to the integration of strategy into legal theory. If law were what some conventional theorists conceive it to be—a set of written rules that specify comprehensively the appropriate outcomes

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119. *Cf., e.g.*, 2 LASSWELL & MCDOUGAL, *supra* note 7, at 1046-47 (1992) (noting the role of creativity in legal strategy).

120. As Professor Nussbaum stated:

> A commitment to the commensurability of all an agent's ends runs very deep in the Law and Economics movement. Even when a plurality of distinct ends is initially recognized, the underlying view that agents are "maximizers of satisfactions," and that satisfaction is something that varies in degree rather than in kind, leads the theorist rapidly back to the idea that distinctions among options should be understood in terms of the quantity of utility they afford, rather than in terms of any basic qualitative differences.

Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199 (1997).

121. *See supra* note 7 (defining "strategy").

122. *See infra* Part IV.C (discussing the rise and fall of local legal cultures).

for various fact patterns—legal strategy could have far less impact on outcomes.

A. *Definitions of Law*

By what is probably the most common definition, "law" is a set of rules and standards promulgated by the state to govern conduct. In the American legal system, these rules and standards appear in statutes, court rules, court opinions, regulations, ordinances, and the like. The definition excludes social norms (the rules that spontaneously arise in groups of all sizes),[123] oral legal traditions, and private contracts,[124] even though the sanctions for violation of any of the three may be severe. This definition includes the "law on the books" whether or not it is in fact honored in the operation of the legal system. In the remainder of this Article, we will refer to the law thus described as "written law" or as "legal doctrine."[125]

Two leading Realists, Oliver Wendell Holmes, Jr. and Karl N. Llewellyn, used the word "law" to refer to what courts or other participants in the legal system will do in fact. As Holmes put it:

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deduc-

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123. The term "social norm," as we use it here, includes the "sense of appropriateness developed in the [legal] profession and the public over time [but not expressed in legal rules]" that Dworkin refers to as "legal principles." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 40 (1977).

124. Broader definitions often include one or more of these. *See, e.g.*, W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS 2 (1999) ("The law of the state may be important, but law, *real* law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction."); Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies"*, 103 YALE L.J. 323, 326-29 (1993) (including oral legal traditions within the meaning of "law"); Weyrauch, *Unwritten Law*, *supra* note 39, at 1236 (suggesting that overreliance on written law "by Texaco's lawyers contributed to, if not caused, the loss of the case" in *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.), *rev'd*, 481 U.S. 1 (1987)).

125. Some writers include written law within the category of social norms. *See, e.g.*, William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 546 ("For the present, I encompass all rules and standards, without regard to their origins or means of enforcement [within the definition of social norm]. The legal system provides important norms and usually stipulates sanctions for deviant behavior.").

> tions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[126]

Llewellyn expanded Holmes's definition to include the actions of officials, including lawyers.[127] This conception of law ignores "rules of law" that are not enforced and ascribes to those that are enforced the same meaning given them by the officials. So, for example, if the rules of court provide that "if a party fails to respond to a request for admission within thirty days, the matter is deemed admitted," but the judges routinely extend the thirty-day period after it has expired, under the conception of law discussed here, failure to respond timely to a request for admission operates as an admission only if the court fails to excuse it. Using Pound's terminology, we will refer to this conception of law as the "law in action."[128]

Law, social norms, and physical constraints are, as means of social control, largely interchangeable.[129] Hence, we would add to Holmes's and Llewellyn's definitions of law the effects of social norms and physical constraints to the extent they contribute to legal outcomes. The resulting conception of law, which we refer to as "delivered law,"[130] attempts to link fact patterns with outcomes in a manner that is sensitive to "how much the [legal] 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."[131] Delivered law is the pattern of outcomes the legal system delivers. To continue with the preceding example, if judges routinely extend the thirty-day period for responding to requests for admission, then the

126. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

127. *See* LLEWELLYN, *supra* note 1, at 3:

> 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.*

128. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 19 (1910) (describing the latter as "adjusting the letter of the law to the demands of administration in concrete cases").

129. *See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 488-91 (1997) (describing the use of law, social norms, and physical constraints in the construction of law-related systems).

130. *See* LoPucki, *supra* note 30, at 1551-55 (explaining the term "delivered law").

131. *Id.* at 1551.

delivered law is that responses to requests for admission are required only at such time as the court may fix.

As one of us has argued elsewhere, the lawyers, judges, and other officials who regularly interact in the processing of cases in a legal community forge and share mental models of the law that are both different from and simpler than the written law.[132] They process routine cases according to the model, referencing the written law only when the model is challenged. For example, the law on the books provides complex, subjective tests for determining whether loans from insiders must be subordinated under a Chapter 11 plan. In the district in which one of us practiced, the delivered law was that debts owing to insiders could not be subordinated. At the same time, the delivered law of another district was that debt owing to insiders had to be subordinated. The lawyers and judges who processed cases in each district probably shared a mental model of the law that validated the law delivered in their district.[133] That model was nowhere reduced to writing. We will refer to the law contained in these mental models as "the law in lawyers' heads."[134]

Finally, oral legal traditions that parallel but do not coincide with the other forms of law arise spontaneously in social groups.[135] These traditions, which deal with virtually every subject touched by state-made law and many subjects that are not, are in large part the same phenomena discussed by sociologists as "social norms,"[136] and sometimes discussed by economists as "spontaneous" or "private" ordering.[137] Weyrauch and Bell[138] and others,[139] most notably Robert Ellick-

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132. *See id.* at 1516-20; *see also* Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 688 n.24 (1985) (arguing that "easy cases" do not exist in written law, but seem to exist "because the lawyers are socialized into and are part of a way of life that defines the cases as easy").

133. *See* LoPucki, *supra* note 30, at 1504-05 (presenting this example in more detail).

134. *See id.* at 1500.

135. *See* Weyrauch & Bell, *supra* note 124, at 326-33. *See generally* Weyrauch, *supra* note 39 (describing the unwritten rules governing three isolated social units).

136. *See, e.g.*, Tracey L. Mears & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 L. & SOC'Y REV. 805, 809-16 (1998) (presenting a taxonomy of the concept of "norms" in the social sciences).

137. *See generally* Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998) (collecting numerous works on social norms and economic analysis).

138. *See* Weyrauch & Bell, *supra* note 124, at 331 n.16 (postulating hypotheses about the relationship between informal private law and traditional state law).

139. *See, e.g.*, Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 161 (1998) (noting with regard to the opinion publication practices of the federal

son,[140] have noted the ability of these informal rules to displace state-made law.

Some oral legal traditions, however, do not fit easily within the category of "social norms" because they appear, not in the form of rules that purport to govern behavior, but in the form of shared expectations about the outcomes which are appropriate under a given set of facts. For example, a particular community might expect that a youthful first offender should not do jail time for possession of a small amount of marijuana. We refer to the latter kinds of oral legal traditions as "expectations regarding outcome."

B. *The Relationship Between Written Law, Social Norms, and Expectations Regarding Outcomes*

Conventional legal theory regards the written law as specifying a set of rules that govern both social interaction and dispute resolution.[141] For nearly any set of facts, the theory posits, written law specifies the appropriate outcome.[142] The theorists who subscribe to this view acknowledge the existence of "gray areas" in which the appropriate outcomes are unclear. They differ regarding the size of these gray areas, but nearly all agree that written law specifies appropriate outcomes for a wide range of "easy" cases.[143] In their view, social norms, prejudices, public policies, and social expectations are relevant only in the small minority of cases of first impression or cases in which litigants seek a change in the law to reflect modern conditions.[144]

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courts of appeals that "the behavior of judges is primarily governed by internally generated norms that can be altogether different from the officially stated organizational rules").

140. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991) (arguing that social norms are capable of displacing law).

141. *See, e.g.*, Schauer, *supra* note 3, at 407 (explaining that "the Constitution channels and constitutes American public and private life").

142. *But see* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.").

143. *See, e.g.*, Schauer, *supra* note 3, at 414 (using as his example of an easy case an attempt by a person under 35 years of age to assume the Presidency of the United States). *But see* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-aged President*, 84 NW. U. L. REV. 250, 250-52 (1990) (disputing Schauer's example and emphasizing the importance of the context in which the case arises).

144. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973) (changing the law in Florida from contributory negligence to comparative negligence because "contemporary conditions must be met with contemporary standards").

The theory we present here regards delivered law as the product of complex interactions among written laws, law in lawyers' heads, social norms, law in action, system imperatives, and expectations regarding outcomes. Legal strategists, who include lawyers, clients, judges, legislators, other officials, and sometimes persons who have not yet retained a lawyer or even become involved in a dispute, are the catalysts for these interactions. Through these strategic interactions, they construct the pattern of legal outcomes. Within broad cultural limits, the strategies these participants pursue and the quality with which they execute them—not law or judges—determine that pattern.[145]

Social norms and expectations regarding outcomes specify "just" or "fair" outcomes for virtually all human interaction, including interactions directly addressed by written law or the law in lawyers' heads.[146] In regard to those interactions, the norms or expectations are often congruent with the written law and/or the law in lawyers' heads, but often they are not. One can easily think of examples of situations in which the written law requires one pattern of conduct, but social norms permit or require another. The possession and sale of illegal drugs is perfectly acceptable in particular subcultures. A testator has the legal right to disinherit a child, but any attempt to exercise that right clashes with a social norm that allows disinheritance only in the most extreme circumstances.[147] The written law may applaud and protect the whistleblower at the same time that social norms render him or her unemployable.[148]

145. As Lawrence Friedman has put it, "what makes a theory or a strategy 'persuasive' or winning is culturally and historically determined." Letter from Lawrence M. Friedman, Marion Rice Kirkwood Professor of Law, Stanford Law School, to Walter O. Weyrauch, Steven C. O'Connell Chair and Distinguished Professor, University of Florida College of Law (Aug. 5, 1999) (on file with the *Duke Law Journal*).

146. *See* ELLICKSON, *supra* note 140, at 69-81 (describing a system of norms that addresses the same subject as section 841 of the California Civil Code—determining who pays the costs of boundary fences).

147. *See* JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 551 (5th ed. 1995) ("In contests by disinherited children, judges and juries are frequently influenced by their sympathies for the children. This is well known to practicing lawyers, who will often advise the devisees to agree to an out-of-court settlement with a disinherited child.").

148. *See* David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L.J. 109, 112 (1995) (noting that most whistleblowers "have been fired, blackballed from their industry or profession, and have suffered personal problems"); Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 295 (1995) (describing the present regime with regard to lawyers as "a mandatory *non*whistleblowing regime").

These norms specify—though with considerable imprecision—the socio-legal entitlements of members of the group. Though the written law may seem to entitle the bank to call the loan "on demand,"[149] the social norm may require that the bank act with some consideration for the borrower.[150] Though the written law may regard the employer as entitled to discharge the employee "at will," the social norm may prohibit discharge for certain "unjust" reasons.[151] Strategists who acquire the property of others in "perfectly legal" transactions may nevertheless be regarded as thieves.[152]

Conventional legal theory assumes wrongly that decisionmakers will apply written law to the exclusion of social norms,[153] maintains falsely that expectations regarding outcomes are the direct product of written law,[154] and does not even recognize the existence of the law in lawyers' heads.[155] Were these assumptions accurate, legal strategists would have relatively few tools to employ. In fact, written law is sufficiently malleable that decisionmakers can interpret it to support virtually any position that finds support in social norms or expectations regarding outcomes.[156] That is, whatever exists in a fact pattern that

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149. U.C.C. § 1-208 cmt. (1997) (providing that the U.C.C. good faith requirement "has no application to demand instruments or obligations whose very nature permits call at any time with or without reason").

150. *See* KMC v. Irving Trust Co., 757 F.2d 752, 760 (6th Cir. 1985) (applying U.C.C. § 1-208 to require good faith in calling a demand note); JOHN STEINBECK, THE GRAPES OF WRATH 32-35 (1939) (describing Oklahoma Depression-era farm repossessions as little different from theft of property).

151. *See* Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1929 (1996) (arguing that a clear norm forbids firing an employee without cause, despite the employee's formal at-will status).

152. *See, e.g.*, Joseph B. Cahill, *Title-Loan Firms Offer Car Owners a Solution That Often Backfires*, WALL ST. J., Mar. 3, 1999, at A1 (referring to auto-title lending as "legalized extortion").

153. Professor Robert Burns describes the conventional view as follows:

> The Received View understands the trial as a necessary institutional device for actualizing the Rule of Law in situations where there are disputes of fact. The trial allows punishments to be imposed or civil wrongs to be righted only after a careful factual analysis of what actually occurred, specifically structured for the exclusive application of an established legal rule to the exclusion of other possible norms.

Robert P. Burns, *Some Realism (and Idealism) About the Trial*, 31 GA. L. REV. 715, 717 (1997).

154. For example, when asked how the courts would rule on a particular case, most law students and many lawyers would merely consult the written law. By so doing, they would implicitly assume that the written law determines outcomes.

155. *See generally* LoPucki, *supra* note 30 (arguing that legal culture determines mental models of law in lawyers' heads which leads to differing laws in different communities).

156. The matter has been the subject of extensive debate. *See* D'Amato, *supra* note 143, at 251-56 (collecting sources). Our argument does not depend, however, on the outcome of that

gives rise to rights or entitlements under social norms will find support in legal doctrine.[157] As the language of written law departs from the entitlements of parties under social norms, that language becomes less effective.[158]

The view that written law drives legal outcomes is plausible only because written law (to the extent that it has any meaning at all) is usually in accord with social norms. The outcomes of cases in which the applicable norms differ from the written law demonstrate that the norms, not the written law, are the driving force.[159] While written law is sufficiently flexible to support virtually any social norm, the social norms of a particular group are not sufficiently flexible to support virtually any written law.[160]

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debate. Our statement in the text is what we consider to be the best explanation of the legal strategy phenomenon.

157. The empirical test of this proposition is whether one can find a real case or invent a realistic hypothetical in which no legal doctrine exists by which a court could reach the outcome that accords with the applicable social norms. *See infra* note 163 and accompanying text. Professor D'Amato makes this point another way, arguing that some cases appear easy to decide in accord with the written law only because no dispute exists. With respect to Lawrence Solum's candidate for the irrefutable easy case—if a homeowner eats ice cream in the privacy of her home, it will not give rise to any legal action—D'Amato responds:

> But there is no dispute here! No one is claiming that the homeowner has injured anyone else by eating ice cream, and hence there is no occasion to cite a legal rule that she may have violated. There is, in short, no "case." Professor Solum must supply us with a posited but real harm to someone resulting from the homeowner's action in order to have a person who could make a claim against her.

D'Amato, *supra* note 143, at 256. By a "dispute," D'Amato obviously means the social basis for a dispute, and by an "injury" he must intend one socially recognized as a wrong. The "social" in this characterization is a reference to social norms. Thus, D'Amato's response to Solum's example is that no legal doctrine supporting a contrary result should be expected, because no social norm supports the contrary result.

158. *See* Farber, *supra* note 28, at 604 ("Of course, the more counterintuitive the outcome—the more it violates what seems to be the purpose of the rule or runs against social norms—the harder the task [manipulation of written law] becomes and the more valuable are the [manipulation] skills involved.").

159. *See* KARL LLEWELLYN, THE CASE-LAW SYSTEM IN AMERICA 82-83 (Michael Ansaldi trans., 1989) ("Legal rules provide certainty in the affairs of people whose interests are affected by law if, in a lawsuit, they yield a result that accords with their real-life norms."). Professor Basu has reached essentially the same conclusion through economic analysis. *See* Basu, *supra* note 21, at 15-17 (arguing that law cannot reach outcomes unsupported by norms).

160. The difference is ultimately a product of the different forms in which the two kinds of rules exist. Because law is written and the procedures for changing it are cumbersome, those who administer it have introduced conflicting meta-rules that render it malleable with respect to any given case. An example of conflicting meta-rules are the rules of stare decisis and obiter dicta. The first holds that a court is bound to follow precedent. The second holds that statements made in a decision that were not necessary to the decision are of no effect. A court that wishes to narrow a rule to exclude the case before it has merely to distinguish the precedent in some respect and then invoke the rule of obiter dicta to prevent the precedent from governing. The

Social norms differ from group to group and place to place. The geographical boundaries within which particular norms prevail are not congruent with the jurisdictional boundaries of the written law. Because the strategist can draw from such a wide variety of conflicting social norms and written legal doctrines, the strategic possibilities are virtually limitless.[161] The strategist need only ascertain what in a given fact pattern gives rise to the client's conviction that the position is just. By generalizing on that quality of the case, the strategist can identify the governing social norm, which is probably already expressed in some existing legal doctrine. If it is not, the norm itself will be sufficient to establish the doctrine.

