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# On Strategy

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# On Strategy

## Cover Page Footnote

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# ON STRATEGY*

*by*
*RICHARD K. NEUMANN, JR.* **

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## INTRODUCTION

OF all the characters in the massive landscape of the Peloponnesian War, Thucydides singles out Themistocles as one who "beyond all others deserves our admiration."[1] "Without studying a subject in advance or deliberating over it later . . . [Themistocles] had the power to reach the right conclusion in matters that have to be settled on the spur of the moment and do not admit of long discussions . . . ."[2] "He was particularly remarkable at looking into the future and seeing there the hidden possibilities for good or evil," and "his forecasts of the future were always more reliable than those of others."[3] Not only could he concretely explain all he knew, but his judgment was such that "even outside his own department he was still capable of giving an excellent opinion."[4] In sum, "this man was supreme at doing precisely the right thing at precisely the right moment."[5]

*To do precisely the right thing at precisely the right moment*: what more could a client want from a lawyer, and what more could legal education hope to teach? But so many lawyers lack the decisiveness and

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1. Thucydides, History of the Peloponnesian War Book I, *138 (R. Warner trans. 1954).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

presence of mind to make wise decisions "on the spur of the moment"; they disregard "the hidden possibilities for good or evil"; their predictions of the future are wrong more often than need be; and they do not have the feel for a situation's inner logic that would enable them to act astutely when few facts are available. They lack, in other words, what Thucydides found in Themistocles: the ability to create a strategy that will cause things to happen.

Strategy is the design of conflict.[6] It is not the provocation of conflict, for that might not be of the lawyer's or the client's choosing. Rather, once the potential for hostility arises, strategy is the process of structuring the conflict around the means for winning it. Strategizing is the most central lawyering skill: even the most placid office lawyer—doing little more than drafting instruments—cannot be effective unless all the conflicts that might later grow out of a will or contract are strategized in advance through the document itself.

Tactics are a smaller matter—more limited in effect, simpler to explain and more easily understood. A tactic is "an application of strategy on a lower plane,"[7] or, conversely, a strategy is a design composed of a mosaic of tactics.[8] A staged anger display in negotiation is a tactic. A systematic plan for demoralizing a negotiation adversary over a period of weeks is a strategy. Not only is a random collection of tactics not a strategy, but a tactic that is part of a well-designed strategy is far more likely to have an effect than one that is not. And the most effective process of planning creates an overall strategy and then furnishes it with tactics.

This Article is the first exploration in the legal literature of the process of creating strategy (Part IA), of the effect of temperament on strategy (Part IB), and of the ways in which strategy is learned and most effectively taught (Part II). Part III considers some moral problems raised by both strategic instrumentalism and law school teaching heavily flavored with it. Because strategic creativity in law has not been rigorously studied, this Article necessarily draws on insights from other fields. Part II, in particular, does not and cannot ultimately resolve all the questions it raises, because strategizing is not merely the most essential lawyering skill: it is also among the most difficult to teach. Much further inquiry will be needed before the pedagogy that most effectively imparts it is fully understood.

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6. *See* B. Liddell Hart, Strategy 338 (2d ed. 1967).

7. *Id.* at 335.

8. This distinction between strategy and tactics is generally accepted both in the literature on lawyering and in the literature on war. *See* K. von Clausewitz, On War 128 (M. Howard & P. Paret transl. 1976); D. Gifford, Legal Negotiation: Theory and Applications 25-43 (1989); B. Liddell Hart, *supra* note 6, at 335; S. Morison, Strategy and Compromise 4 (1958); Fisher & Siegel, *Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?*, 36 Cath. U.L. Rev. 395, 418-20 (1987).

## I. STRATEGIC ANALYSIS

### A. *The Process of Strategy*

Luck is the residue of design.

- Branch Rickey

A *mediocre* strategist reduces legal representation to a bureaucratic routine and approaches work serially, thinking about each task for the first time only after the preceding one is completed. When a tactic is chosen, the mediocre strategist is willing to act on the first "good" idea that appears, without imagining a full range of options and failing to evaluate the effectiveness of whatever few options might be apparent. Often, decisions are not accompanied by a conscious attempt to predict how they will influence events, and if predictions are made, they turn out to be inaccurate far more often than necessary. Disconcerting facts tend to be ignored, and tactics tend either to be changed impulsively or to be adhered to despite mounting evidence of their ineffectiveness.

To a shocking extent, these lawyers litigate without strategy because the tactics they use lack strategic coherence: tactics are not designed for a cumulative effect, and at times they even conflict with each other. Rather than design litigation to cause a favorable result, these lawyers process it in the same mechanical way that a government agency processes paper. When asked, they usually cannot describe their strategy in a given case or explain how their tactics are related to the goal of the litigation. Sometimes they are unable to describe even the goal itself. And tactics in current cases tend to be justified by *post hoc ergo propter hoc*[9] analyses of episodes in past cases. Although no published empirical research has ever attempted to estimate the proportion of the bar that muddles through in this way, anecdotal evidence suggests that it may be a majority of the profession, and this mechanical approach to strategy certainly seems to be the natural instinct of the overwhelming majority of persons entering the practice of law.

A more or less *average* strategist, on the other hand, considers at least a range of alternatives before acting and thinks at least a few steps ahead—for example, by mentally sketching out a complaint while interviewing the client and by later drafting the complaint to minimize the risk of a successful motion to dismiss. An average strategist, however, lacks the imagination needed to generate the largest possible number of reasonable options, the capacity to predict accurately the success of each one, the ability to treat time retrospectively, and the intellectual agility needed for strategic coherence.

A *superior* strategist, by contrast, designs a struggle in its entirety at the beginning and redesigns it continually as new circumstances come to light. Certain habits of mind are essential to this process.

9. "[P]ost hoc, ergo propter hoc denotes the fallacy of confusing sequence with consequence." B. Garner, A Dictionary of Modern Legal Usage 424 (1987).

First—and preliminarily—a superior strategist has a skepticism[10] that compels him or her to identify precisely the very few things—facts, pieces of evidence, aspects of law or policy—that are most likely to influence the resolution of the conflict. The same skepticism senses disguised opportunity, exposes unstated assumptions, inventories each side's strengths and weaknesses, and finds hidden risks, thus causing the strategist to anticipate that which is exploitable and that which realistically could go wrong.

Second, a superior strategist identifies the future event[11] that, if brought about, would be most likely to cause victory. What adjudicative decision, for example, would most likely terminate the conflict favorably,[12] and what actions are most likely to cause that decision? What injury will so wound the adversary that he or she will be compelled to negotiate on favorable terms? Or conversely, what constructive event will so seduce the adversary that a negotiation is likely to end favorably? In a purely rational sense, the superior strategist "identifies" this event, but more practically the event is *imagined* in precise and vivid detail.[13]

Third, a superior strategist organizes strategy around the decisive event by "backward mapping":[14] planning backward—from the future

10. *See* B. Tuchman, Practicing History 280 (1981).

11. Depending on how one conceives of it, the "event" might actually be a handful of interrelated events, or it might be a decisive *idea*—such as a theory of the case—that seduces others into action or causes the adversary's strategy to unravel.

12. For example, where a client complains of the continuing behavior of other people, the decisive event might turn out to be a preliminary injunction that so greatly restricts behavior as to skew negotiation in the client's favor; or a summary judgment embodying a permanent injunction, a declaratory judgment or an award of damages; or one of those forms of relief gained through trial; and so on. A superior strategist can often identify the decisive event much more specifically: "this trial will be won or lost according to how well this witness stands up under cross-examination" or "the only way to win this motion is to convince the judge that the Court of Appeals is likely to adopt the *Silkwood* test." (A more complex example appears in note 28, *infra*.)

Although these predictions turn out to be inaccurate more frequently than any lawyer would like, a strategist's superiority is largely measurable by the ability to choose a decisive event wisely and to organize and concentrate effort to cause it. Often, the decisive event cannot be recognized until well after conflict has begun. Once that event is identified, however, effort is wasted unless directed at causing it, at protecting a back-up strategy, *see* note 23 and accompanying text, or at preventing the adversary from accomplishing something decisive.

13. Imagery has a powerful effect in creative thinking, which is often and misleadingly described only in verbal and rational terms. *See* V. John-Steiner, Notebooks of the Mind: Explorations of Thinking 84-88 (1985). In fact, "a reliance on verbal concepts alone may lead . . . to a certain rigidity of thought." *Id.* at 86. That is because the process of finding solutions is filled with "inner monologues, crystallized concepts, reveries, fleeting as well as generic images, abstract pictures, visualized movements, and subjective feelings." *Id.* at 87. The same is true of daydreaming, "a form of mental activity frowned upon by people who are immersed in the practicality of life and who want immediate action." S. Arieti, Creativity: The Magic Synthesis 374 (1976). Although some people daydream in order to retreat into an unrealistic fantasy life, for others daydreaming "may open up unforeseeable new realms of growth and discovery." *Id.* at 375.

14. R. Neustadt & E. May, Thinking in Time: The Uses of History for Decision-Makers 255 (1986). For carefully documented examples of the effective use of this pro-

to the present—to identify things that must be done to make that event probable and by developing sub-strategies to accomplish each of those things. *No concept of strategy is more important than this one*: it prevents aimless expense of effort and concentrates the strategist's work on those things most likely to cause the desired end of the conflict.[15] The

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cess and of disaster caused by its absence, see R. Huntford, Scott and Amundsen: The Race to the South Pole 479-525 (1980) (treating climate and terrain collectively as the adversary, Amundsen's strategic planning enabled his party to travel 1400 miles on cross-country skis across shelf ice and glaciers, actually gaining weight in the process, while everyone in Scott's lavishly financed but incompetently prepared expedition died of scurvy and starvation).