This does not mean, of course, that the social norm identified will appeal to anyone assigned to adjudicate the case. If the decisionmaker is from outside the group that forged the norm, the decisionmaker may not share it. But it does mean that if the decisionmaker shares the norm—that is, believes after presentation of the case that the party *should* win—then the doctrinal basis exists for a decision in the party's favor. Cases in which the decisionmaker sincerely[162] opines that a particular party should have won, but the law required a contrary result, are virtually always cases in which the party's lawyer failed to pursue the most persuasive legal theory.[163]

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court that wishes to apply the rule to the case before it simply recites that whatever differences exist between the two cases are unimportant. *See* LLEWELLYN, *supra* note 1, at 74-75 (discussing the ability of courts to employ this technique to expand or narrow precedents). There are many other examples of conflicting meta-rules. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (setting forth opposing canons of statutory construction).

161. *See infra* Part IV.C.

162. In some cases, the judge will not be sincere. He or she will use the supposedly binding force of the law as an excuse for doing what he or she is inclined to do anyway.

163. To clarify the point, we pose the following challenge: it is impossible to identify any case in which social norms favor a particular result that cannot be achieved because legal doctrine disfavors it. To put it another way, if the lawyer truly believes it would be just for the client to win, the lawyer's advice that the case will be difficult or impossible because the law favors the other side is erroneous. We invite readers to attempt to identify such a case.

To illustrate our challenge, consider *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49 (D. Mass. 1997), in which the court denied a claim brought on behalf of a man who died as a result of his health insurer's refusal to comply with its contractual obligations. ERISA provides health insurers with an exemption from liability for actions taken in the administration of plans. In *Andrews-Clarke*, the judge portrayed himself as sympathetic to the plaintiff's case but bound to an unjust result by the ERISA exemption. In a thinly-veiled plea to Congress to change the law, the opinion ends with the words, "Does anyone care? Do you?" *Id.* at 65.

The case does not meet our challenge, however, for two reasons. First, the ERISA exemption is not supported merely by law. It has been actively debated nationally, and something of a consensus has formed among participants in the legal process that plaintiffs such as these

High-stakes litigation is fought principally on two issues. The first issue is who will decide the case.[164] The second is who should win according to the values of, or the norms adhered to by, the decisionmaker. Parties can use legal doctrine to persuade decisionmakers that they should win, but legal doctrine is only one tool for doing so. It is seldom an effective one, because it inevitably carries within it support for the opposing position.[165]

The task of persuading the decisionmaker at the normative level is often an urgent one. Decisionmakers, particularly those who conceptualize law as a generally consistent set of rules that inform and bind their decisions, may frame the issue in accord with the first persuasive argument and be unable to give fair consideration to equally persuasive but conflicting arguments.[166] Once the decisionmaker is persuaded at the normative level, the task of persuasion at the doctrinal level is easier and less urgent. The strategist need only provide the decisionmaker with legal doctrine that plausibly links the facts of the case to the strategist's desired conclusion. That other legal doctrines plausibly link the facts to other conclusions presents no real danger at this late stage. Presented with a bridge to the "right" conclusion, the decisionmaker is unlikely to adopt a doctrinal rationale that leads to a conclusion he or she believes is wrong.

The possibility of an appeal may seem, at first, a significant barrier to the trial judge's imposition of personal values in determination of the case. However, with the exception of appeals by certain "domi-

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should be sacrificed to the national drive to control health care costs. That consensus is itself a norm. Second, while the court could not have freed the plaintiff of the burden of ERISA exemption, the court could have awarded relief on some other basis. *See, e.g.*, Rice v. Panchal, 65 F.3d 637, 646 (7th Cir. 1995) (holding that an action was not preempted by ERISA because a health care plan was vicariously liable for medical malpractice of a physician under a state law theory); Moreno v. Health Partners Health Plan, 4 F. Supp. 2d 888, 893 (D. Ariz. 1998) (holding that ERISA does not preempt a health care plan provider's liability for its negligence in designing a substandard health care plan or the negligence of the plan's physicians in treating patients); *see also* Peter Aronson, *Congress Squares Off Over HMO Liability*, NAT'L L.J., June 21, 1999, at A1 (discussing pending cases in which strategists seek to overcome ERISA preemption).

164. *See infra* Part III.C.5.

165. *See supra* note 160.

166. *See* FRANK E. COOPER, LIVING THE LAW 161 (1958) (suggesting that "the initial impression counts more than all the rest of the argument"). *But see* William C. Costopoulos, *Persuasion in the Courtroom*, 10 DUQ. L. REV. 384, 392-95 (1972) (contending that the advantage will differ from case to case).

nant parties,"[167] the losing party's right to appeal an adverse decision is likely to have little actual impact on case outcome. First, the judges' determinations of fact are for all practical purposes unappealable.[168] A judge who wishes to avoid reversal on appeal can often do so simply by making a disingenuous ruling against the appellant on an issue of fact instead of on the issue of law that is actually in controversy. Second, practical considerations such as costs, delay, or an inadequate record prevent appeals of the large majority of judicial decisions.[169] Third, many, if not most, appeals are disposed of without argument or actual consideration by the judges of the appellate court,[170] making

167. Farole, *supra* note 18 (finding that state governments are more successful on appeals in state supreme courts but that businesses are not more successful than individuals); *see also* Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992) (finding that data shows the "stronger" parties are more successful in U.S. courts of appeals).

168. *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) ("[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

169. Even though the court may make numerous contested rulings in the course of a single case, the number of appeals from U.S. district courts is only about one-fifth the number of cases filed in the district courts. The corresponding percentage for the bankruptcy courts is four-tenths of one percent. *See* LoPucki, *supra* note 30, at 1530 n.159.

170. Though the rules may require a judge to make findings of fact in cases tried without juries, *see, e.g.*, FED. R. CIV. P. 52 (stating that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon"), they are not required to explain what they believe to be the governing law or its appropriate application to the facts. In the large majority of their cases, American judges write neither opinions nor explanatory orders. The U.S. Supreme Court receives nearly 7,000 appeals and petitions for certiorari each year. *See, e.g.*, *The Supreme Court, 1997 Term—Statistics*, 112 HARV. L. REV. 366, 372 (1998) (showing 1,990 fee-paid appeals and petitions for review and 4,581 *in forma pauperis* appeals and petitions for review in 1997). Yet the Court issues fewer than 100 opinions. *See, e.g.*, *id.* at 370 (showing 93 full opinions issued in 1997). The number of cases filed in the U.S. district courts is about 38 times the number of opinions written, even though an opinion may deal with only a single issue in a case. For example, over the 12-month period ending September 30, 1996, there were 269 filings in U.S. district courts, *see* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES 51 (1996); a search of LEXIS, Genfed Library, Newer File (Feb. 27, 2000) for records containing "F. Supp." or "F. Supp" in the CITE field and "1996" in DATE field yielded only 7,819 records. The proportion of cases in which judges offer no explanation of their decisions is apparently rising. *See, e.g.*, Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 L. & SOC'Y REV. 267, 267-301 (1976) (finding that the proportion of cases in which judges wrote opinions or made findings in two California counties declined steadily and significantly from 1890 to 1970); William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at A1 ("[C]ourt statistics show that Federal appeals courts publish only 24 percent of their decisions, down sharply form 54 percent in 1985.").

them little more than empty rituals.[171] Finally, even if the decision is reversed on appeal, the case may be remanded to the judge who initially decided it "incorrectly." That judge may reach the same decision on remand, merely substituting a rationale acceptable to the appellate court or deciding the case on a different issue. Of course, if the appellate court does undertake to decide the merits of the case, its decision will not be the product of legal doctrine, but the product of the same factors discussed here, viewed from the appellate judges' own perspectives and based on the record presented to them.[172]

The basic strategy outlined here—persuade the decisionmaker and provide a doctrinal bridge to the desired result—is capable of producing virtually any result consistent with the decisionmaker's values. This does not mean, however, that the system is capable of doing so in every case. The kind of lawyering required for such strategy is skilled, time-consuming, and therefore expensive. For lawyers to do it too frequently may violate the local legal community's norms for case processing.[173] In low-stakes cases, considerations of cost and

171. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 274-75 (1996) (describing changes in the operation of the federal courts of appeals and concluding that "an effective right to *appeal* error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges"); Glaberson, *supra* note 170, at 1 (noting that "the [federal courts of appeals] created new staff lawyer positions, permanent employees with the authority to screen and, some critics say, to effectively decide thousands of cases by giving judges brief summaries of recommended decisions"). Empirical research demonstrates that some of the courts of appeals dispose of the hardest cases without opinions in order to reduce their workload. *See* Gulati & McCauliff, *supra* note 139, at 192-93. Some of these practices of the courts of appeals were challenged in *United States v. Lopez-Lukis*, 170 F.3d 187 (11th Cir. 1999). That case received substantial attention from the media for the important issues it raised about court practices. *See, e.g.*, Glaberson, *supra* note 170 ("The debate in the case shows how the dispute over the abbreviated appeals proceedings is playing out across the country."); William C. Smith, *Big Objections to Brief Decision: Critics Contend One-Word Appellate Rulings Give Short Shrift to Justice*, A.B.A. J., Aug. 1999, at 34 (discussing criticism of "no-comment decisions by circuit courts"). In what can only be regarded as an incredible display of arrogance, the district court ruled against the plaintiff without writing an opinion; the Eleventh Circuit affirmed in a one-word opinion, 170 F.3d at 187; and the Supreme Court denied certiorari without stating any reasons, 120 S. Ct. at 445.

172. *See* Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage 4 (May 4, 1999) (unpublished manuscript, on file with the *Duke Law Journal*) (empirical study showing that in cases tried by juries, defendants win reversal in 31% of appeals while plaintiffs win reversal in only 13% of appeals). Because appellate judges have a narrower legal right to overturn a jury verdict than do trial judges, these results are virtually unexplainable by any conventional theory.

173. *See* LoPucki, *supra* note 30, at 1529-32 (describing pressures on lawyers to move matters along).

case-processing resources are likely to dominate, producing outcomes in accord with the law in lawyers' heads.[174]

C. *The Residual Role of Legal Doctrine*

Written law is less influential in the legal system we have described than it is in common understanding. Though the large majority of decisions will appear to be in accord with law, they are in no meaningful sense the product of it.[175] Legal strategy, playing on expectations regarding outcomes and social norms internalized by the decisionmaker, determines case outcomes.[176] The rules of the written law are mere incantations[177] that may or may not have some effect on the decisionmaker. Unsupported by norms, the rules become impotent technicalities, "scrivener's errors," or dead letters.[178]

Though our theory may at first seem to exclude written law from legal system content, it does not do so entirely. First, unskilled parties or their lawyers can render indeterminate law determinate through admissions that characterize the facts in such a way that particular adverse doctrine applies or through concessions that adverse doctrine applies. The legal process deliberately pressures lawyers and parties to make such admissions.[179] Theoretically, one can deny every allegation and object to every piece of evidence. But in practice, a pattern of such denials and objections quickly discredits both parties' wit-

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174. *See id.* at 1516-20.

175. *See, e.g.*, Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 126 (1998) (referring to "the much-criticized American tradition of judicial subterfuge, in which courts claim to follow statutory rules and testators' intent rigidly but in fact manipulate equitable doctrines to effect estate distributions that comport with judges' individual standards of fairness and justice").

176. *See* Basu, *supra* note 21, at 22 (concluding that "[i]f a certain outcome is not an equilibrium of the economy, then it cannot be implemented through any law").

177. *See* Walter O. Weyrauch, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 798-800 (1973) (analogizing "magic and magicians to law and lawyers").

178. *See, e.g.*, Holloway v. United States, 526 U.S. 1, 19 n.2 (1999) (Scalia, J., dissenting) (noting that the doctrine of "scrivener's error" gives the Court the authority to "correct" a statute that does not have a "plausible purpose"). Absent legislative history describing its purpose, any statute that is contrary to established social norms will appear to be without plausible purpose and hence an appropriate candidate for correction.

179. *See, e.g.*, Berkowitz v. Home Box Office, Inc., 89 F.3d 24, 27-28 (1st Cir. 1996) (describing district court pressures on parties to communicate their factual and legal theories); J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1326-27 (7th Cir. 1976) (appending a standing order on pretrial conferences ordering parties to stipulate to the "uncontested facts" and to recite their own versions of the contested facts).

nesses and their lawyers.[180] The lawyers may be marginalized and ultimately ostracized.[181] Lawyers must appear to be constructively engaged in a process that "narrows the issues" in preparation for the court's decision.[182] Often, they come under intense pressure to admit facts or the applicability of law before they can entirely predict the effect of their admissions.[183] Once a party has, against its own interests, admitted each of the facts in the antecedent of a rule[184] in the language of that rule, the court may no longer have any alternative but to apply the rule. In such a case, legal doctrine may compel a particular outcome.

Second, participants in the legal process may see the rules of written law themselves as norms. That is, they may believe that a party should win because the rules of written law seem to direct that the party should win.[185] This belief is an erroneous one; written law generally obtains normative content only when decisionmakers inject that content through interpretation in the particular case.[186] Some decisionmakers' lack of sophistication in this regard, perhaps combined with poor lawyering on the losing sides, prevents those decisionmakers from seeing this. When decisionmakers feel genuinely compelled to a particular result because they believe it to be required by the rule, the result does, in a sense, follow from the rule.

That does not mean that the strategist should devote much effort to determining what result the rules compel on particular facts. The rules compel no particular result. Instead, the realization that decisionmakers may perceive themselves as compelled to accept a par-

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180. For example, in *Pennzoil v. Texaco*, Texaco's executives were each able to deny credibly remembering reading the *Wall Street Journal* report that Pennzoil had reached an agreement with Getty; however, Pennzoil's lawyers were able to discredit them as a group by noting the cumulative effect: "Thus, January 5, 1984, became known at the trial as the one day in Texaco's history during which no one read the *Wall Street Journal*." PETZINGER, *supra* note 34, at 313.

181. *See* LoPucki, *supra* note 30, at 1531 (indicating that lawyers who engage in such behavior may become "ineffective in that community").

182. *See* cases cited *supra* note 179; COOPER, *supra* note 166, at 43-50 (addressing the importance of an attorney's formulation of the issues to the final decision).

183. Thus, the ability to foresee the effects of admission may be the most valuable aspect of legal experience.

184. The "antecedent" of a rule is the "if" clause once the rule has been translated into an if-then statement. *See infra* note 199 and accompanying text.

185. *See* Basu, *supra* note 21, at 18 (observing that "the law works . . . entirely through its influence on people's beliefs and opinion[s]").

186. For example, Llewellyn states that "[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewellyn, *supra* note 160, at 400.

ticular rule recommends that the strategists attempt to discover how the process settles on a particular rule. The issue is explored further in Part III.

Third, even judges who believe, as we do, that law exists to support any conclusion they may choose to reach in the vast majority of cases will continue to be concerned with the doctrinal bridges by which they explain their decisions. Some outcomes will be more popular than others among the court's constituents. Particularly when the outcome will be unpopular within an important segment of that constituency, the ability of the judge to wrap the decision convincingly in legal doctrine can be important.[187] The judge's willingness to make a particular decision may depend in part on the level of assistance counsel's briefs and arguments offer in the drafting of a persuasive opinion.[188]

Perhaps the most important role of legal doctrine today is in maintaining the respect of the public for the legal system and the decisions it renders. The public tolerates the current system because it erroneously believes that the system operates largely according to the conventional view.[189] That is, that by and large, written laws bind judges to particular outcomes.

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187. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (describing the doctrinal and political constraints on judges phenomenologically).

188. Lawyers sometimes actually draft the judge's order or opinion, but the practice is generally frowned upon. *See, e.g.*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1373 n.46 (11th Cir. 1997) (admonishing that "[w]e have consistently frowned upon the practice of delegating the task of drafting important opinions to litigants, and 'the cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion'" (quoting Colony Square Co. v. Prudential Ins. Co., 819 F.2d 272, 274-75 (11th Cir. 1987))).

189. Probably the best evidence of this belief are the repeated warnings that various actions will undermine that conventional view. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 142 (3d Cir. 1991) (confirming that "confidence of the public in the rule of law would be undermined"); Michael C. Dorf, *Prediction and the Rule of Law*, 42 U.C.L.A. L. REV. 651, 689 (1995) (stating that use of a prediction model "would undermine the public's confidence in, and its felt obligation to, the rule of law"); Charles Fried, *The Supreme Court, 1994 Term-Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34 (1995) (referring to the "rule of law to which the public is probably more devoted than to any specific constitutional doctrine or ruling"); Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 723-24 (1997) (declaring that "[l]itigants, especially those who do not prevail, must believe that judicial decisions are made on the basis of neutral criteria and are grounded on more than the judge's personal feelings"); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 9 (1983) (referring to "the risk of undermining public confidence in the stability of our basic rules of law"); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 632 (1999) (claiming that "attacks on judicial activism are often stated in terms that appeal to public understanding of the

But judicial opinions are, in essence, merely propaganda on behalf of the judiciary. Their purpose is to support the belief that legal doctrine plays a role in the system that it, in fact, does not. The difficulties of nations that lack a tradition of respect for written law—such as Russia and China—underline the importance of the exercise.[190] Those difficulties should not, however, be considered justification for American legal scholars to maintain falsely that legal doctrine is the principal determinant of legal outcomes when it is not. Among other problems with that approach, steadily accumulating data on case outcomes will soon prove it wrong.[191]

III. THE VARIETIES OF LEGAL STRATEGY

This part describes the wide variety of legal strategies currently in use. Participants in the legal system have acknowledged most of these strategies individually but not their cumulative effect. We assert that the presence or absence of these strategies, and perhaps numerous others of which we are unaware, is the predominant determinant of case outcomes.