15. Mark Tushnet has argued that the NAACP's litigation effort leading up to Brown v. Board of Educ., 347 U.S. 483 (1954), was "not systematic or strategic" because "the contents of that 'plan' changed with some frequency" and a fair amount of the NAACP's litigation effort was directed at "targets of opportunity." M. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-50, at 144-45 (1987). Stephen Wasby similarly argues that later desegregation litigation was unstrategized because the course of events was never completely under the NAACP's "control," *see* Wasby, *How Planned Is "Planned Litigation"?*, 1984 Am. B. Found. Res. J. 83, 91; because "accidental factors" were "often decisive," *id.* at 118; because "there was a 'lot of improvization, a lot of impromptu,' " *id.* at 92; and because "not all cases which end up in the Supreme Court were started with that in mind." *Id.* at 118.

These theories are based on misunderstandings about the nature of strategic thinking. Both Tushnet and Wasby undervalue the role of creativity in strategy development. Both mistakenly assume that a strategy is by definition a fixed and unchangeable plan that is inadequate unless it is the *entire* cause of victory. And both ignore the fact that a movement seeking revolutionary change is usually so inherently weak that, simply to retain its constituency, it must devote substantial effort to "putting out brushfires," *id.* at 87, even while following a long-term strategy not addressed to things that burn.

Like other forms of artistic creativity, strategy develops in stops and starts, and reflection may bring insights up into consciousness long after those insights have influenced the evolving artistic product on an unconscious level. It would not surprise us if a novelist, in the midst of work, were unable to tell us the eventual fate of a coffin he has just introduced into the forecastle of the *Pequod*: even in the most perfectly plotted novel the act of creation is not complete until the last page of the final draft is written. *See infra* note 19 and accompanying text. Nor was it unstrategic, as Tushnet urges, for NAACP lawyers to begin litigating in the upper South for simple convenience and later to concentrate effort there once the region's strategic advantages became apparent. *See* M. Tushnet, *supra*, at 162-63. A strategy is a living, changing thing, and these lawyers improved their strategy as they learned more about the conflict in which they were engaged. That kind of evolution shows strategic skill, not weakness.

With rare exceptions, even a well-built strategy does not unfold so cleanly that the adversary is reduced to helplessness in precisely the manner that the strategist originally envisioned. Even the best strategist cannot rob life of its chaos by reordering that which is naturally random into a rigidly controlled sequence of events. A more realistic concept of strategy is the *shepherding* of chaos so that it travels toward the decisive event.

A litigation campaign is not unstrategized simply because accidents turn out to be decisive or because the cases that are appealed are not the ones that were designed for that purpose. Strategy depends in part on the ability to integrate the unexpected into an evolving plan—to capitalize on accidents, rather than be victimized by them. The NAACP lawyers demonstrated that skill in abundance. Sometimes, a strategist's relation to the decisive event is not that the strategist causes it, but instead that the event happens independently of the strategist's efforts and the strategist recognizes its potential and acts to endow it with its decisive quality. It cannot reasonably be argued, for example, that all of Trotsky's careful preparation and planning were not the foundation for the occurrences of October 24 and 25, 1917, simply because on October 16 the Petrograd garrison

only battles fought, then, are those that are likely to help terminate the conflict in the client's favor.[16] Effort is not diffused and wasted on other

had collectively decided to disobey Kerensky's orders to march out of the city—an event that Trotsky himself recognized "in advance decided the outcome of the contest." I. Deutscher, The Prophet Armed: Trotsky, 1879-1921, at 300 (1954). In fact, it would have decided nothing if Trotsky had not found a way of *using* it. Revolutionary situations are rarely the creation of revolutionists, who start in weakness; instead, the true skill of revolution is the recognition and exploitation of revolutionary situations created by others or by circumstances that are out of everyone's control.

A wise strategist "is able to recognize changing circumstances and to act expediently." Sun-tzu, The Art of War, ch. 1, verse 7 (S. Griffith trans. 1963) (commentary by Tu Mu). Moreover, it is axiomatic in military strategy—and ought to be axiomatic in litigation strategy—that if a plan is rigid, overly intricate and unadaptable, it will become meaningless within the first few moments of battle when all hell breaks loose in the most unexpected ways. That is exactly what happened at the Somme in 1916, where the British, obeying an inflexible 57-page order, were led into slaughter, suffering 60,000 casualties on the first *day*. *See* M. Van Creveld, Command in War 159-68 (1985). (A reader who is skeptical about whether this type of material can teach lawyers anything about strategy might consider the contents of note 101, *infra*.).

In fact, the historical evidence from which Wasby and Tushnet conclude that desegregation litigation was unstrategized can in almost every instance be used to support the opposite conclusion. Charles Houston was the leading NAACP litigator early in this struggle, as well as the teacher of the group, led by Thurgood Marshall, that succeeded him. It is not historically accurate to argue, as Tushnet does, that "Houston simply felt more comfortable as a lawyer attacking targets of opportunity than as a long-range planner of litigation." M. Tushnet, *supra*, at 45.

Nearly two decades before *Brown v. Board of Education* reached the Supreme Court, Houston conceived of a strategy of dismantling educational segregation in stages, from the top to the bottom. The first stage was to persuade the judiciary of the cruelty and indefensibility of segregation in the one form of education that judges could most easily understand—law schools and other forms of professional and post-graduate education. That was also a form of education where integration would least alarm the white population and for which states could hardly afford to build separate facilities that were even arguably equal. Then, once the judiciary had been conditioned to suspect that separate could never truly be equal, the plan was to seek, in successive litigation, a gradual extension of the same logic to other graduate schools, to undergraduate education and, finally, to local public schools. That strategy was followed from Pearson v. Murray, 169 Md. 478, 182 A. 590 (1936), through Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948), Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950). The only drastic change in strategy—and one acceded to by Houston shortly before his death in 1950—was to accelerate the effort and seek an early Supreme Court ruling (obtained in *Brown* in 1954) that separate facilities were per se unconstitutional in any form of public education. (Unfortunately, the details of these events are most fully recorded in two histories that do not analyze them. *See* R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality (1980); G. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1983)). That change in strategy was made to capitalize on exactly the kind of thing that Wasby calls an "accident": the small but distinct evolution in the public and judicial moods following the Second World War, characterized by the integration of the armed services and professional baseball and the adoption of a civil rights platform at the 1948 Democratic convention.

Although a full consideration of the question is beyond the scope of this Article, one might ponder the extent to which the impotence of the Critical Legal Studies movement outside the academy—and often inside it—is related to its strategic Hegelianism illustrated here. *See infra* note 55.

16. Practicing law out of a 20 by 22-foot office over a harness store in Springfield,

things. Where strategy is well-concentrated and where the circumstances permit, the consequence can be the creation of "a strategic *situation* so advantageous that if it does not of itself produce [victory], its continuation by a battle is sure" to do so.[17] This is made all the more difficult by the problem of identifying decisive events, which are often obscured by massed and unrecognized assumptions.[18]

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Illinois, Lincoln tried over 3,000 cases and argued about 250 appeals before the Illinois Supreme Court. *See* J. Frank, Lincoln as a Lawyer 3 (1961); N.Y. Times, Feb. 10, 1989, at B7, col. 6. He was a local lawyer only, with a practice and reputation largely limited to central Illinois. *See* J. Frank, *supra*, at 171-72. Except for the last five years of his practice, when he began to develop a corporate clientele, his cases were primarily private disputes of the "one-shot" variety. *Id.* at 41, 168. When he was catapulted into the Presidency, he had almost no background making decisions in large struggles, much less in war itself. "He had no previous experience in public administration, . . . and by every account he could not even very effectively command his own family." *Id.* at 151. But history has judged him "a better natural strategist than were most of the trained soldiers." T. Williams, Lincoln and His Generals 7 (1952); *accord* E. Larrabee, Commander In Chief 643 (1987).

Apparently, Lincoln analyzed the war just as he had learned to analyze litigation. For three years, his generals all insisted on concentrating their efforts on capturing the Confederate capital at Richmond. Practically from the beginning, Lincoln recognized that those efforts were wasted because they would not cause the adversary to surrender, and that the decisive event would instead be the destruction of Lee's army, something Lincoln's generals were too insecure even to attempt. *See* T. Williams, *supra*, at 7-10. The result was the sad succession of commanders—each being replaced after Lincoln was unable to teach him to think strategically—until Grant finally appeared. And even Grant began by considering his predecessors' mistaken approach and had to be tutored to the contrary by Lincoln. *See id.* at 295-96. Taken as a whole, this was the gravest single strategic judgment ever made by an American lawyer: the future of a nation rested on it, and hundreds of thousands died in accordance with it.

17. B. Liddell Hart, *supra* note 6, at 339 (emphasis added). The point is to gain "a strategic dislocation . . . a decisive advantage previous to battle." *Id.* at 339-40. In chess, for example, one's adversary might as well resign without so much as losing a pawn when one has gained so much control over the center of the board that the adversary's freedom of movement barely exists. "Thus a victorious army wins its victories before seeking battle." Sun-tzu, *supra* note 15, at ch. 4, verse 14.

In law, something similar can happen in what might be called "prelitigation": knowing that a later dispute might erupt, a superior strategist drafts a contract or a will, for example, with enough foresight that litigation, even years later, would be tilted as much as possible in the client's favor. But in law and elsewhere, the lack of drama in such a victory often deprives the strategist of credit. "A victory gained before the situation has crystallized is one the common man does not comprehend." *Id.* at ch. 4, verse 11 (commentary by Tu Mu). "When you subdue your enemy without fighting[,] who will pronounce you valorous?" *Id.* (commentary by Ho Yen-hsi).