We present our taxonomy in three parts. First, most (but not all) legal strategies seek to enlist the judge. Other legal strategies seek to pressure the judge or limit the judge's alternatives, while still other legal strategies seek to deprive the judge of any say at all in the outcome of the case.

A. Strategies Requiring Willing Acceptance by Judges

Strategies that seek to persuade the judge, jury, or other decisionmaker to rule in the strategist's favor are both the most common and the most visible type. Some of these strategies of persuasion may have nothing to do with the particular case. For example, lawyers adopt the speech, mannerism, and dress of jurors or judges as a means of gaining their confidence.[192] They attempt to undermine the credi-

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importance of the rule of law that requires judges to base their decisions on the law"). The public's belief in the rule of law coexists with its inconsistent belief that skillful lawyers can manipulate the system to reach virtually any result. *See supra* note 8 and accompanying text.

190. *See generally* Frances H. Foster, *Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative*, 54 WASH. & LEE L. REV. 923 (1997) (describing the Russian Judicial Chamber's efforts to create a legal culture).

191. *See infra* Part V.

192. *See* ROGER HAYDOCK & JOHN SONSTENG, TRIAL: THEORIES, TACTICS, TECHNIQUES 55 (1991) ("Attorneys may have to put aside personal tastes and conform their dress to the

bility of adverse witnesses, even when they believe them truthful.[193] They employ rhetorical techniques, such as theme, repetition, and innuendo.[194] They pursue "linguistic strategies," employing words and phrases that seem concrete and evoke favorable reactions, while skirting the edges of falsifiability.[195] They may attempt to construct logical arguments[196] or they may simply throw out possibilities in the hope that the decisionmaker will seize upon one of them.[197]

Most strategy, however, relates to case-specific information: the evidence the lawyer will offer, the facts the lawyer will assert, or the rationale the lawyer will encourage the decisionmaker to adopt. The three combine to form an argument that the decisionmaker should reach a particular conclusion.

Ostensibly, the system approves only a single rationale for decisions:[198] application of the written law to the facts proven requires the

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standards of a community or judge so as to safeguard and promote the best interests of a client.").

193. *See* FRANK, *supra* note 17, at 82 ("The lawyer considers it his duty to create a false impression, if he can, of any witness who gives [disadvantageous] testimony.").

194. *See, e.g.*, PETER L. MURRAY, BASIC TRIAL ADVOCACY 97-105 (1995) (advocating story-telling in the opening statement); *id.* at 353-78 (describing the use of dramatics, body language and rhetoric in the summation); Peter B. Carlisle, *In Cold Blood and the Fine Art of the Opening Statement*, HAWAII B.J., Nov. 1999, at 9 (advocating theme and repetition in opening statements); Ervin A. Gonzalez, *Creating and Developing Winning Themes and Arguments*, FLA. B.J., Feb. 1988, at 53 ("[Y]our trial plan should be built around a theme that will define the case and will allow the jury to rally around that theme.").

195. DELANEY, *supra* note 82, at 167-68 (discussing "linguistic strategies" that can help "legitimate the claim to bankruptcy"); *id.* at 161 (providing an example).

196. *See* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 1-2 (1989) (equating logical reasoning with thinking like a lawyer).

197. *See, e.g.*, Walter Otto Weyrauch, *Legal Practice as Search for Truth*, 35 J. LEGAL EDUC. 123, 128-29 (1985) (book review) (discussing Viehweg's advocacy of argument "based on multiple, perhaps overlapping or even contradictory, points" so that "failure of one point leaves the others intact"). Logical arguments are relatively weak in the legal context because they proceed in an orderly fashion from their premises to their conclusions. Successful attack on a single element destroys the entire argument. Their order alerts decisionmakers and opponents to each argument's points of vulnerability. A generally more effective alternative is to make emotionally appealing suggestions, leaving it to the decisionmaker to choose among them and construct the arguments. Law professors will recognize this approach as one often employed by students on examinations, commonly referred to as "shotgunning."

198. Some legal theory recognizes a second argument: that the law requires a conclusion other than the conclusion sought, but the law should be changed. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973). We regard this argument as relatively ineffective and doubt that it is employed in any significant number of cases. Appellate courts sometimes characterize their decisions as changes in the law, but legal doctrine is sufficiently indeterminate that the lawyer need never concede that a change in the law is required to reach the desired conclusion—unless the desired conclusion is not a victory in the case but the announcement of a change in the law. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (escaping the binding precedent of a

conclusion sought.[199] Even when a matter is within the "discretion" of the court, a legal standard governing the exercise of that discretion will almost certainly already exist.[200] Formally, the argument—and the judge's explanation of the outcome—must be that application of the standard for the exercise of that discretion requires the conclusion sought.[201]

Despite the relative ineffectiveness of written law, in practice it provides the sole basis for most legal argument. Nearly all written law is sufficiently general, however, that a sophisticated opponent can find substantial ambiguity in it as it would be applied in the case at hand. The basic technique for discovering such ambiguity is a simple one. The opponent examines each word of the proffered rule for ambiguity. If even a single word is ambiguous, application of the rule is ambiguous. Once that ambiguity is demonstrated, the opponent often asserts a rule from another area of law that, if applied, would lead to the opposite result in the case at hand.[202] The proponent examines that new rule for substantial ambiguity and the process repeats itself.[203]

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line of "separate but equal" cases with the observation that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation of white and colored children in public schools has a detrimental effect upon the colored children] is amply supported by modern authority").

199. Even a standard that limits choices without compelling a single one logically can be recast as a rule that permits particular choices but bars others. The idea that any statute can be expressed as an if-then statement without changing its meaning originated with Layman Allen. *See* Layman E. Allen & C. Rudy Engholm, *Normalized Legal Drafting and the Query Method*, 29 J. LEGAL EDUC. 380, 402-03 (1978) (describing statutes as if-then statements); *see also* Grayfred B. Gray, *Reducing Unintended Ambiguity in Statutes: An Introduction to Normalization of Statutory Drafting*, 54 TENN. L. REV. 433, 436-44 (1987) (providing examples of statutes expressed as if-then statements). *Accord* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 136 (1997) ("The elements of the rule structure, or doctrine, are thousands of statements that have the form, 'If these facts are found, the judge should do this.'").

200. *See* WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 840-42 (1994) (enumerating legal standards for the "best interests of the child" in custody disputes).

201. That is, the judge cannot say that he or she was entitled to reach either result but chose one on the basis of personal preferences.

202. *See, e.g.*, Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (finding ambiguity in statutory language stating that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void" and then accepting an argument based on prior law and legislative history suggesting that a secured creditor's lien could "pass through bankruptcy unaffected").

203. For example, assume that Peter buys an automobile from Paul under an installment contract. Peter misses a payment and Paul sues for possession, citing U.C.C. section 9-503. That statute provides that "a secured party has on default the right to take possession of the collateral." U.C.C. § 9-503 (1995). In searching for a defense, Peter considers whether his missed

If a party is unable to discover ambiguity in the rule proffered by its opponent, the party can turn to any of a number of meta-rules to invalidate the unambiguous rule: the rule is unconstitutional, the rule was not properly adopted, the rule is not authoritative in this jurisdiction, the (statutory) rule constitutes a scrivener's error, the rule should be changed because of changes in technology or society since it was adopted, etc.[204] Most recently, the Supreme Court has been implicitly employing a test of "mandatory culpability" in the review of criminal convictions. That is, the defendant must not only have violated the written law; the defendant must also be "culpable."[205] This use of meta-rules to nullify rules mimics a technique employed both in public debate and in computerized systems of analysis: when a pattern of thought is unsuccessful, shift to a higher or lower level of generality.[206] If the parties are sufficiently skillful in manipulating the written law, the written law ultimately proves at least plausibly indeterminate.

Sophisticated lawyers argue the written law, but they anticipate its indeterminacy. Understanding that content must be injected into written law in every case, they ground their arguments in several nondoctrinal rationales. These include social norms, the law in action,

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payment constitutes a "default," whether Paul is a "secured party," and whether the automobile is "collateral." If, for instance, it is unclear whether missing a payment is a default, Peter might assert the rule that a contract of adhesion is to be interpreted against the drafter. Paul would then search for an avoidance by considering whether his installment contract is one of "adhesion" and, if so, whether he is the "drafter."

204. D'Amato provides an example in his response to Schauer's argument that the attempt of a person under 35 years of age to assume the Presidency of the United States would be an "easy case." D'Amato responds by pointing out that, through the strategy of assuming office and forcing his adversaries to bring suit, the underage President might win on the basis that the plaintiffs lack standing to sue or on grounds of mootness. *See* D'Amato, *supra* note 143, at 253-54; *see also supra* note 160 (describing the strategic opportunities created by conflicting meta-rules).

205. *See* John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1021-23 (1999) (documenting and advocating use of the technique).

206. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 17 (1984) ("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 be used to nullify it . . . ."). Alternatively, the move can be from the general to the specific. For example, in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337 (Cal. 1999), the issue was whether members of the press had the right to be present at the trial of a civil case. The applicable statute provided in relevant part that "the sittings of every court shall be public." Although the rule was clear, the court side-stepped it by noting two decisions from California courts closing trials for specific reasons despite the statute. *See id.* at 347-49. In this example, the statute is the general proposition; the cases are the specific ones.

Argument from	**Generalization of the argument**	**Example of the argument**
Social norms	This is the fair thing to do.	"An employer can't fire an employee based solely on false accusations."
Law in action or legal outcomes	This is the result reached in like cases in the past.	"The evidence shows that employees have never been given hearings in cases such as these."
Law in lawyers' heads	This is what the law requires.	"The law is clear that, unless otherwise specified, employment is 'at will' and the employee can be discharged for any reason or for no reason."
Informal rules of factual inference	When fact A is present, fact B is present as well.	"The defendant was late for an important meeting; so she was hurrying and therefore careless."[207]
System imperative	Absent this result, the system cannot operate as intended.	"If this employee is entitled to a hearing, then so are the other 500,000 employees discharged each year."
Community expectations regarding outcomes	This result is in accord with commercial or community expectations.	"Most employees would be shocked to learn that they could be fired on the basis of false accusations—without being given the opportunity to present their side."
Public policy	This interpretation is in accord with the lawmakers' intention.	"The reason for the rule is that . . . ."

Figure 1

207. *See* ALBERT J. MOORE ET AL., TRIAL ADVOCACY 23-34 (1996) (presenting this example).

the law in lawyers' heads, informal rules of factual inference, system imperatives, community expectations regarding outcomes, and public policy. Figure 1 contains illustrations of each kind of argument.

These arguments do not purport to be based in law. They purport only to buttress the maker's argument that the written law, correctly interpreted, requires the desired conclusion: "The law favors our side, and this argument is proof of its wisdom and rationality in doing so." In actuality, arguments such as these are outcome-determinative. If both lawyers are competent, both sides will have sound arguments from legal doctrine. The side that is most persuasive with their indirect arguments will almost always win. Through the process of interpretation, the sources in the first column of the table—spontaneously generated "private" law—are fused into and made the content of the rules of law promulgated by the state.[208]

The inclusion of "public policy" in the category of "spontaneously generated private law" requires explanation. While arguments from "public policy" are sometimes based on declarations of the legislature made simultaneously with the promulgation of a statute or declarations of a court made in the opinion that established the rule, most "public policies" are invented by lawyers or law professors based on examination of the rule itself. That is, they are mere speculations on what the intent behind such a rule might be. When accepted by a decisionmaker, however, they can fix a single meaning to a rule that on its face has several. Thus "public policy," like social norms, provides content to law.[209] But public policy is a more flexible device because the policy, unlike the norm, can spring wholly from the strategist's imagination.

Before a judge who believes legal doctrine determinate, the most effective response to each of the arguments in the table is to point out that the argument is grounded in something other than legal doctrine. For example, in response to the argument from social norms, opposing counsel might reply that "my opponent argues that social norms prohibit an employer from firing an employee for something the employee did not do. That may well be, but the law is to the contrary." Similarly, the best response to an argument that relies on informal

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208. *See* Weyrauch & Bell, *supra* note 124, at 381 ("Thus interpretation becomes a method by which private lawmaking and the printed rules of the state are fused.").

209. *See* KENNEDY, *supra* note 199, at 133-56 (arguing that a formal structure of policy arguments exists and that policy arguments are based ultimately in ideology). In contrast to our theory, however, Kennedy regards the judge as the source of both the policy and the ideology. *See id.* at 155-56.

factual inference is probably to point out precisely the basis on which the inference is being drawn. "My opponent argues that just because a person was late for a meeting, you should infer that the person was careless."

Full articulation will damage these arguments and most legal strategies, whether the articulation is by the opponent or by the proponent-strategist. To avoid that articulation, the proponent-strategist should make its own argument sketchily and by innuendo—expressing just enough of the argument to reach the decisionmaker, but not enough to alert the opponent to its nature or to destroy the argument by full articulation. Weyrauch and Bell give the following example:

> [I]t is difficult for a divorced husband to obtain custody of his twelve-year-old daughter. There is an unarticulated cultural norm, no matter how factually inaccurate, that a single adult male cannot be trusted in an intimate living arrangement with a young female. It would be impossible, however, to articulate this highly prejudicial concern openly in court. Lawyers instead prefer veiled references to sexual concerns by arguing that the daughter is "maturing" and needs the guidance of the mother in "hygienic matters."[210]

Once such an argument has reached the decisionmaker, full articulation may be the best way to defuse it. The husband's lawyer points out that wife's counsel is insinuating, without supporting evidence, that the husband will sexually molest his daughter if the court gives him custody. Thus restated, the argument loses its impact.

Normative content can be infused into otherwise empty legal rules even before any case arises. That is, even though the ultimate interpretation of a rule remains open as a technical or legal matter, if a consensus forms in the relevant legal community that a particular interpretation is "correct," other interpretations may, as a practical matter, be foreclosed. For example, when a new law is enacted, "experts" may promote a particular interpretation at judicial education or continuing legal education programs.[211] Even though the law is ambiguous on its face, once a consensus forms in the relevant legal community, individual judges may be under pressure to conform.

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210. Weyrauch & Bell, *supra* note 124, at 379 n.243.

211. *See* Galanter, *supra* note 2, at 103 (referring to actions of repeat players as "secur[ing] the penetration of rules favorable to them"); *accord* WALTER O. WEYRAUCH, THE PERSONALITY OF LAWYERS 230-31 (1964) (referring to corresponding practices in Germany).

B. Strategies That Constrain Judges

At least four types of legal strategy exist for pressuring judges into a favorable resolution of a case without entirely persuading them to it: case selection, making a record, legal planning, and media spin.

1. *Case selection.* In his landmark article, *Why the "Haves" Come Out Ahead*, Marc Galanter explained the many ways that "repeat players"—who generally were business interests—could tip the balance of law in their favor by selecting to litigate the cases most likely to make favorable law.[212] He advocated the development of counterstrategies in which organizations of otherwise "single-shot" players would do the same thing.[213]

To illustrate case selection as a legal strategy, assume that the manufacturer of a product is interested in establishing that its product is not unreasonably dangerous as a matter of law. Plaintiffs have filed cases in which this issue might be raised in half a dozen state or federal courts spread throughout the United States. The manufacturer begins by evaluating the six cases on a single criterion: if the plaintiff raises the issue of whether the product is unreasonably dangerous as a matter of law, what is the likelihood that the court will decide it in favor of the manufacturer? Assume that the likelihood of decision favorable to the manufacturer is 60% in each of two courts and 10% in the four others.[214] Assume also that the unfavorable courts are further along in processing the cases, so that their decisions are likely to be rendered first. Absent a case-selection strategy, the odds are nine-to-one that the first decision will go against the manufacturer. With that

212. Galanter states:

> Rule-development is shaped by a relatively autonomous learned tradition, by the impingement of intellectual currents from outside, by the preferences and prudence of the decision-makers. But courts are passive and these factors operate only when the process is triggered by parties. The point here is merely to note the superior opportunities of the [repeat player] *to trigger promising cases and prevent the triggering of unpromising ones*.