18. For example, now that the Supreme Court has Dred-Scotted abortion rights into a political issue, Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)—thus inviting anti-abortionists to lobby and pressure every state legislature in the country—a pro-choice strategy limited to counter-lobbying and counter-pressure is not likely to cause eventual victory. At best, it may only prolong the conflict indefinitely because of the moral issues involved and the political dynamics with which they have been infused. This conflict is further protracted by widespread tactics like the intimidation of women seeking abortions, of doctors and hospitals performing abortions and of pharmaceutical companies that might market RU-486. Such an interminable struggle can exhaust feminism's energies and divert resources indefinitely from other needs. Although counter-lobbying and counter-pressure are necessary in the short run to prevent the situation from worsening, they are an inherently defensive strategy and do little or nothing to

Fourth, a superior strategist works through the full process of creativ-

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destroy the adversary's strength, which is the only way to bring this struggle to a successful conclusion.

Here, the anti-abortion movement's largest single strength is the aggressive involvement of the entirely male clergy of the largest religious organization in the United States. Although the withdrawal of that clergy from an active role in this controversy would be an event that would decide most of the conflict, real inquiry into how that might be brought about is practically forbidden by a mass of assumptions about its supposed impossibility. Little could have been accomplished by litigation aimed at depriving that organization of its tax-exempt status, such as the failed attempt in United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988). Not only do such lawsuits stiffen the adversary's will to fight, but even if the plaintiffs had somehow succeeded in court, Congress would have been besieged with irresistible demands for amendments to the tax code that would have mooted out the entire issue.

A more effective strategic inquiry would seek ways of accelerating the natural evolution in the response of clergy to concepts that are historically inevitable but temporarily stigmatized by pasts of unacceptability:

> So long as it seems safe [clergy] fight [such a concept] in the open, hitting valiantly on both sides of the belt, and trying to gain a quick victory by sheer ferocity. But once it becomes apparent that this quick victory is impossible, they begin to be more discreet. First they try to force some element of conformity into the heresy before them. Then they discover that it is not a heresy at all. And then they proceed to declare that they were never against it.

H.L. Mencken, Treatise on the Gods 259 (2d ed. 1946). Catholic clergy went through exactly this evolution with Columbian geography, Copernican and Galilean astrophysics, modern banking (charging interest as a sin), Darwinian biology, first amendment rights (Syllabus of Errors, 1864), and (until Rerum Novarum, 1891) membership in labor unions and any other activity that might dilute the power of private property. But massed assumptions now discourage inquiry into whether the same process can be accelerated in the case of abortion.

For example, the image of Catholic laity unwilling to speak up against their clergy obscures the option of creating among laity a crisis of confidence in clerical rule-making that could so demoralize the clergy as to hasten their withdrawal from the conflict. Assumptions that Catholic laity are solidly anti-abortion are belied by polling evidence that shows Catholics either favoring abortion to a greater extent than Protestants, *see* N.Y. Times, June 30, 1990, at 7, col. 1; N.Y. Times, Apr. 26, 1989, at A1, col. 6; N.Y. Times, Sept. 10, 1987, at A1, col.3, or at least not opposing abortion more than Protestants. *See* G. Gallup & J. Castelli, The American Catholic People: Their Beliefs, Practices, and Values 93-94 (1987); *see also* A. Greeley, Crisis in the Church 213-14, 241-42 (1979) (alienation of laity because of the Church's lack of "sexual credibility").

But this is unlikely to ripen into confrontation between clergy and laity as long as the laity remain unaware that their clergy have not been honest with them about the Church's history on the issue of whether a fetus acquires a soul, and thus becomes a person, at the moment of conception. For nearly the entirety of its existence—and until the revisionism of 1869 to 1917—the Church taught that a fetus does *not* become ensouled at conception. Before the period of revisionism, the Church did not consider abortion of a pre-ensoulment fetus to be homicide. Although some individual Catholic writers argued that ensoulment occurs at conception, and although the Church considered abortion in a general sense to be morally wrong, Church policy recognized qualifications and distinctions based on whether the fetus had passed the point of ensoulment and whether the pregnancy endangered the mother. *See* D. Callahan, Abortion: Law, Choice and Morality 410-16 (1970); J. Connery, Abortion: The Development of Roman Catholic Perspective 63-64, 212, 306-07 (1977); Coriden, *Church Law and Abortion*, 33 Jurist 184 *passim* (1973); Curran, *Abortion Law and Morality in Contemporary Catholic Theology*, 33 Jurist 162, 170-73 (1973); Roe v. Wade, 410 U.S. 113, 133 n.22 (1973); N.Y. Times, Jan. 30, 1990, at A23, col. 3; *see also* J. Connery, *supra*, at 211 ("a consensus of theologians regarding immediate animation [i.e., ensoulment] was reached [only] in the

ity,[19] generating the largest possible number of reasonable strategic op-

second half of the nineteenth century"). Under post-revisionist church law, however, a Catholic is *automatically* excommunicated for aborting a fetus, *see* 1983 Code c.1398, but not for murdering a human being (unless that human being happens to be the Pope). *See* 1983 Code c.1336, 1370 & 1397.