Galanter, *supra* note 2, at 103 (emphasis added). Macaulay made essentially the same point earlier in discussing the automobile manufacturers' strategy in opposition to the Good Faith Act. *See* STEWART MACAULAY, LAW AND THE BALANCE OF POWER 96-103 (1966).

213. *See* Galanter, *supra* note 2, at 141 ("The reform envisaged here is the organization of 'have not' parties . . . into coherent groups that have the ability to act in a coordinated fashion, play long-run strategies, benefit from high-grade legal services, and so forth.").

214. These differences may result from differences in the attitudes of decisionmakers regarding the legal issue or from entirely extralegal matters such as the particularly appealing or unappealing nature of one of the parties.

case argued as precedent,[215] whether binding or not,[216] the manufacturer's chances of winning the next three cases probably sink even lower. By the time the favorable courts reach the issue, the domino effect of precedent may already have put four decisions unfavorable to the manufacturer on the books. This "weight of authority," perhaps augmented by a "precedential cascade"[217] effect against the manufacturer's position, may persuade the two remaining courts to abandon their inclination in favor of the manufacturer.

The manufacturer could improve the odds of the case law developing in its favor by assuring that the two courts favorable to the manufacturer[218] are the first to render decisions. The manufacturer could employ at least four tactics for accomplishing that result. First, it could settle or delay the four cases pending in adverse courts so that the courts did not decide them, or at least, did not decide them first. Second, it could permit the cases to go forward to jury verdicts, but without raising the issue of whether the product was unreasonably dangerous as a matter of law. Third, it could strike a bargain with the plaintiffs in the unfavorable courts that would tie the outcomes of their cases to the outcomes in the two favorable courts and delay the former until the latter were decided. The inducement might be the elimination of much of the cost of litigation, or the guarantee of a minimum recovery regardless of the outcome of the case.[219] Lastly, after trying and losing the first cases, the manufacturer could enter into

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215. Even when a court does not publish an opinion in the process of deciding the case, parties who are aware of the decision are usually free to present the decision to a later court and argue that the later court should follow it. *See* Richman & Reynolds, *supra* note 171, at 286 ("Even though they cannot cite unpublished opinions, repeat litigants . . . are able to catalog them and use their arguments. They also may request formal publication of those unpublished opinions that they believe will make favorable precedent."); Kurt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 569 (1997) (noting that "[s]ix circuits currently allow citation [of unpublished opinions], up from only two circuits in 1994").

216. Precedent set by a trial court typically would not bind a trial court in another district.

217. Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999) (arguing that the spread of legal precedent may be augmented by a "cascade" effect that magnifies the significance of early decisions).

218. Courts often indicate their intentions with regard to future rulings. In some cases, they do so formally, but in most it is only by their demeanor or their rulings on preliminary issues.

219. While in practice, one of us was offered such an arrangement by an attorney for the Internal Revenue Service. In that case, a single legal issue seemed likely to determine the outcome. By accepting the IRS's offer to tie the result in our case to the result in its other cases, the client was spared the entire expense of litigation—which, in litigating against the IRS, could easily have been more than the entire amount in issue. Even though the deal lowered our chances of winning, we were more than compensated by the cost savings.

settlement agreements conditioned upon the court not publishing an opinion or upon the court sealing the file.[220] By assuring that the favorable courts decide first, the manufacturer puts favorable law on the books for use in arguing subsequent cases.

Though the strategy of case selection has been sufficiently effective to draw the attention of legal scholars, it remains relatively weak. Case selection is a means of generating written law favorable to one's position. However, litigation is unlikely to establish written law in any given case, and, as previously noted, even once established, written law is not very powerful.[221]

2. *Making a record.* Appellate courts decide cases on the record and the written and oral arguments of counsel.[222] The record consists of selected portions of the pleadings and other documents filed in the case, transcripts of what transpired orally, and evidence offered. The appellate court may reverse the decision because the court below decided it wrongly or because the lower court did not follow appropriate procedures, as indicated by the record.

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220. *See* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 390-95 (1999) (discussing the sealing of court records pursuant to settlement agreements); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 764-65 (1995) (discussing the practice of vacating published opinions when requested by the parties upon later settlement of the case); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 596 (1991) (discussing the benefits to the unsuccessful litigant who then negotiates a settlement with her adversary to request the court to vacate the judgment).

221. *See, e.g.*, Galanter, *supra* note 2, at 149-50 (observing that "[t]he system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages").

222. The factual accounts of appellate lawyers have an impact on outcomes, even when they are not supported by the record. In appellate arguments, lawyers often functionally present themselves as witnesses, either spontaneously or in response to questions posed by judges. The effect is to avoid cross-examination and exclusionary rules of evidence. (The pejorative terms for such accounts when made orally is "blurting out.") Objection to such oral accounts is made difficult by a socio-legal norm that prohibits objections to oral arguments except in the most extreme circumstances. Brandeis briefs have also been described as a way to "bring facts into the judgment that have not been entered into the record." Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 94 n.5 (1993). The original Brandeis brief, filed in *Muller v. Oregon*, 208 U.S. 412 (1908), was an egregious example. *See* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 443 n.341 (1988) ("Much of the brief consisted of statements by workers that they liked factory legislation.").

When litigating a case, the lawyers generally have an incentive to "make a record" favorable to their own position. The record may be useful in overturning an adverse decision on appeal, or defending a favorable one.

Strategic opportunities abound. To maximize the possibility of reversal on appeal, the lawyer may make frequent objections, may attempt to incite the judge to intemperate action,[223] may proffer evidence or testimony of questionable admissibility, or may argue positions ineffectually in the hope of leading the court into reversible error.

These strategies can become complex. For example, a lawyer who actually hopes to win the case may create the impression that he or she is just making a record for appeal. The court, knowing of this hostile intent, may be reluctant to rule against the lawyer on particular issues for fear that the ruling will provide the basis for reversal. The result may be that the lawyer gets the benefit of every doubt on the hundreds of legal issues that arise in a typical case.[224] Merely bringing a court reporter to a hearing may have the same threatening effect.

Appellate courts assume that the judges below had legally acceptable reasons for their decisions unless the records affirmatively show that they did not.[225] For that reason, a judge who does not wish to be reversed on appeal is best advised to give no more explanation than is legally required.[226] That is what most judges do. They listen to arguments and sign an order stating the outcome of the case, but they

223. *See, e.g.*, United States v. LeFevour, 798 F.2d 977, 985 (7th Cir. 1986) ("The tactic of a lawyer in a losing cause who tries to provoke the trial judge into error is an old one, well exhibited by LeFevour's counsel, who was twice held in contempt in the course of the trial."); Terry Carter, *Playing Hardball at Microsoft: Chief Counsel William Neukom is Leading a Legal Charge that Verges on Either the Risky or Brilliant or Both*, A.B.A. J., Aug. 1998, at 24-25 (speculating that the attorney for Microsoft may have been attempting "to provoke the judge into appealable error").

224. To counter the strategy of a lawyer who is making a record for appeal, the court may rule in favor of the lawyer on nondeterminative matters to prevent reversal on appeal, and then rule against the lawyer on the case itself, perhaps couching the decision as one on the facts and thus difficult to overturn.

225. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 111-16 (Cal. Ct. App. 1976) (considering defendant appellee's four theories for sustaining the court's order of dismissal in a case where the court gave no reason for its ruling).

226. *See* FED. R. CIV. P. 52(a) (requiring federal judges to make findings of fact in cases tried without juries).

either give no reasons or they give their reasons in a perfunctory manner.[227]

The task of a lawyer-strategist who seeks reversal is to get the judge to articulate an unacceptable reason for the decision. The lawyer might do that by directly asking the reasons for the ruling, or by accusing the judge of employing a particular line of reasoning, thereby provoking a response.[228] Alternatively, the lawyer might make a series of motions or proffers that, when ruled upon, eliminate particular lines of reasoning as possible explanations for the overall decision.[229]

For present purposes, the key is to understand that these strategies are not meant to persuade the trial judge—or in many instances the appellate judge either—to the lawyer's position. The goal may be to intimidate the trial judge or to make sure that the case is decided on ancillary issues in the appellate court. Although reversal on ancillary issues is not automatically victory, it can get the lawyer a "second bite at the apple"—another trial at another time, in different circumstances, and perhaps with a different trial judge—and is also highly likely to lead to settlement.[230]

3. *Legal planning.* The term "legal planning" is used broadly to refer to action taken before contemplated litigation in an attempt to establish what will become the facts of that litigation.[231] Professor Leo Katz provides the following examples of particularly strategic legal planning:

> (3) A lawyer suggests to a client who owns a farm that she incorporate the farm and declare herself its employee in order to qualify for social security. . . . (5) A lawyer recommends to elderly clients that they distribute their assets to their children so that they qualify for governmental assistance more quickly. (6) A lawyer recommends that a client turn most of its employees into independent contractors

227. The typical order provides that "upon the plaintiff's motion for [relief] and the court having heard the argument of counsel it is hereby ordered and adjudged that [decision]."

228. *See, e.g.*, United States v. Hartford, 489 F.2d 652, 655-56 (5th Cir. 1974) (describing an instance in which one of the authors of this Article successfully employed this strategy).

229. *See, e.g.*, Dynes v. Dynes, 637 N.E.2d 1321, 1324 (Ind. Ct. App. 1994) (holding that the trial court's rejection of proffered evidence of a witness's reputation for dishonesty fatally undermined the court's findings of fact, which were based solely on that witness's testimony).

230. *See* David F. Pike, *Retrials: A Bad Case of Deja Vu*, NAT'L L.J., Aug. 31, 1981, at 1, 27 (noting that "retrials are relatively rare" and explaining the reasons).

231. Professor Galanter refers to it as "restructur[ing] the transaction to escape the thrust of the . . . rule." Galanter, *supra* note 2, at 149.

> to escape the burden of social security taxes or even simple tort liability.[232]

The planner may conceive of his or her purpose as avoiding litigation,[233] but the plan typically accomplishes that only by assuring that, in the event of litigation, the planner's side would win.

The strategies Katz suggests consist of creating fact patterns that satisfy the antecedents of legal rules, and thus achieving the desired results. However, as we have seen, legal rules are not, in and of themselves, of much effect. For virtually any legal rule that would achieve the planner's objectives, there is another rule or doctrine that could be used to attack it. Corporate veils can be pierced; security interests can be subordinated; contracts can be rescinded, reformed or invalidated; and conveyances can be avoided. At a minimum, such planning is always vulnerable to attack as a "sham" or a "subterfuge."[234]

The sophisticated planner realizes that norms, customs, system imperatives, expectations regarding outcomes, and other informal bases for decisionmaking likely will be determinative. Accordingly, sophisticated planning will proceed largely on the basis of appearances. To illustrate the difference, consider the circumstances of a debtor who expects to file bankruptcy soon and wishes to keep as much property as possible. Mere attention to legal doctrine might suggest that the debtor convert all of the debtor's assets to exempt property, leaving it to the court to determine which of the conversions were made with fraudulent intent. But the strategist who took a broader view would realize that the greed and lack of consideration evidenced by that strategy would likely turn the court against the debtor. Bankruptcy lawyers express this truth in the familiar aphorism that "pigs get fat, hogs get slaughtered."[235] Similarly, if the law exempts an automobile of a specified value, the doctrinalist might as-

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232. Katz, *supra* note 7, at 566.

233. *See, e.g.*, LOUIS M. BROWN & EDWARD A. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS xix (1978) ("As contrasted with dispute-resolving law, preventive law . . . deals with the avoidance of dispute, and with the structuring of relations and transactions apart from any extant dispute.").

234. *See, e.g.*, Lubrizol Corp. v. Cardinal Constr. Co., 868 F.2d 767, 769 (5th Cir. 1989) (noting that the various names given to the cause of action that seeks to hold one corporation liable for the acts of another, including "sham corporation," are not analytically helpful and instead "cloud the thinking of lawyers and judges").

235. *E.g.*, Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223, 1264 n.170 (1998) (quoting the popular aphorism in the context of bankruptcy exemption planning).

sume that the model and color were irrelevant.[236] The sophisticated strategist, by contrast, would immediately recognize the difference between purchasing a staid blue Chevy Caprice and a flashy red Corvette—even if the dollar amounts of the two purchases were identical.[237]

Legal planning is often an effort to persuade rather than constrain the court. Judges are to some degree politicians. Even those with lifetime appointments often seek higher offices or professional acclaim. To those ends, they seek low rates of reversal and reputations for sound, responsible decisionmaking. Despite the lack of any doctrinally-recognized difference between a Corvette and a Caprice, the former projects an image of extravagance and privilege that most observers would consider to be inappropriate for a person who is discharging debts in bankruptcy. The latter projects an image of practical necessity that fits more comfortably with bankruptcy discharge. A judge is therefore more likely to suffer criticism for permitting a debtor to retain a Corvette than a Caprice of the same dollar value.

4. *Media spin.* Because judges care what members of the profession and the public think of them, they are vulnerable to media spin regarding the cases that come before them. To release a defendant who was probably guilty of the crime charged because the police violated the defendant's rights is a great deal more difficult when the crime is a heinous one that has caught the press's attention. For that very reason, the prosecutor who wants to win the case has an incentive to make sure the crime catches the attention of the press. F. Lee Bailey, a highly successful trial lawyer in the 1960s and 1970s, was notorious for arguing his cases in the press, thereby "seeking to create a force outside the courts with the expectation and intention that the force so created would produce a desired result in a particular case

236. *See* LLEWELLYN, *supra* note 1, at 48 (discussing the relevance of model and color of an automobile in a negligence hypothetical).

237. *See* Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back—Something May Be Gaining On You"*, 68 AM. BANKR. L.J. 155, 190 n.189 (1994) (stating that "[i]t is often the attempt to extract the last dime of illegal profit that raises creditor and court ire").

within the courts."[238] Since Bailey's heyday, the standards for what is acceptable have been liberalized.[239]

For the past two decades, manufacturers and insurers have been campaigning in the mass media against high jury verdicts and expanded remedies.[240] Ironically, the campaign seems to have had more effect on judges than on jurors. Recent studies show astonishingly high rates of verdict reductions or reversals by both trial and appellate courts.[241]

C. *Strategies That Transcend Judges*

The most interesting types of strategies are those that seek a particular result "in spite, if you please, of what the judges in a case of dispute may be expected to do."[242] These are legal strategies that seek to prevent the other side from obtaining an adjudication or that seek to control who the adjudicator will be.

1. *Cost strategies.* Legal remedies are available only through litigation.[243] Litigation is expensive and can be made more so by the manner in which it is conducted. For example, by expanding the issues in litigation, a party can expand the scope of discovery or the

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238. *In re* Bailey, 273 A.2d 563, 566 (N.J. 1971) (internal quotation marks omitted). In fact, as a result of disciplinary proceedings arising from Bailey's penchant for publicizing cases, he was suspended from practicing *pro hoc vice* in New Jersey for a period of one year. *See id.* at 567.

239. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991) (Kennedy, J., plurality opinion) ("An attorney's duties do not begin inside the courtroom door. . . . [A]n attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment . . . . including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried."); Robert L. Shapiro, *For the Defense*, 30 LOY. L.A. L. REV. 105, 109 (1996) ("Most sophisticated city and county prosecutorial offices now have professional public relations personnel to manage press coverage and disseminate information about an ongoing case.").

240. *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 747 (1998) (discussing "corporate investment in projecting an image of unrestrained litigiousness and rampant overclaiming" and its "paradoxical effect of increasing the level of claiming"); William Glaberson, *Some Plaintiffs Losing Out in Texas' War on Lawsuits*, N.Y. TIMES, June 7, 1999, at A1 (describing the campaign against plaintiffs' verdicts in Texas).

241. *See* Clermont & Eisenberg, *supra* note 172; Margaret Cronin Fisk, *Now You See It, Now You Don't*, NAT'L L.J., Sept. 28, 1998, at C1 (discussing a study of 100 representative large verdicts of $1 million or more in 1994, about two-thirds of which were reduced or set aside).

242. LLEWELLYN, *supra* note 1, at 14.

243. That is, courts do not grant remedies or enter orders in the absence of a case filed by some party.

opportunity to employ experts. Depositions may be taken in geographically remote areas, putting the opposing party to the expense of attending. Retention of experts by one party ordinarily necessitates the retention of other experts by the opposing party.[244] As a result, it may cost millions of dollars in out-of-pocket costs for plaintiffs to prepare for trial a simple dispute over whether the dumping of toxic chemicals caused a cluster of children's leukemia.[245] Occasionally, a party is able to win a case by exhausting the other side's resources, or to prevent the bringing of a case by eliminating the other side's resources,[246] though the more common result is settlement of such a case at a discount.[247]

A manufacturer's or seller's announcement that it will defend all cases to final decisions by the courts, without consideration of settlement, can, in some situations, dramatically reduce the number of cases that are cost-effective to litigate.[248] For example, the cigarette companies "decided they would defend every claim, no matter what the cost, through trial and any possible appeals" and held to that policy for thirty-five years.[249] The strategy was phenomenally successful. At the end of those thirty-five years, few cases had come to trial, and the companies had not paid out a cent in tort awards.[250]

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244. *See, e.g.*, Karen Donovan, *Squirm Time for Milberg Weiss*, NAT'L L.J., Apr. 5, 1999, at A1 (quoting class-action lawyer Melvyn I. Weiss, a frequent user of expert witnesses, to the effect that "[e]xpert witnesses neutralize each other"). The experts testify regarding issues of fact, issues of foreign law, and increasingly, issues of domestic law. *See, e.g.*, Bookhardt v. State, 710 So. 2d 700 (Fla. Dist. Ct. App. 1998) (permitting expert testimony on legal meaning of the term "security"). *See also* Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984) (arguing that courts do, and should, ignore the prohibition on expert legal testimony).

245. *See, e.g.*, HARR, *supra* note 9 (describing the great trial-preparation costs to plaintiffs in the Woburn, Massachusetts, suit alleging harmful effects of a leak from a toxic dump into drinking water supplies).

246. *See, e.g.*, Southern Christian Leadership Conference v. Superior Ct. of La., 61 F. Supp. 2d 499 (E.D. La. 1999) (upholding the state and federal constitutionality of the Louisiana business community's decision to dismantle the Tulane Environmental Law Clinic to prevent the bringing of certain kinds of cases).

247. *See* HARR, *supra* note 9, at 405-48 (describing cost pressures toward settlement in a complex environmental case).

248. This would be a cost-effective strategy where the increased costs of litigating every case are outweighed by the savings from not having to defend or pay settlements in cases where the strategy discourages plaintiffs from pursing their claims.

249. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992).

250. *See id.* at 874 ("Thus, after thirty-five years of litigation, the tobacco industry could still maintain the notable claim that it had not paid out a cent in tort awards.").

2. *Delay strategies.* Litigation takes time, and defendants can expand the amount required by the manner in which they respond.[251] An award of the same relief at a later time may be less valuable to the plaintiff or less costly to the defendant.[252] For example, if the court delays the entry of an order barring a competitor's illegal practices, the competitor may succeed in driving the plaintiff out of business in the interim. Damages may not be an adequate substitute, because the damages actually incurred might be too speculative to recover[253] or the judgment for those damages might not be collectible.[254]

Delay may reduce the expected value of a lawsuit by reducing the plaintiff's chances of winning. Witnesses may die or disappear. Evidence may be altered or destroyed. The pattern of judicial or community attitudes that made the case worth bringing may change. The damage inflicted on the plaintiff by the defendant's wrongful act may become less poignant with the passage of time—perhaps through the death of the plaintiff. The plaintiff may become discouraged by the passage of time, or become less determined or less able to devote the necessary resources.

Delay may also reduce the plaintiff's chances of collecting any money judgment that may be rendered; that is, a defendant that is not judgment-proof at the commencement of litigation may become judgment-proof by its conclusion.[255] The defendant may even be able

251. *See* David E. Rovella, *High-profile Conn. Lawyer Disappears*, NAT'L L.J., Mar. 22, 1999, at A19 (noting that "[f]ellow stars of the Connecticut defense bar were unequivocal in their admiration for [attorney] Francis Mac Buckley . . . . His capacity to delay cases, it is said, is legendary").

252. *See, e.g.*, Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 893 n.9 (1984) (suggesting situations in which a defendant can benefit from a meritless appeal by earning sufficient interest on the plaintiff's judgment to cover the costs of the appeal and earn a margin of profit). For an example of an ultimately unsuccessful use of this strategy, see *Hersch v. Citizens Sav. & Loan Ass'n*, 194 Cal. Rptr. 628 (Cal. Ct. App. 1983), in which the court added $125,000 to the plaintiff's damage award because the defendant had pursued a frivolous appeal that was made profitable only by the fact that it could earn interest on the plaintiff's judgment award during the term of the appeal. *See id.* at 638.

253. *See, e.g.*, Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V., 28 F. Supp. 2d 126, 131 (S.D.N.Y. 1998) ("While lost profits need not be established with 'mathematical precision,' they must be 'capable of measurement based upon known reliable factors without undue speculation.'" (quoting Ashland Mgt. Inc. v. Janien, 82 N.Y.2d 395, 403 (1993))).

254. *See, e.g.*, Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 14-38 (1996) (describing strategies by which a defendant can protect its assets so as to render itself "judgment-proof").

255. As a general rule, without a judgment from a court, a creditor cannot interfere with a debtor's use of its property. *See* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,

to delay until the case becomes moot.[256] When cases settle, the amounts of the settlements are likely be discounted for the time, expense, and uncertainty that would have been involved in completing the litigation.

The fact that delay affects case outcomes is widely recognized. What is not widely recognized is the capacity of legal strategy to manipulate the extent of delay.[257] Strategies that can change the extent of delay can change both the parties' chances of winning and the amounts by which their cases will be discounted in early settlements.

Various rules of law may seem to prohibit strategies that seek delay, but, on close examination, they prove ambiguous. Thus, for example, the ABA Model Rules of Professional Conduct impose on lawyers an obligation to "make reasonable efforts to expedite litigation" but only "consistent with the interests of the client."[258] The comment to that rule provides that "[d]elay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."[259] The term "merely" suggests that deliberate delay is acceptable strategy when those motives coincide with loftier ones, even if the loftier ones are of little weight in the decision. Rule 11 of the Federal Rules of Civil Procedure refers to "unnecessary delay" as an "improper purpose,"[260] suggesting that delay is a proper purpose when the delay is "necessary." The effect of these ambiguities is to provide

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Inc., 527 U.S. 308, 333 (1999) (holding that because of this general rule, in the instant case, "the District Court had no authority to issue a preliminary injunction preventing [debtor] petitioners from disposing of their assets pending adjudication of the [creditor] respondents' contract claim for damages").

256. *See, e.g.*, Board of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 130 (1975) (holding that a case brought by six high school students for interference with their First Amendment rights with respect to a school newspaper was moot because the students had graduated by the time the case reached the Supreme Court).

257. *See, e.g.*, Galanter, *supra* note 2, at 121 (treating delay as merely the product of institutional overload); *id.* at 139 (suggesting that an "increase in institutional facilities for processing claims" would be sufficient to eliminate delay). Rule 3.2 of the Model Rules of Professional Conduct misses the legal strategy point when it states that "[a] lawyer shall make reasonable efforts to expedite litigation *consistent with the interests of the client*." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1999) (emphasis added). Read literally, the rule authorizes every delaying tactic that benefits the client because elimination of that delay would be *inconsistent* with the interests of the client.

258. *Id.*

259. *Id.* cmt. 1.

260. FED. R. CIV. P. 11.

the basis for an array of strategies that lawyers can use to pursue, or counter, delaying strategies.

3. *Extralegal strategies.* Much strategic effort is devoted to extralegal means of deterring those entitled to legal remedies from suing or from continuing suits already filed. These efforts range from common courtesy—an airline's making relatives comfortable and providing them with information in the days immediately following a fatal crash—to physical violence. Between those extremes are a variety of pressures that parties to a litigable dispute can apply against their opponents. One can embarrass an opponent by the kinds of questions asked in trial or in deposition, or by the nature of the matters inquired into in discovery. One can make an opponent's life unpleasant by conducting litigation in an uncivil manner. One can threaten an opponent—perhaps explicitly, but more likely implicitly—with the loss of business relationships, unwanted publicity, the loss of a job, criminal prosecution,[261] deportation,[262] or embarrassment in matters having no direct relationship to the litigation. Or one can go entirely outside the law, fabricating evidence, bribing judges,[263] or murdering witnesses.[264]

The effect of these extralegal strategies on patterns of litigation is difficult to overestimate. Businesses tend to sue their trading partners

261. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992) (finding that "[t]he Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, provided that the criminal matter is related to the client's civil claim"). Statutes in some states may, nevertheless, prohibit the practice.

262. For example, illegal aliens may have difficulty in claiming their legal rights because they fear that the opposing party will discover their status and bring it to the attention of the immigration authorities. *See, e.g.*, HARROP A. FREEMAN & HENRY WEIHOFEN, CLINICAL LAW TRAINING: INTERVIEWING AND COUNSELING 208-09 (1972) (summarizing a divorce case in which the husband used threats of deportation to discourage his Canadian wife from asserting her rights in the divorce proceedings).

263. The bribery of judges has been a recurring problem in the American legal system. *See, e.g.*, United States v. Maloney, 71 F.3d 645, 665 (7th Cir. 1995) (affirming a Chicago judge's conviction for accepting bribes in murder cases); *2 Judges Guilty in Florida Corruption Inquiry*, N.Y. TIMES, Apr. 28, 1993, at A18 (reporting the conviction of two Dade County, Florida, judges for bribery).

264. *See, e.g.*, R. Jeffrey Harris, *Whither the Witness? The Federal Government's Special Duty of Protection in Criminal Proceedings After* Piechowicz v. United States, 76 CORNELL L. REV. 1285, 1302-03 (1991) (discussing the problem of protecting witnesses in criminal cases and proposing a duty for the government to protect federal criminal witnesses who are threatened, based, *inter alia*, on knowledge or reasonable foreseeability that the witness is in danger).

only when the business relationship expires.[265] A recent empirical study found that only one in fifty patients with a valid claim for malpractice against a medical provider actually made the claim.[266] Cases against professional killers or other violent felons are notoriously difficult to bring because witnesses understandably fear for their lives.[267]

4. *Contractual strategies.* Through a variety of contracts, legal strategists can install their allies as decisionmakers, bar the bringing of otherwise meritorious cases, or shift risks to persons who do not realize their magnitude. Examples of the first are contracts that require arbitration of customer claims against industry by arbitrators whose primary loyalty is likely to be to the industry.[268] Examples of the second are contracts in which customers waive their right to sue the businesses they patronize. An example of the third is an agreement in which the customer indemnifies the company against claims by third parties.[269]

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265. *See* Tahirih V. Lee, *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335, 1409 (1996) ("Litigation makes sense only if merchants expect to profit beyond the breakdown of the business relationship."); Stewart Macaulay, *Non-Contractual Relations In Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61-62 (1963) (finding that parties in long-term business relationships litigate only when reputational sanctions fail, usually in situations involving high stakes or the termination of the relationship); *see also* MACAULAY, *supra* note 212, at xv ("Once their franchises have been terminated, [automobile dealers] have been willing to sue."). Professor Galanter notes that "the more inclusive in life-space and temporal span a relationship between parties, the less likely it is that those parties will resort to the official system." Galanter, *supra* note 2, at 130 (footnotes omitted).

266. *See* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 73 (1993) (describing a hospital review where only 8 out of 280 patients with "identifiable negligent injury" actually filed claims).

267. *See* John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1113 (1995) ("Most civilian witnesses in organized crime investigations—extortion victims, relatives of murder victims, and chance eye-witnesses—are extremely reluctant to testify. Often they refuse to do so even in the secrecy of the grand jury.").

268. *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 936-39 (1999) (describing a hypothetical case where a consumer purchases a computer through an advertisement and finds inside the box a binding contract that includes the requirement that all claims be arbitrated "in Phoenix, Arizona before a panel of three retired industry executives"). *But see* UNITED STATES GENERAL ACCOUNTING OFFICE, SECURITIES ARBITRATION: HOW INVESTORS FARE 35-39 (1992) (finding securities investors no more likely to prevail in an "independent" forum, such as the American Arbitration Association, than in industry-sponsored forums such as the New York Stock Exchange or the National Association of Securities Dealers).

269. *See, e.g.*, United Servs. Automobile Ass'n v. Snappy Car Rental, Inc., 87 Cal. Rptr. 2d 742, 743 (Cal. Ct. App. 1999) (analyzing a car rental contract under which a consumer renter

In most of these circumstances, the strategy is both contemplated and authorized by legal doctrine. That is, policymakers have made a deliberate choice to permit customers to waive their rights. But legal strategy is capable of extending these contracts and waivers beyond the limits contemplated or authorized. For example, Professor Katherine Van Wezel Stone documents how legal strategists for industry have transformed the Federal Arbitration Act from a guarantor of a level playing field to a tool for the oppression of employees or customers.[270]

5. *Forum shopping.* Given what we have already said about the ineffectiveness of legal doctrine, the fact that different decisionmakers reach different results on the same legal doctrine should not be surprising.[271] To take advantage of those differences, legal strategists have devised numerous ways of controlling who will decide a dispute. In some circumstances, legal doctrine deliberately

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indemnified a car rental company against claims of third parties arising out of use of the automobile). Most providers of Internet access, including Microsoft Network, require that the customer indemnify the provider against litigation arising out of the customer's use of the Internet. Probably few users of the Microsoft Network realize they have agreed to pay Microsoft's attorneys' fees, in a defense managed by Microsoft, in the event that a third party sues the user for libel and joins Microsoft as a defendant. Microsoft's contract provides:

> You agree to indemnify MSP and Microsoft from and against any and all liabilities, expenses (including attorneys' fees) and damages arising out of claims based upon use of your MSN account, including any claim of libel, defamation, violation of rights of privacy or publicity, loss of service by other Members and infringement of intellectual property or other rights. MSP will notify you promptly of any claim for which MSP or Microsoft seeks indemnification and will afford you the opportunity to participate in the defense of such claim, provided that your participation will not be conducted in a manner prejudicial to MSP's or Microsoft's interests, as reasonably determined by MSP or Microsoft.

Indemnification (visited Feb. 25, 2000) <http://memberservices.msn.com/gettingstarted/guidelines/memberagreement.htm#Section12> (on file with the *Duke Law Journal*).

270. *See* Stone, *supra* note 268, at 938-41 (lamenting that a contract to arbitrate in an unusual forum with a panel chosen by industry could be enforceable even though the contract—found inside the package after it was purchased—made no mention of arbitration, referring only to "the rules and regulations of the Computer Manufacturer's Industry Trade Association").

271. *See, e.g.*, Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999) (analyzing rampant forum shopping in cases under the United States Bankruptcy Code); Ed Flynn, Confirmation Rates By Judge, 1989-1996 (July 1998) (unpublished manuscript, on file with the *Duke Law Journal*) (showing five U.S. Bankruptcy judges as confirming reorganization plans in fewer than 10% of their cases and six confirming plans in more than 50% of their cases). Some portion of the difference in the confirmation rates reported by Flynn may be attributable to differences in types of cases assigned to the judges, but the differences are too great to be entirely accounted for by that factor.

affords the party filing the case a choice among courts[272] or even among judges of a single court.[273] The most prominent example is the right of a plaintiff to sue a defendant in any jurisdiction in which the defendant does business.[274] Most plaintiffs so entitled use their "venue privilege" to bring their actions in the jurisdiction most convenient for them. But some choose the jurisdiction for the likelihood that its courts will rule in their favor.[275]

The doctrines that initially afford plaintiffs choices among courts may also give opposing parties means of upsetting the plaintiffs' choices, leading to an interaction of strategies. For example, if the plaintiff files a case against an out-of-state defendant, the defendant may have the right to remove the case to the federal court.[276] Plaintiffs who anticipate the possibility of removal may be able to prevent it by joining additional defendants,[277] by suing only on state law causes of

272. For example, in Florida, most civil suits may be filed "in the county where the defendant resides," or "in the county where the cause of action accrued." FLA. STAT. ANN. § 47.011 (West 1994). Some actions can be filed in state court or federal court. *See, e.g.*, 20 AM. JUR. 2D *Courts* § 97 (1995) ("[I]n diversity of citizenship cases, the jurisdiction of federal courts is concurrent with that of state courts, provided the amount involved meets the minimum specified by Congress for an action to be brought in a federal court.").

273. For example, Wisconsin and California statutes give each party to the case the option to remove one judge. *See* CAL. CIV. PRO. CODE ANN. § 170.6 (West Supp. 2000) (providing for substitution of judges based on an affidavit that the judge is prejudiced against any party or attorney). The filing of the affidavit may establish prejudice even without a judicial determination that the prejudice exists. *See* Johnson v. Superior Court, 329 P.2d 5, 8 (Cal. 1958). *See also* WIS. STAT. ANN. § 801.58 (West 1999):

> (1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. . . . (2) When the clerk receives a request for substitution, the clerk shall immediately contact the judge whose substitution has been requested for a determination of whether the request was made timely and in proper form. If the request is found to be timely and in proper form, the judge named in the request has no further jurisdiction and clerk shall request the assignment of another judge . . . .

274. *See* B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1108-19 (1990) (describing the legal basis for jurisdiction over causes of action that did not arise out of the defendant's activities in the forum).

275. *See, e.g.*, David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion"*, 29 TEX. INT'L L.J. 353, 354-55 (1994) (quoting Lord Denning's description of how numerous cases involving injuries suffered on North Sea oil rigs were filed in Texas due to the possibility of larger verdicts in the United States than overseas).