The history of abortion in the United States has been similarly lied about: in the mid-nineteenth century, before the enactment of anti-abortion statutes, abortion was openly practiced, abortion clinics were widespread, the abortion rate may have been higher than it is now and middle-class married women had come to consider abortion an important means of controlling their own destinies. When enacted, those statutes were not usually motivated by any desire to protect an ensouled fetus. Instead, legislatures reacted to intense lobbying by a medical profession that felt threatened by the economics of abortion. *See* J. Mohr, Abortion in America: The Origins and Evolution of National Policy 1800-1900, at 147-70 (1978).

Assumptions have clouded the possibility that the Catholic clergy might become demoralized enough to withdraw from an active role in the abortion conflict if a significant proportion of the laity were to adopt the habit of incessantly demanding principled explanations for what seem to have been arbitrary and unexplainable rules—and arbitrary and unexplainable *changes* in those rules—and if the laity were to contemplate openly a religious alternative to their differences with the Catholic clergy. The Episcopal Church considers itself a "catholic" church, Episcopal theology generally tracks Roman Catholic theology, and in many Episcopal congregations the liturgy is close to the Roman Catholic. Unlike Roman Catholicism, however, Episcopal doctrine has adopted many feminist values: the legalization of abortion has been endorsed, a large number of women have been ordained as priests, and one has been elected a bishop. *See* N.Y. Times, Aug. 6, 1989, at A20, col 6.

Here, even though a potentially decisive event has been obscured by assumptions, it is itself based, first, on acceptance of one of the adversary's assumptions (that abortion is a religious issue) and, second, on rolling that assumption back on the adversary by converting the issue of abortion into an issue of democracy in the church, thus raising the specter—certainly frightening to the adversary—of feminism's leading significant numbers of laity out of the Church and into another religion.

19. Effective strategizing tracks the creative process, which the research has broken down into the following stages: (1) a recognition stage, in which a need to control an event is noticed; (2) a preparation stage, in which raw information about assets and impediments is gathered in a fairly open-ended manner; (3) an option-generation stage, in which the largest reasonable number of competing methods for controlling the event are hypothesized; (4) an option-evaluation stage, in which each method is assessed for effectiveness; and (5) a decisional stage, in which the option evaluations are compared and the most effective option chosen. For a more detailed explanation, see Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 Hastings L.J. 725, 744-49 (1989).

"In the daily stream of thought these . . . stages constantly overlap each other as we explore different problems. . . . Even in exploring the same problem, the mind may be unconsciously incubating on one aspect of it, while it is consciously employed in preparing for or verifying another aspect," G. Wallas, The Art of Thought 81-82 (1926), which is why solutions often surface into consciousness "unexpectedly, with surprising suddenness." T. Amabile, The Social Psychology of Creativity 85 (1983). And creative work is an uneven mixture of "sudden bursts of insight and tiring efforts of execution." V. John-Steiner, *supra* note 13, at 79.

Creativity in youth is somewhat different from creativity in middle age, which more closely resembles the process of strategy. "[T]he creativity of the twenties and early thirties tends to be . . . 'hot-from-the-fire[,]' . . . spontaneous, intense, or precipitative . . . . [But what happens in] the late thirties and thereafter, is . . . 'sculpted creativity.' The inspiration may be just as intense and the unconscious work as active as before, but there is much intermediary processing between the initial and the final stages." S. Arieti, *supra* note 13, at 381 (summarizing findings in E. Jacques, Work, Creativity and Social Justice (1970)).

tions and accurately predicting the effectiveness of each.[20]

Fifth, a superior strategist protects against failure in two ways.[21] The first is to identify points of weakness and to create sub-strategies to shore them up.[22] The second is to develop back-up strategies and sub-strategies in case the original strategy proves partly or entirely ineffective. Even where an eventual decisive event can be identified, a contingency plan is desirable for each predictable possible failure along the way. A superior strategist therefore identifies alternative decisive events and, reasoning backward from future to present, strategizes to cause them, in case they become needed.[23] Ideally, primary and alternative strategies

20. For a description of the research on option-generation and option-evaluation, see Neumann, *supra* note 19, at 746-49, 751-52. In essence, option-generation depends on an eye for exploitable opportunity, together with "an uninhibited flow of association, during which judgment is suspended and [valuable] ideas . . . arrive mixed together with ideas that eventually turn out to be wrong or even silly. Paradoxically, the critical judgment on which option-evaluation depends can impoverish option-generation, censoring sound ideas before their potential can be noticed." *Id.* at 751 (citations omitted). Option-generation is more productive when fantasy facilitates the flow of association. *See* Rogers, *Toward a Theory of Creativity*, in Creativity and Its Cultivation 76 (H. Anderson ed. 1959).