276. *See* 28 U.S.C. § 1441(b) (1994) (authorizing removal "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought").

277. *See* Erwin Chemerinsky, *Rationalizing Jurisdiction*, 41 EMORY L.J. 3, 7 (1992) ("[A] plaintiff trying to avoid removal to federal court might add defendants who are from the same state."); Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail*

action,[278] by requesting particular relief,[279] by suing in the defendant's home state,[280] or by otherwise destroying diversity.[281] Defendants who

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on the Erie Railroad, 48 LA. L. REV. 1369, 1374-75 (1988) ("Plaintiffs who wish to avoid removal to federal court may do so if they can join, in addition to the non-resident defendant, a resident defendant, thus avoiding the complete diversity of citizenship that is a prerequisite to federal court jurisdiction."). The doctrinal limit on this strategy is that the joinder cannot be "fraudulent." *See* Marble v. American Gen. Life and Accident Ins. Co., 996 F. Supp. 571, 573 (N.D. Miss. 1998) (quoting Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1997)):

> To prove that non-diverse parties have been fraudulently joined in order to defeat diversity, the removing party must demonstrate either "outright fraud in the plaintiff's recitation of jurisdictional facts," or that "there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court."

278. *See, e.g.*, Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1986) (noting that a plaintiff is "the master of the claim" and may choose to avoid removal by omitting federal law claims from the initial complaint).

279. *See, e.g.*, St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1937) ("If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."). *But see* De Aguilar v. Boeing Co., 47 F.3d 1404, 1410 (5th Cir. 1995) ("The inquiry, however, does not end merely because the plaintiff alleges damages below the threshold. The face of the plaintiff's pleading will not control if made in bad faith.").

Divorce courts are regarded as generally favorable venues for persons seeking alimony and child support; bankruptcy courts are regarded as less favorable. Bankruptcy lawyers developed the strategy of attacking divorce court awards of alimony and child support (which are not dischargeable in bankruptcy) by characterizing them as disguised property settlements (which are dischargeable in bankruptcy). After decades of final dispositions of such cases by the bankruptcy courts, divorce lawyers hit on the strategy of returning to the divorce court to seek modification of the divorce decree to award post-bankruptcy alimony and child support on the grounds of "changed circumstances." *See, e.g.*, *In re* Siragusa, 27 F.3d 406, 408-09 (9th Cir. 1994) (holding that an alimony modification granted by a divorce court and based on "changed circumstances" created by a bankruptcy discharge did not constitute an effort to collect discharged debt in violation of Bankruptcy Code § 524); Dickson v. Dickson, 474 S.E.2d 165, 169-71 (Va. Ct. App. 1996) (holding that the discharge in bankruptcy of an equitable distribution obligation the debtor owed to his former spouse under the divorce decree justified an increase in support payments from the discharged debtor); LYNN M. LOPUCKI, STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS 283 (3d ed. 1997).

280. *See* Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 73 n.55 (1997) ("A plaintiff can always avoid removal on diversity grounds, however, by filing a suit in the defendant's home state.").

281. *See, e.g.*, Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 188-90 (1931) (allowing an Oklahoma administratrix to resign and a Louisiana administrator to be appointed to destroy diversity so an action could be brought in Louisiana). The statute has more recently been amended to make the decedent's residence determinative. *See* 28 U.S.C. § 1332(c)(2) (1994) ("[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ."). Sometimes, the strategies used to shop between state and federal courts are remarkably imaginative. When a Texas state court jury returned a $50 million verdict against Crown Life Insurance Co.—then admittedly a private company—Crown responded by persuading a Saskatchewan government agency to convert debt owed by Crown's parent company to the agency into nonvoting equity. Crown then returned to court with the argument that it was a "foreign state" entitled to removal of the case from state court to federal

fear adjudication by a state or federal trial court can sometimes avoid it by filing for bankruptcy and having the initial adjudication made by the bankruptcy court as a determination of the amount of the plaintiff's claim.[282]

With respect to some types of actions, the party who would otherwise be the defendant can file first, thereby seizing the venue privilege for itself. These actions include divorces,[283] bankruptcies,[284] and virtually any matter that can be the subject of an action for declaratory relief.[285] Parties with bargaining leverage may attempt to control venue through a contract provision imposed at the time of the initial transaction.[286]

The system's response to these kinds of strategies is to pass or create laws, such as the doctrine of forum non conveniens,[287] that authorize judges to transfer cases. But these laws fall far short of providing an antidote to forum shopping for legal outcomes. First, these laws do not even theoretically contemplate a single, most appropriate venue for each case. Second, in at least some contexts, practical and

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court and to have its case heard without a jury. *See* Larry M. Greenberg, *Canadian Insurer Crown Life Becomes a "Foreign State" as It Loses U.S. Suit*, WALL ST. J., Oct. 30, 1995, at A5.

282. *See, e.g.*, *In re* Apex Oil Co., 91 B.R. 860, 865 (Bankr. E.D. Mo. 1988) (assuming jurisdiction to estimate the Department of Energy's claims against a debtor over the Department's objections).

283. *See, e.g.*, Martin v. Fuqua, 539 S.W.2d 314, 315-16 (Ky. 1976) (holding that where a husband and wife filed divorce actions in different counties, only the first case filed should proceed).

284. The first court in which a bankruptcy case is filed by or against a particular debtor controls venue. *See* Bankr. Rule 1014(b), 11 U.S.C. app. (1994). In preparation for filing bankruptcy in New York, Baldwin-United, a Cincinnati company, established a New York headquarters. Creditors filed an involuntary case in Cincinnati just minutes before Baldwin-United filed its New York case. Unlikely to win the venue fight, and apparently fearful of offending the Cincinnati judge, Baldwin-United dismissed its New York filing without a fight. *See* 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, 28 n.60.

285. *See, e.g.*, League of Latin Am. Citizens v. Clements, 986 F.2d 728, 769 (5th Cir. 1993) (noting that, under Texas rules on venue, "a party who anticipates being sued may 'capture' venue by filing suit first") (citation omitted).

286. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding a contract provision providing for venue in Miami, Florida, for a Washington plaintiff injured on a cruise between Los Angeles and Puerto Vallarta, Mexico). Similarly, Microsoft's contract of adhesion for Internet access provides for venue in King's County, Washington, for all actions arising out of the customer's relationship with Microsoft. *See supra* note 269.

287. *See* 28 U.S.C. § 1404(a) (1994) (authorizing a district court to change venue "[f]or the convenience of parties and witnesses"); *In re* Union Carbide Corp., 809 F.2d 195, 202-03 (2d Cir. 1987) (upholding a dismissal due to forum non conveniens where the incident occurred in India, all plaintiffs were Indian citizens, and "the proof bearing on the issues to be tried [was] almost entirely located in India").

political pressures on judges have caused a general failure in the venue correction process.[288] Internationally, no correction mechanism may exist at all.[289] Empirical studies suggest that the struggle over venue is often outcome-determinative.[290]

Forum shopping among the judges of a single court is generally prohibited, and violations are usually treated as serious violations of legal ethics.[291] The predictable differences in legal outcomes across judges are, however, so great that legal strategists continue to find ways of picking their judges. The simplest means is to file the case in a court that has only a single judge,[292] or in a court that will advise filers in advance what judge will be assigned.[293] In a system that rotates the assignment of judges in a predictable order, the strategist has merely to observe which judge was assigned to the previous case or cases to know which judge will be assigned to the next case filed.[294] In a system that assigns cases randomly, the strategist typically looks for situations in which the judge it seeks to avoid is removed from the draw temporarily because of vacation, illness, imbalance in already assigned cases, or some other reason. Often, the chief judge of the court

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288. *See, e.g.*, Eisenberg & LoPucki, *supra* note 271, at 968 (finding, based on an empirical study, that forum shopping was rampant in the bankruptcies of large, public companies from 1980 to 1997); *id.* at 1000 (concluding that venue correction occurred in only about 5% of those cases); LoPucki & Whitford, *supra* note 284, at 24-26 (describing forum shopping in specific cases).

289. *See, e.g.*, Laurie P. Cohen, *Frankel May Surrender, as a Deal Is Expected*, WALL ST. J., July 1, 1999, at C1 (noting that Samuel D. Sheinbein, accused of murder in the United States, successfully defeated United States venue for his murder trial by obtaining Israeli citizenship based on the fact that his father was born in the territory that became Israel).

290. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507 (1995) (reporting that federal court plaintiffs lose a significantly larger percentage of transferred cases than they lose of all cases).

291. *See, e.g.*, *No Judge-Shopping Allowed*, NAT'L L.J., May 5, 1997, at A8 (reporting that an attorney paid sanctions of $7,500 for filing 13 lawsuits, then withdrawing all but one in a case involving Dr. Jack Kevorkian); Randall Samborn, *Chicago Judge Sanctions Firm*, NAT'L L.J., Apr. 18, 1994, at A4 (reporting that a judge sanctioned Mayer, Brown & Platt lawyers for filing five identical complaints in an attempt to draw one of three judges).

292. *See, e.g.*, Mark Ballard, *Biggest Little Court in Texas: Plaintiffs Flock to Texarkana with Billion-Dollar Suits*, NAT'L L.J., Aug. 30, 1999, at A1, A10 (noting the filing of numerous large cases in the Texarkana, Texas, federal court to get Judge David Folsom and referring to the technique as "pinpoint forum shopping").

293. *See, e.g.*, GORDON BERMANT ET AL., CHAPTER 11 VENUE CHOICE BY LARGE, PUBLIC COMPANIES 40-41 (1997) (reporting the Delaware Bankruptcy Court's practice of advising prospective filers of the name of the judge who would be assigned to the case when filed).

294. *See, e.g.*, WEYRAUCH, *supra* note 211, at 225 n.17 ("The attorneys hang around in the clerk's office until the proper letter is about to come up. As soon as this happens, they file their complaints.").

has the authority to bypass the random assignment system, opening the way for political corruption.[295] Strategists may file several identical cases, and then dismiss all but the one assigned to the desired judge.[296] In more sophisticated versions of the same strategy, the strategist files only a single case in the court, observes the assignment, and then decides whether to go forward or dismiss. If the strategist chooses dismissal, the strategist may later file in the same court or file in a different court. Other variations are possible.[297]

Strategists can also select courts—and thereby select more favorable panels of judges—by changing the nature of the relief they request. For example, wealthier taxpayers can avoid the notoriously pro-government judges of the tax court[298] by paying the tax and then suing for a refund in the United States district court. In the Texaco-Pennzoil example with which this Article began, Pennzoil tested the waters in Delaware by filing for injunctive relief, and then changed judges by dismissing that action and filing for money damages in Texas, before having New York judges imposed on them by Texaco's filings in New York federal and bankruptcy courts.[299]

6. *Settlement strategies.* The conventional view considers the settlement of cases a means of reaching approximately the same result litigation would reach, but at less expense. The concept is

295. *See, e.g.*, Pete Yost, *Custom Broken in Cases Tied to President; Judge Picks Clinton Appointees to Preside*, BOSTON GLOBE, Aug. 1, 1999, at A13 (revealing that the chief judge of the United States District Court for the District of Columbia bypassed the random assignment system to steer cases against friends of President Clinton to judges appointed by President Clinton).

296. This form of shopping is considered unethical, even in the absence of any rule violation. *See* Samborn, *supra* note 291.

297. For example, if a similar case anywhere in the United States has been assigned to a sympathetic judge, later filers can seek assignment to the same judge on the ground that their case is related to that one. *See, e.g.*, Bob Van Voris, *N.Y.'s Judge-shopping Channel*, NAT'L L.J., July 26, 1999, at A4 (asserting that tobacco and gun plaintiffs are flocking to the United States District Court for the Eastern District of New York to seek related-to assignments to Judge Jack B. Weinstein).

298. *See* Deborah A. Geier, *The Tax Court, Article III, and the Proposal by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 998 (1991) (showing, in an empirical study, that the government won 70.5% of district court tax cases and 90.4% of tax court cases in the same period).

299. *See supra* Part I.A.; *see also* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 24 (1986) (Marshall, J., concurring) (objecting to "the odor of impermissible forum shopping which pervades this case").

crystallized in Professors Mnookin and Kornhauser's memorable phrase "bargaining in the shadow of the law."[300]

Settlement is, however, more than just an amicable resolution of a dispute. It is a complex, often adversarial process with its own norms, procedures, strategies, and range of possible outcomes. Settlement strategies can include the arguing of facts that would be inadmissible at trial or of legal theories that would have little chance of winning in court, the making of threats that would be considered extortionate in any other context, and the substituting of what the parties really want for the remedies the legal system offers.

Settlement can generate outcomes that lie entirely outside the range of possible outcomes from litigation. The operative leverages may result from the court's restrictions on continuing the litigation[301] or from the consequences of continuing aside from the ultimate decision.[302] For example, the litigant who can credibly threaten to embarrass the opposing party in the course of the litigation—perhaps by discovering facts that then become part of the public record—may be able to settle for more money than the litigant could win in court.[303] Similarly, the litigant may threaten an opponent with disclosure of business strategies or as-yet unpublicized vulnerabilities. An adverse result in litigation may have consequences that extend far beyond the specific matter in issue. Loss of a civil suit may lead to a criminal indictment. The filing of a civil action may bring the plaintiff's or the defendant's conduct to the attention of law enforcement agencies.[304]

300. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (focusing on the role of law in divorce proceedings outside of the courtroom).

301. *See, e.g.*, E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 312 (1986) ("One can in fact *define* managerial judging as the selective imposition by judges of costs on *lawyers* for the purpose of rationing the use of procedures available under the Federal Rules of Civil Procedure.").

302. *See, e.g.*, Karen Donovan, *Class Action War Heats Up*, NAT'L L.J., Dec. 22, 1997, at A1 (asserting that companies often felt compelled to settle securities class action strike suits to avoid embarrassment).

303. *See id.*

304. *See* HARR, *supra* note 9, at 491-92 (describing how bitter, unsuccessful civil litigation over several years generated a record of environmental abuses that then made action by the EPA feasible). Consider this additional example. The wife of a law student may threaten to expose his use of cocaine in a divorce action. Because the law student must disclose the divorce case in his application for Bar membership, if the wife were to make this allegation on the record in the divorce action, the Bar would be likely to discover it. At minimum, the allegation would delay the law student's admission to the Bar. Rather than take the chance, the law student in this situation may choose to accede to the wife's demands in the divorce action. While the wife's threat may constitute the crime of extortion, skilled counsel will raise it in an indirect

One plaintiff's success in an obscure lawsuit may cause an avalanche of such suits by others. Settlement of the initial case prior to filing may have enhanced value because it could prevent such occurrences.

Commentators generally consider the settlement process harmless because they assume that parties are free to refuse a settlement that gives them less than they think they would win at trial.[305] The assumption is incorrect. Some judges attempt to "encourage" settlement of their cases through implicit threats of retaliation against recalcitrant parties, and thus make it virtually impossible for those parties to continue to litigate.[306] Though the written law may give the parties the right to refuse to discuss settlement, the party who actually refuses may suffer retaliation from the court.[307] Once the party is forced into negotiations by this threat, the party will encounter other norms, such as those requiring the party to divulge aspects of its case that would otherwise be confidential.

In multiparty litigation, settlement norms may be enforced by strategic alliances among parties. For example, strategic alliances are generally regarded as important determinants of recoveries—by liti-

manner that leaves no basis for prosecution. For example, the wife's counsel may advise the husband's counsel that the wife insists on making the accusation, but that the wife's counsel is trying to dissuade her because of the risk that the matter might come to the attention of the Bar.

305. For example, Professor Alexander states:

> The implicit message of the economic model is that we do not need to be concerned about the high proportion of cases that are settled because the outcomes of settled cases approximate the positions the parties would have occupied after a trial on the merits. One could also arrive at this conclusion from the fact that the parties must consent to a settlement. A party who believes trial would produce a more attractive outcome than a particular settlement proposal can simply refuse the offer and go to trial. The ability of either party to force a trial by refusing to agree to an unfavorable settlement thus should drive settlements toward expected trial outcomes. Therefore, settlements should be at least as substantively accurate as trials.

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 502 (1991).

306. *See, e.g.*, Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 755 (1986) (noting that "settlements are neither dictated nor even necessarily driven by statutes and *stare decisis*"); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 78 (1995) ("The combination of managerial and substantive decision-making powers provides district judges with powerful leverage during the pretrial phase. Judges can use their power over substantive decision-making to coerce settlements and intimidate counsel into abandoning litigation theories or defenses.").