Option-generation derives from the ability to see things "differently," finding ways of transforming, for example, an adversary's special strength into a weakness or the lawyer's own weakness into a strength. Developing a theory of the case is especially dependent on this process. For example, until Charles Houston became involved, pre-*Shelley v. Kramer* restrictive covenant litigation was simple and straightforward: the plaintiff alleged that the covenant existed, that the defendant resided in the covenanted property, that the defendant was a Negro, and that the plaintiff was white (and therefore not personally in violation of the covenant). As soon as these allegations were proved, a court would order that the defendant be ejected. Occasionally, defendants raised constitutional arguments, which were summarily rejected. For the most part, these cases were as routine as run-of-the-mill landlord-tenant litigation. But Houston began denying—and requiring plaintiffs to prove—that they were white and that the defendants were black. *See* C. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 60-61 (1959). This produced cross-examinations that searched into plaintiffs' ancestries for several generations, stunning plaintiffs and the communities they represented. Houston's purpose was not to be procedurally obstructive: it was instead part of a much larger effort to persuade the courts, the public and the parties themselves that distinctions based on race are meaningless. "Every time you drag these plaintiffs in and deny that they are white," Houston said, "you begin to make them think about it. That is the beginning of education on the subject. In denying that your defendants are Negroes, you go to the question of the standards of race. There are many people who cannot give any reason why they are white." *Id.* at 61.

21. *See generally* R. Huntford, *supra* note 14, *passim* (especially in this respect, Amundsen's expedition to the South Pole was a model of strategic planning, while Scott's was a catalog of strategic incompetence).

22. Strategy thus depends on an ability to understand how the adversary thinks: his needs, "his capabilities, his training, his psychology." B. Tuchman, *supra* note 10, at 280.

23. For example, when suing a private organization that could be expected to claim that its discrimination was outside the scope of existing statutes addressing governmental discrimination, Charles Houston would also sue any government that provided the organization with any kind of discretionary benefit, on the theory that a government acts outside its powers when so aiding discriminatory organizations. *See, e.g.*, Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.) (defendant was a privately owned public library that received municipal funds), *cert. denied*, 326 U.S. 721 (1945); Norris v. Mayor

should so interlock that the strategist can switch to an alternative strategy when the primary strategy becomes unproductive or when the alternative presents unexpected opportunity. The point is to ensure flexibility and adaptability to changing circumstances and to guard against false assumptions.[24]

Sixth, a superior strategist juggles masses of detail to produce strategic coherence. In addition to thinking forward and backward in time, a superior strategist can also "think of many matters at once, in their interdependence, their related importance, and their consequences"[25]—all in order to fit together the pieces of the main strategy, to coordinate the execution of tactics, to test actions continually for their effectiveness, and to manage windows through which the strategist can shift to a back-up strategy if necessary.[26] To coordinate ideas and effort so widely spread out over time or space, a strategist must be able to think in several dimensions at the same time[27] and see the entire conflict as an organic

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of Baltimore, 78 F. Supp. 451 (D. Md. 1948) (primary defendant was Maryland Institute for the Promotion of the Mechanic Arts, a private organization). While today this might seem like a routine plaintiffs' strategy, Houston implemented it before modern civil rights statutes, before personal injury lawyers developed the custom of suing anyone with the faintest financial connection to the issues, and at a time when concepts of state action were more narrowly defined than they are now.

24. All other things being equal, a strategy that would foreclose another is for that reason alone the alternate.

25. B. Tuchman, *supra* note 10, at 278. Compare, for example, Brooklyn Dodgers president Branch Rickey's multi-faceted strategy for integrating baseball, J. Tygiel, Baseball's Great Experiment: Jackie Robinson and His Legacy 47-70, 119, 145-52, 161-77, 206-08 (1983), with Cleveland Indians owner Bill Veeck's equally well-intentioned but more one-dimensional and less successful approach. *Id.* at 40-41. Ultimately, Veeck had to follow Rickey's lead. *See id.* at 211-45.

26. Research on the psychology of business executives has shown that

> the most successful corporate leaders think in a style notable for its complexity . . . . This so-called cognitive complexity . . . include[s] the ability to plan strategically without being rigidly locked in to one course of events; the capacity to acquire ample information for decision-making without being over-whelmed and being able to grasp relationships between rapidly changing events.
>
> Executives who do not think in this complex way . . . see problems in isolation from each other, and often rigidly hold to a single overriding goal, such as profit.
>
> The successful executives, however, have the mental capacity, the temperament and the inclination to confront complexities even in small problems. [According to one researcher,] they "tend to plan long into the future, taking into account all possible events that can be anticipated, as well as the consequences of those events."

N. Y. Times, July 31, 1984, at C1, cols. 4-5.

27. For example, Bill James theorizes that success as a baseball manager depends on the ability to strategize in three dimensions at once: strategy for an individual game, strategy for the season as a whole and strategy for the long-term development of individual players:

> [A] manager makes about 70 game-level decisions in an average day, or about 11,000 a year. . . .
>
> [Although m]any managers . . . try to preplan as many as possible of their player utilization patterns so as to minimize the decisions required at this level[,] . . . the most successful managers, like Earl Weaver, Whitey Herzog, and

whole.[28]

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> Sparky Anderson tend to deliberately keep at least one or two positions open to allow them to make day-to-day realignments. . . .
>
> . . . .
>
> Weaver used to say that the biggest decision he had to make all year was who was the twenty-fifth man on the roster out of spring training. He would turn his roster over and over in his head, looking at question after question. If I have Gary Roenicke in left field to start the game and I have to pinch hit for my shortstop early in the game, will I still have another option later in the game? If it's a 7-4 game in the second inning and we've knocked out their starter but we're still three runs behind and they switch to a left-hander, can I change to a right-handed lineup without ruining my defense?