307. *See* Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 49 (1994) ("Additionally, because of a 'judicial zeal for settlement,' the increased opportunity for abuse may lead to judges punishing parties and lawyers who fail to cooperate in settlement.").

gation or negotiation—in large bankruptcy reorganization cases.[308] The party who fails to accede to settlement norms—such as the norm that everybody at the table gets something, regardless of legal entitlement—may find itself excluded from key alliances.[309] The power of these alliances derives in part from the fact that if the case comes before the court with all parties in agreement except one, that one is likely to be overruled.[310]

IV. IMPLICATIONS

The theory of legal strategy we present here is capable of explaining several phenomena for which current explanations are inadequate or nonexistent.

A. The Effect of Superior Lawyering on Legal Outcomes

By the conventional view—made manifest both in bar examinations and judicial opinions—law is an extensive set of instructions to courts on how to decide cases.[311] Those instructions are necessarily incomplete in some respects and ambiguous in others. But the instructions are sufficient to render most cases "easy."[312] The judge's task in the remaining cases is to select the best result by resolving the ambi-

308. *See, e.g.*, 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, 318 (1994) ("The outcome [of a financial restructuring] depends not only on the substantive rights of the parties, but also on the process through which the parties address the restructuring problem, the order in which the issues are considered, and the particular alliances that form."). One such norm is that every constituency at the bargaining table gets something, even if that constituency has not even an arguable entitlement to anything under the applicable law. *See* 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, 154 (1990) ("Rather, the outcomes of these negotiations are significantly determined by the social norms of the legal culture which has grown up around these kinds of cases.").

309. *See* LoPucki, *supra* note 30, at 1507-08 (explaining this inclusion as a result of the shared mental model).

310. In the bankruptcy reorganizations of large, public companies, nearly all objections to confirmation are unsuccessful. About 96% of cases result in confirmation of a plan, and that virtually always occurs in the first hearing on confirmation. *See* Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 CORNELL L. REV. 597, 600 (1993) (finding confirmation of reorganization in 69 out of 72 cases – a 96% rate).

311. *See, e.g.*, 1 LASSWELL & MCDOUGAL, *supra* note 7, at 316-17 (describing the traditional view as the "positivist frame").

312. *See* Schauer, *supra* note 3, at 413 ("Following the law is a legal event, and the vast majority of *these* legal events are easy cases.").

guity in light of social conditions and other factors. Were this traditional view correct, lawyers could, in most cases, look up the law before litigation and predict those cases' outcomes. Only rarely could the quality of lawyering change those outcomes.

Observations of the legal system in operation suggest that the quality of lawyering is highly correlated with success. The theory we have presented explains why. Legal outcomes are the products of complex human interactions in which the lawyer can draw not just on written law, but on social norms and prejudices, the law in action, the law in lawyers' heads, informal rules of factual inference, apparent system imperatives, community expectations regarding legal outcomes, and virtually anything else that might persuade the decisionmaker.[313] Strategy can constrain judges and other decisionmakers—or replace them altogether. No a priori limits on this process exist, in or outside of the law. The strategic possibilities are almost limitless, which accounts for the importance of creativity and imagination on the part of the strategist.[314] The skilled strategist knows that one can no more predict the outcome of a case from the facts and the law than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing.

B. The Strategic Transformation of Law

In the conventional view, the common law evolves according to the policy choices or "insight" of judges.[315] The alternative view—that litigants drive changes in the law—has been argued principally by Professors Galanter and Macaulay in the law-and-society literature[316] and principally by Professors Rubin and Bailey in the law-and-economics literature.[317] In Galanter and Macaulay's theories, the

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313. *See supra* Parts II.A-B.

314. *See, e.g.*, 1 LASSWELL & MCDOUGAL, *supra* note 7, at 1046-50 (noting that creativity in the formulation of legal strategy can translate a client's "hopelessly confused and uncertain" situation into a claim that will "win the respectful attention of community decision makers").

315. *See, e.g.*, POSNER, *supra* note 107, at 275 (assuming that judges control the evolution of the law).

316. *See supra* Part III.B.1.

317. *See* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994) (proposing that the law is driven by the preferences of attorneys, not judges or litigants); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 51 (1977) (arguing that parties with a continuing interest in the establishment of efficient rules will invest resources to overturn inefficient results); *see also* Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 140 (1980)

mechanisms of change are essentially case selection.[318] Although Rubin and Bailey have compiled impressive empirical evidence in support of their position,[319] they have not specified mechanisms by which litigants can substitute their own views for the views of judges.[320]

Our theory of legal strategy suggests an additional, and we think, more powerful, mechanism by which litigants can change the law. The mechanism has essentially three stages. In the first, the litigant succeeds in bringing about a result that is contrary to expectations and conventional understanding of the written law.

In the second stage, others similarly situated copy the successful strategy. This copying is problematic. Successful legal strategy is not always recognizable as such; indeed, it is generally more effective when it goes unnoticed. But the moves that execute the strategy are usually disclosed in public hearings or on public records. Careful observers can piece them together. Even strategies never publicly disclosed or admitted are nearly always in some manner revealed to sufficiently observant opponents.

At this second stage, the decisionmakers or other defenders of the status quo may attempt to neutralize the strategy. If they succeed, the strategy dies. They may fail, however, for a variety of reasons. The legal system relies on certain basic principles that are widely known and virtually impossible to change.[321] Those principles cannot be abandoned simply to deny the strategist's victory. Practical diffi-

("Litigants try to win their cases, not increase the law's efficiency, but the former may result in the latter."). If litigation can improve the law, it must be able to change it.

318. *See supra* Part III.B.1.

319. *See* Rubin & Bailey, *supra* note 317, at 817-21 (linking the rejection of the privity doctrine to the rate of increase in the number of lawyers and noting efforts to link plaintiffs' law reform efforts through litigation groups).

320. Professors Rubin and Bailey principally show that plaintiffs' lawyers are organized and motivated toward law reform favorable to their interests. They assert that those efforts result in favorable precedents. *See id.* at 808 ("This is our basic hypothesis: *The shape of modern product liability law is due to the interests of tort lawyers*."). But they make only vague references to means by which those motivations and efforts could generate precedents in spite of the contrary views of judges. *See, e.g.*, *id.* at 816 ("[A]s each individual attorney's cases become stronger [as a result of membership in the litigation group] the chance of favorable precedents also increases."); *id.* at 813 (alluding to the lawyer's ability to choose the state in which to bring suit, but not discussing how that could affect outcomes); *id.* at 810 (asserting that "[t]he plaintiff will fight very hard for such a decision, while the defendant will not resist much[,]" but not explaining why fighting hard would matter).

321. *See* LoPucki, *supra* note 254, at 8-13 (describing the nine basic principles on which the liability system is constructed and which serve as the foundation for judgment-proof structures). These principles are not law, but deeper understandings as to the operation of society: that a person can own property is an example.

culties in making a necessary distinction may prevent the system from making an exception directed against the strategist.

Consider the example of a strategist who creates a judgment-proof business to engage in hazardous activity. To avoid exposing assets to the liability likely to be generated, the strategist rents both plant and equipment at arms length, sells its products only for cash, and distributes earnings to shareholders frequently. In an action by an injured plaintiff, a court might like to defeat the strategy by subjecting the plant and equipment to later judgments against the strategist. The court cannot, however, hold leased plant and equipment generally subject to the claims of tort creditors, because such a basic change in principles would disrupt the plant and equipment leasing industries. Nor can the court make an exception applicable only to strategists who deliberately judgment-proof their businesses. All uses of limited liability are deliberate, and every case in which the exception could be at issue is one in which the debtor ultimately had insufficient assets to pay the tort creditors. The court must allow the strategist to win, because if it does not, the court finds itself on a slippery slope that leads to massive social change.[322] The ultimate problem is the inability of the courts to make certain kinds of decisions with sufficient reliability. Unreliable rules or standards generate uncertainty that ultimately creates anxiety and interferes with planning. The legal system must draw lines where it can, which is not always where it thinks best. If the decisionmaker cannot defeat the strategy at this second stage, the strategy changes the pattern of case outcomes.

At the third stage, the legal system recognizes the triumph of the strategy by changing the written law to make it consistent with the case outcomes.[323] The system does so to eliminate the expense and

322. *See id.* at 8 (noting that the court will tolerate considerable amounts of unintended strategic activity because of the trauma involved in making basic changes). Working from an economic perspective, Professor Basu offers an alternative explanation of the court's inability to effectuate the written rule: "If a certain outcome is not an equilibrium of the economy, then it cannot be implemented through any law." Basu, *supra* note 21, at 22.

323. In the example of judgment-proofing presented here, the short-term result of acquiescence is that judgment-proofing succeeds; but the long-term result is an even more massive social change: the liability system fails. *See* LoPucki, *supra* note 254, at 4 (arguing that the ability to enforce a money judgment is essential to the system of liability, and that liability is essential to enforce American law). Judges occasionally acknowledge their lack of omnipotence over legal outcomes. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973) (giving as one reason for abolishing the rule of contributory negligence in Florida that juries may have been handing down compromise verdicts in violation of their duty to apply the rule).

embarrassment to the system of the strategic activity and the disparity in outcomes between strategists and nonstrategists.

Another example may help in understanding this process of transformation. Nineteenth-century law recognized no method by which a corporate debtor could continue to operate its business without paying its debts as they became due—a process currently referred to as "bankruptcy reorganization."[324] Strategists representing corporate debtors forced the development of such a process.[325] As Professor Skeel described it:

> In a pattern that reorganization lawyers perfected through time, the [debtor] railroad would arrange for a friendly creditor (generally an out-of-state creditor, to create federal diversity jurisdiction) to file a creditor's bill asking for the appointment of a receiver. Rather than preparing to liquidate assets, as a creditor's bill contemplated, the receivers, who generally included members of the [debtor's] management, worked out the terms of a reorganization. At the same time, the [debtor's] investment bankers formed bondholder "protective committees" and attempted to persuade the bondholders to deposit their securities with the committee, which would commit the bondholders to the terms of the eventual reorganization. Once everything was in place, the bonds and other security interests were foreclosed and the [debtor's] assets were "sold" in a foreclosure sale. In reality, the "sale" simply effected a reorganization of the railroad's capital structure.[326]

The foreclosure sale theoretically was an exposure of the company to the market—anyone could have bought it. But in reality, the process was closed. Only the purchaser organized by the insiders could bid because the insiders had unique knowledge of the business, some of the relationships necessary to continue the business may have been personal relationships of the insiders, and the insiders manipulated the timing of the proceedings to their own advantage. Sale by the receiver for less than the amount owing to the creditors left the creditors with less than the full amounts owing to them, yet permitted the shareholder-insiders to remain in ownership and control in their

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324. Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1250-53 (1981) (describing the evolution of bankruptcy reorganization).

325. *See* David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1356 (1998) ("In effect, managers and their advisers took creditors' state law debt collection remedies and turned them inside out to fit the needs of troubled railroads.").

326. *Id.* at 1356-57 (footnotes omitted).

role as purchasers at the foreclosure sale. The "reorganization" thus accomplished was a result superior to piecemeal liquidation,[327] but the courts undoubtedly would have preferred to have the reorganization without insider dominance. The strategists had, however, eliminated that possibility by being the only ones in a position to bid. Even though a good case might have been made that the insiders were usurping corporate opportunities in breach of their fiduciary duties, the courts had no practical alternative to approval of the proposed sale to the insiders.

After a period in which these equity receiverships enabled insiders to remain in control through a process that reduced the claims of creditors, Congress enacted a bankruptcy reorganization law designed to recognize and regulate the reorganization process.[328] An early version, Chapter X of the Bankruptcy Act, attempted to eliminate insider domination by requiring the appointment of a trustee in every case.[329] Strategists for the insiders responded by filing their cases under Chapter XI of the Bankruptcy Act—in violation of the written law—and negotiating.[330] In the Bankruptcy Code adopted in 1978, Congress acknowledged its inability to contain the insiders' strategy[331]

327. *See* Clark, *supra* note 324, at 1252 ("This procedure made economic sense whenever there were no or few potential outside buyers with accurate and timely information about the true state of affairs and the future prospects of the business, and when the process of searching for and informing outside buyers would itself be very expensive.").

328. *See id.* at 1253 ("The fifth and final phase in the development of corporate debtor-creditor law involved the formal establishment of a bankruptcy reorganization law that offered a more structured version of the transformed equity receivership.").

329. *See* David G. Epstein & Christopher Fuller, *Chapters 11 and 13 of the Bankruptcy Code—Observations on Using Case Authority from One of the Chapters in Proceedings Under the Other*, 38 VAND. L. REV. 901, 925 (1985) ("In Chapter X . . . the court appointed a trustee in every case.").

330. As experts familiar with the process described it to Professor Elizabeth Warren:

> [M]ost publicly traded companies entering bankruptcy initially filed in Chapter XI. The company then struggled with the SEC and negotiated with its various creditors to try to devise a consensual plan. If the SEC was persuaded that the public interest would be better served by the flexibility offered by Chapter XI, and if no reason existed to toss out current management, the case remained in Chapter XI. If the SEC, the debtor, and the major creditors could not agree, the SEC would seek an order from the bankruptcy court to convert the company's filing to a Chapter X, or the creditors might seek to liquidate the company in a straight bankruptcy.

Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 454 (1992).

331. The official justification for eliminating the requirement of the appointment of a trustee in the bankruptcy of every publicly-held company was that "debtors [would] avoid the reorganization provisions in the [Code] until it would be too late for them to be an effective remedy." H.R. REP. NO. 95-595, at 231 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6191 (footnotes omitted).

and gave them broad reign.[332] Bankruptcy law now formally recognizes a right in the owner-managers of a debtor corporation to remain in ownership and control through a reorganization proceeding specifically designed to reduce the corporation's debts.[333]

Additional examples of strategic transformation of law abound. During the late 1980s, aggressive debtors' lawyers changed the terms on which consumer debtors could adjust their debts under Chapter 13 of the Bankruptcy Code. Prior to the change, the conventional wisdom held debtors to a choice between the relief available under Chapter 7 (discharge of all debt, without the necessity to make payments to unsecured creditors) and the relief available under Chapter 13 (the ability to save the debtor's home from foreclosure, but only on the condition of paying all of the debtor's disposable income to unsecured creditors for a period of three years). Almost a decade after adoption of the legislative scheme, strategists invented a method for circumventing this choice that became known as a "Chapter 20"—a Chapter 7 case promptly followed by a second filing under Chapter 13.[334] By discharging his or her debts in Chapter 7 before filing the Chapter 13 case, the debtor assured that the "price" of Chapter 13 relief—payments to unsecured creditors—would be zero. Apparently unwilling to read into the statute words that were not there, the Supreme Court permitted a Chapter 20 case to stand, thereby putting its imprimatur on the change the strategists had effected.[335]

Finally, attorney Lincoln Brooks has developed a strategy that gives business debtors what is generally viewed as the most important advantage of a bankruptcy filing—the ability to stay and bind dissenting creditors—without having to file bankruptcy.[336] Prior to Brooks's strategy, the conventional wisdom held that "dissenting creditors cannot be bound in a workout, but they can be bound in

332. *See* 11 U.S.C. § 1107(a) (1994) ("[A] debtor in possession shall have all the rights . . . and powers . . . of a trustee serving in a case under this chapter."); *id*. § 1108 ("Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the [debtor's pre-bankruptcy management] may operate the debtor's business.").

333. *Accord* Bank of Am. Nat. Trust and Sav. Ass'n v. 203 North LaSalle St. Partnership, 526 U.S. 434, 458 (1999) (requiring exposure to the market as a condition of continued ownership and control).

334. For a more complete description of the problem and the strategists' solution, see LoPucki, *supra* note 30, at 1533-37.

335. *See* Johnson v. Home State Bank, 501 U.S. 78, 80 (1991) (holding that a mortgage lien can be rescheduled under Chapter 13 even after the personal obligation secured by the mortgaged property has been discharged under Chapter 7).

336. *See* LoPucki, *supra* note 30, at 1539-41.

Chapter 11."[337] Brooks's strategy is to grant a security interest in all of the debtors' assets to the Credit Managers' Association as trustee for all of the unsecured creditors. If a dissenting creditor attempts to levy, Brooks opposes the levy on the novel ground that it violates the newly minted secured creditors' right to priority. Though the case is weak on the written law, it is normatively strong and appealing from a systems standpoint. Brooks can argue that a few dissenting creditors should not be able to overturn the efforts of the majority to negotiate a solution to the company's financial problems. That appeal, combined with favorable economics of litigation, has enabled Brooks to win about fifty consecutive cases. Other lawyers have adopted similar techniques, thereby changing the delivered law.[338]

In each of these instances, the decision to make a change in how things were done was not made by a judge or a legislature, but by a strategist working on behalf of a party. Perhaps sufficiently determined judges or legislatures could have reversed the outcomes—if not in the cases where the strategies were first employed, at least in later cases. But even that is not clear. Legal strategy exploits vulnerabilities of the existing system. Comprehensive identification of these vulnerabilities is beyond the scope of this Article. Almost certainly among them, however, are (1) the inability of the system reliably to make desired distinctions, (2) the deliberate retention of "flexibility" in the legal system on the theory that it is necessary to accommodate change, (3) the lack of any social consensus as to the appropriate fora for the resolution of legal disputes, and (4) the diffusion of decisionmaking power among tens of thousands of judges in the United States alone. Vulnerabilities such as these give rise to the indeterminacies that legal strategists exploit.

C. Explaining Local Legal Cultures

Written law purports to be universal within geographical boundaries.[339] Because the same law applies throughout each jurisdiction, the conventional view suggests that legal outcomes should be

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337. MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY: CASES AND MATERIALS 14 (1996).

338. For a more complete description of the problem and the strategists' solution, see LoPucki, *supra* note 30, at 1537-41.

339. Federal law purports to govern all transactions or occurrences within the United States and each state's law purports to govern transactions or occurrences throughout the respective state.

uniform throughout each as well. Empirical research, however, has repeatedly discovered large variations in legal outcomes from place to place within jurisdictions, a phenomenon referred to as "local legal culture."[340] The mystery is why and how these systematic variations in legal outcome occur from one part of a jurisdiction to another when the law that supposedly generates them is the same.

The answers lie in the fact that several of the factors we have identified—social norms, the law in lawyers' heads, and expectations regarding outcomes—are not uniform within the neat boundaries of legal jurisdiction. They are forged by frequent interactions among members of groups. The locations of these groups are rarely coextensive with the city, state, or national boundaries that define the reach of legal doctrine. Because social norms, the law in lawyers' heads, and expectations regarding outcomes are oral traditions, they may have little credibility to outsiders and little effect outside the group. The law in lawyers' heads may be different from city to city, or city to rural area, yet the same throughout national or international groups whose members interact frequently. Social norms exist within virtually every group of people who interact repeatedly, from the citizens of a nation to the members of a family.[341] They differ by religion, race, interests, geographical location, occupation, institution, and any other factor that brings groups together.

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340. *See, e.g.*, 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 AM. B. FOUND. RES. J. 449, 451 (referring to "the practitioner norms governing case handling and participant behavior in a criminal court"). Sullivan, Warren and Westbrook define local legal culture as follows:

> systematic 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.

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 writers cited here do not attempt to describe comprehensively the nature of the "practices, perceptions and expectations" that constitute local legal culture, but we think they are the same ones we identify here. For a recent attempt to describe the mechanisms of legal culture, see generally LoPucki, *supra* note 30.

341. *See, e.g.*, Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 30-33 (1983) (describing social norms in various religious sects, company towns, and other non-sectarian settings); Weyrauch & Bell, *supra* note 124, at 395; Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49, 56-58 (1971) (depicting the evolution of law when a group of Berkeley students were experimentally locked in a penthouse for three months).

Such differences explain, at least in part, the processes by which local legal cultures arise, change, and disappear. The cultures are constantly in flux because the underlying factors that give rise to them are in flux. Through legal strategy, changes in social norms and expectations are translated into changes in legal outcomes, even while the written law remains constant. These changes in outcomes vary from place to place within a jurisdiction and change abruptly over time for the simple reason that the factors producing them, including legal strategies, change. If local legal cultures were merely the products of general cultural differences from place to place—the general practices, perceptions, and expectations of the people who live in a community—they could not appear and disappear nearly as quickly as they do.[342]

D. Why the "Haves" Come Out Ahead

The theories we present here extend Professor Galanter's theory as to why the "haves" come out ahead, by explaining new means by which spending more resources[343] on litigation can produce more favorable outcomes for the spenders. If law operated in accord with conventional legal theory, resources would affect results only in the small minority of cases in which determinative facts remained undiscovered or the result specified by law was unclear. Yet, resources consistently produce good or acceptable results in what had seemed to be the most hopeless of cases.

Resources matter because they unleash strategy, and strategy is capable of altering legal outcomes across a wide range of possibilities. Adverse legal doctrine defeats only those who believe it can. For nonbelievers, the strategic application of resources can construct out-

342. For example, when Chief District Judge Joseph J. Farnan, Jr. in 1997 took the unprecedented step of withdrawing the automatic reference of Delaware bankruptcy cases to the bankruptcy court and personally taking over the assignment of Chapter 11 cases filed in Delaware, the proportion of large Chapter 11 cases filed in Delaware instantly fell from 86% to almost zero. *See* Eisenberg & LoPucki, *supra* note 271, at 986 (reporting that only a single large, publicly held company filed for bankruptcy in the United States during the five months following Judge Farnan's order). Conventional legal theory would have predicted no change in filing rates because the newly assigned judges would be bound to follow the same law and procedures as the old.

343. We use the term "resources" rather than "money" in recognition of the fact that lawyers may devote their time to particular cases for ideological reasons—pro bono work—and organizations may sponsor litigation for ideological reasons, such as a foundation sponsoring litigation to protect the environment. In either case, the effect is the fundamentally the same as an expenditure of the parties' own money.

comes to order, within cultural limits. The more resources the party can spend, the better the outcomes the party is likely to get.

That does not mean that the party with greater resources will prevail—or even have an advantage—in every case. The resources that a party can profitably spend on a case are limited by the value of the case to that party. It follows that if a case involves only money—as many commercial disputes do—neither party should be willing to spend more than the amount in issue. Of course, if one of the parties is not sufficiently liquid, that party may not be able to invest optimally in the case. In addition, a given level of expenditure by opposing sides in a given case may do more for one side than the other, as where one side is a frequent litigator and can reap economies of scale.

If the dispute is over a nonmonetary right—the validity of a patent or the right to control a corporation—the win may be worth more to party A than to party B. The party with more to gain can probably cost-justify larger expenditures than the opposing party, giving the former an advantage in the litigation. This clash of strategists might have some tendency toward efficiency because the party that places a higher value on a favorable outcome is more likely to get it.[344] But for strategy to be "efficient" in the economic sense, its tendency toward efficiency would have to be greater than the tendency toward efficiency of the other systems that might be adopted. That seems unlikely, because strategy is of greatest use in cases that the legal system would otherwise regard as nonmeritorious. The types of cases in which Professor Galanter initially propounded his theory of why the "haves" come out ahead—cases in which the "haves" are repeat players but their opponents are not—fall within this class.

Probably few legal disputes are simply over money. Among those that are, settlement usually produces a better result for both sides. The cases that go to litigation tend to be either cases in which emotional investments are high and parties are interested not only in what

344. Scholars have proposed a number of theories under which law evolves toward efficiency. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235-36 (1979) (discussing private and public judicial systems from an economic standpoint); Rubin, *supra* note 317, at 51 (showing that the "efficient rule situation" noted by Posner is due to an "evolutionary mechanism whose direction proceeds from the utility maximizing decisions of disputants rather than from the wisdom of judges"); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397, 398, 404 (1981) (looking to evolutionary analysis from biology to support "the proposition that inefficient legal rules are litigated more frequently than efficient ones"). *But see* Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 584 (1992) (noting that Richard Posner has shifted the basis for his theory of common law efficiency).

benefit they can win but also in what harm they can inflict on others, or cases the parties believe will establish important precedents. The responsiveness of the legal process to infusions of resources will tend to give the "haves" advantages over the "have nots" in these cases.[345]

As discussed above, innuendo—the oblique allusion to matters that must remain unarticulated—is a principal skill of lawyer-strategists. Some lawyers will be better at it than others. That may occur because they have superior linguistic skills generally, or a better understanding of what can be left unsaid with the particular decisionmaker. This difference in skill level inures to the benefit of those who can afford the best advocates. Though that is generally the wealthier side, because of the contingency fee system it is far from invariably so.

EVALUATION AND CONCLUSIONS

In the conventional model of the legal process, the lawyers present the facts of a case and the governing law to the judge. The judge applies the law to the facts to reach a decision. If the decision is wrong, the losing party can appeal to a higher court that will set it right. Settlements can, and usually do, occur along the way, but these settlements are merely estimates or approximations of the results the courts would otherwise reach. No room exists within that model for legal strategy.

The alternative model we have presented is a more open-ended one. When the stakes are sufficiently large, lawyers assume the role of strategists. They compete in the selection of decisionmakers from an unlimited array of judges, arbitrators, private parties in settlement, or other persons. They employ a wide variety of strategies to reach or prevent adjudication. In the small minority of cases in which adjudication occurs, the strategists argue from a similarly wide variety of materials, which include social norms, law in action, law in lawyers' heads, informal rules of factual inference, system imperatives, community expectations, public policy, and written law. Because adjudicated outcomes depend so much on the predispositions of the adjudicators and the strategies employed in presentations, those outcomes differ widely from judge to judge, case to case, and place to place.

345. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 764 (1977) (noting that the estate being litigated all the way to the Supreme Court was worth only $2,500). When, as here, the resources necessary to prosecute the case far exceed the amount in issue, the side most willing to spend resources will have the advantage.

Appeals are rare, and reversals even rarer. Strategy, not law, is the principal determinant of outcomes.

Once the dominant role of legal strategy is accepted, some undoubtedly will defend it on the ground that the vulnerability of the system to strategy gives the system an added measure of stability. That is, the system bends to accommodate power. We argue, to the contrary, that legal strategy renders legal outcomes unpredictable, making the system less stable. To the extent that strategies determine the outcomes of cases, the merits of cases as traditionally perceived do not. The injustice causes disrespect for the legal system, which ultimately undermines its legitimacy.

Because legal strategies are attempts to manipulate the outcomes of cases irrespective of their supposed merits under written law, strategies are widely viewed as unethical. Lawyers are reluctant to publicize the strategies they pursue partly for that reason. But an even more important reason is that most lawyers understand that strategies work best when unnoticed. Articulation can, and usually does, render them ineffective. These factors combine to drive legal strategy largely underground.

Some of the legal scholars who share our view of the ubiquity and importance of legal strategy view the problem of legal strategy as insoluble. Strategy, they say, permeates not only law, but life.[346] No matter what system is in place, strategists will attack it and transform it into something other than what was intended.[347]

Though we generally agree with this view, we think it ignores a key aspect of law-related systems:[348] they differ in the *degree* of their vulnerability to strategy. Better systems generate less strategic activity. That strategic activity is more likely to be of the kinds anticipated or even intended by the systems' designers. Strategies can still gain advantage in the better systems, but they can gain less. Accordingly, the first means we propose for reducing the impact of strategy on le-

346. *See, e.g.*, conversation between Lynn M. LoPucki, Security Pacific Bank Professor of Law, UCLA Law School; Theodore Eisenberg, Henry Allen Mark Professor of Law, Cornell Law School; and James A. Henderson, Jr., Frank B. Ingersoll Professor of Law, Cornell Law School, Sept. 25, 1998.

347. *See* Farber, *supra* note 28, at 606 ("A certain amount of formalism is unavoidable. As a result, the kind of moral risk dramatized by the story of the red-hot knife may be difficult to eliminate from any legal system.").

348. A "law-related system" is a system composed of people and objects in which formal law plays a role. *See* LoPucki, *supra* note 129, at 488-97 (explaining the concept of a law-related system).

gal outcomes is to redesign the legal system to provide fewer incentives for system-unintended strategy.[349]

Articulation offers a second means for reducing the impact of strategy on legal outcomes. The articulation need not be by participants in the case. Legal scholars can do it as well. Articulation will not be easy. Because the strategist conceals the strategy, the articulation is necessarily speculative, and therefore dangerous to the articulator. Inevitably, some articulations will miss the mark. Moreover, articulation operates largely by embarrassing the strategists, and, if it comes from a third party, such as the press or an empirical researcher, may also embarrass the judges and opposing lawyers who have been the strategists' unwitting victims. Thus none of the participants are typically willing to divulge information regarding the nature, use, or effects of strategy.

Articulation alone cannot solve the problem of legal strategy. Although its application tends to neutralize the articulated strategy, the effect is uncertain and usually incomplete. The court that receives a case may be embarrassed by the articulation of a forum-shopping strategy but not always enough to send the case back. The neutralization of one strategy still leaves others effective.

In the coming age of information, the task of articulating legal strategy may become easier. Computerization of the legal process—in the courts, in lawyers' offices, and in the offices of business and governmental clients—is documenting the pattern of cases and outcomes. Though such data generally does not capture the motives of participants and therefore does not document the strategies themselves, it does capture the footprint of those strategies in the form of disparities in legal outcomes from place to place, race to race, judge to judge, and, perhaps soon, lawyer to lawyer.[350]

349. Not seeing this potential for improvement, most scholars condemn strategy as unethical, exhort lawyers to refrain from engaging in it, and attempt to ignore strategy in their theories of the operation of the legal system. We consider their condemnations and exhortations ineffective and their attempt to ignore strategy misguided.

For example, Alan Schwartz recently chose to ground an elaborate theory of contract bankruptcy on the assumption that "parties cannot contract in lending agreements to use a bankruptcy system other than the one the state supplies." Schwartz, *supra* note 108, at 1808. Schwartz cites only case law for that proposition. *See id.* at 1808 n.6. In fact, legal strategists have devised a number of means for contracting out of the state-supplied system. *See* LOPUCKI, *supra* note 279, at 186-87 (describing four varieties of such strategies).

350. Scholars have done most of their computer-assisted analyses of the legal process to date in databases that contain only legal opinions. Because legal opinions are non-systematic, self-serving descriptions of the legal process by persons with vested interests, they are a relatively

This development parallels one that has already had a profound effect on the medical services delivery system. Data generated for a variety of other purposes has been analyzed to show that medical procedures employed and outcomes obtained differ sharply from place to place and provider to provider.[351] The effect has been to focus attention on the causes of those differences.[352]

Legal scholars, working with the huge masses of electronic data that have been accumulating in the legal system in recent years, may soon be able to focus similar attention on legal strategy. The legal system already has been profoundly affected by scholars' documentation of the relationship between defendants' race and the imposition of the death penalty,[353] the rampant forum shopping in major business bankruptcies,[354] the nullification of securities class action reform by the simple expedient of moving the litigation to another set of courts,[355] and the lack of relationship between formal circuit rules governing the rules for publication of opinions and actual publication practices.[356]

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weak form of data. Nevertheless, studies of them have already revealed interesting patterns. *See, e.g.*, MARTHA G. DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 179-84, 195-96 (1996) (exposing a pattern of discourse by prosecutors and courts that describe criminal defendants with metaphors of filth); Farole, *supra* note 18 (showing that state governments win disproportionately in state supreme courts); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 385-88 (1999) (showing that despite judicial rhetoric to the contrary, piercing the corporate veil within a corporate group on behalf of a tort plaintiff is extremely rare).

351. *See, e.g.*, Lynn M. LoPucki, *Twerski and Cohen's Second Revolution: A Systems/Strategic Perspective*, 94 NW. U. L. REV. 55, 62-64 (1999) (describing the system employed to generate comparative provider statistics in the field of medicine).

352. *See id.* at 56, 63-64.

353. *See, e.g.*, Weyrauch, *supra* note 177, at 803-07 (citing empirical data on race in capital cases).

354. *See, e.g.*, Eisenberg & LoPucki, *supra* note 271, at 968-69 (reporting rampant shopping from 1980 to 1997); LoPucki & Whitford, *supra* note 284, at 12 (reporting rampant shopping in the 1980s).

355. *See, e.g.*, Donovan, *supra* note 302, at A1 (reporting that despite legislation designed to reduce securities class actions, the volume of securities class actions filed in federal courts has remained the same while the volume in state courts has increased).

356. *See, e.g.*, Gulati & McCauliff, *supra* note 139, at 192-93 (arguing from empirical data showing dramatically different use of judgment orders in different federal circuits that judges engage in strategic behavior regarding publication of full opinions in hard cases).

Data capable of documenting the effects of legal strategy on legal outcomes already exists. Those who have it—principally the courts—are not likely to surrender it easily in usable form.[357] But as the data is inevitably released, the existence and importance of legal strategy in the generation of legal outcomes will become increasingly difficult to deny. When that occurs, scholars, judges, and other participants will be forced to acknowledge strategy's dominant role in the legal process.

357. *See, e.g.*, Westbrook v. County of Los Angeles, 32 Cal. Rptr. 2d 382 (Cal. App. 1994) (barring release of court information in bulk electronic form, even though the information itself was a matter of public record); Office of the State Court Adm'r v. Background Info. Serv., Inc., 994 P.2d 420 (Colo. 1999) (holding that the courts are not subject to Colorado's public records law and barring release of court information in bulk electronic form); *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Hearings on H.R. 3150, H.R. 2500, H.R. 3146, Part IV, Before the Subcomm. on Commercial and Admin. Law of the House Comm. On the Judiciary*, 105th Cong. 154 (1998) (statement of Hon. Michael J. Kaplan, Chief Bankruptcy Judge, U.S. District Court for the Western District of New York, on behalf of the Judicial Conference of the United States) (opposing, on grounds of privacy, provisions that would have made it the policy of the United States to release the public record portions of bankruptcy clerks' databases in electronic form).