B. James, The Bill James Baseball Abstract 1988, at 117, 119 (1988); *accord* G. Will, Men at Work 7-75 (1990); E. Weaver, Weaver On Strategy 51-65, 153-74 (1984).

Franklin Roosevelt's superiority as a strategist was based in part on the fact that "his was not a syllogistic or logical mind, given to sequential reasoning, not a linear mind in McLuhan terms but a mosaic one, suited for the discerning of patterns and syntheses, 'for knowing all kinds of diverse things at once in a flash.' " E. Larrabee, *supra* note 16, at 644 (quoting Secretary of Labor Frances Perkins).

28. *See* B. Tuchman, The First Salute 176-77 (1988); *see also* T. Williams, *supra* note 16, at 7 (Lincoln "saw the big picture of the war from the start"). The following is based on R. Caro, The Years of Lyndon Johnson: Means of Ascent 303-84 (1990):

In 1948, Lyndon Johnson, who was then a Congressman, had stolen a primary election for the Democratic nomination for United States Senator in an era when that nomination in Texas automatically led to victory in the general election. In some corruptly governed counties, ballot-stuffing and graveyard-voting of a kind that today seems incomprehensible had given Johnson a state-wide plurality of only 87 votes. Johnson's opponent, a former governor named Coke Stevenson, had obtained an order in United States District Court preliminarily enjoining state election officials from placing Johnson's name on the general election ballot. The district court had also dispatched magistrates, accompanied by federal marshals, to the counties involved to hold hearings and examine voting records, including, if necessary, the ballot boxes themselves.

Time appeared to preclude appellate review of the preliminary injunction or of any action the district court might take on the basis of the magistrates' findings. The magistrates had instructions to make their reports by October 2. By state law, if the injunction were not dissolved by October 3, the general election ballots would be printed without Johnson's name (and he had almost no hope of winning as a write-in candidate). The October 3 deadline could not be challenged: it took many weeks to print all the paper ballots then in use, and no court would order the rescheduling of the November general election. The Fifth Circuit was not scheduled to convene until October 4, and an individual Court of Appeals judge was not likely to stay the injunction. The United States Supreme Court also would not convene until October 4.

Johnson was in an even more immediate danger. His state-wide margin of 87 votes was so thin and his reported majorities in the disputed counties so impossibly lopsided that the disclosure of the true contents of a single ballot box might give the nomination to Stevenson. It might also have sent several people—perhaps including Johnson himself—to prison. A lot of money had backed Johnson in the primary, and that money had also hired many of the best known litigators in Texas to ensure that no such ballot box would ever be opened.

But it appeared that ballot boxes *would* be opened. The magistrates still had ten days to hold hearings when Johnson and his lawyers met in a hotel conference room in Fort Worth on September 22.

> [N]one of the roomful of attorneys could think of any way to get the injunction overturned and investigation stopped . . . . The lawyers went off separately and wrote drafts of an appeal. . . . Then they came back and discussed them. There was no agreement, either on the broad ground for the appeal or on the specific

Finally, a superior strategist adamantly refuses to submit to the mercy of events and has confidence that events can be influenced or even controlled if the means to do so can be worked out. A superior strategist, then, has decisiveness[29] (the capacity to act under pressure) and presence

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arguments to be used. They couldn't even agree on the court to which the [issue should be taken] . . . .

*Id.* at 368. This debate was made interminable by the war stories and peacocking familiar to gatherings of trial attorneys. Finally, Johnson ran out of patience. He demanded that Abe Fortas, then a 38-year-old Washington lawyer, be brought in at once.

Fortas was located, flown to Fort Worth and taken into a room containing what he later described as "acres of lawyers." Fortas immediately did what none of the Texas lawyers had been able to do. The Texas lawyers had focused on every separate courtroom skirmish, trying to win each of them one at a time. Fortas instead saw the entire battle as an integrated whole, all of its diverse aspects fitting together into a single problem solvable through a strategy that addressed everything from the Supreme Court's October term schedule to the hearings about to be conducted by magistrates in modest rural courthouses in South Texas.

The Texas lawyers had wanted to argue their case fully to every judge who might listen, hoping that one of them might rule in Johnson's favor. Fortas realized from the start that this would be counterproductive. Each additional judge would take time to rule, and even if the ruling were favorable, Coke Stevenson could appeal further, preserving the risk that on October 3 the injunction would not have been dissolved, the incriminating ballot boxes would have been opened, or both.

Fortas realized that the decisive event would be a stay of the injunction and of the magistrates' fact-finding authority by a judge from whose order no appeal could be taken within the available time. Because the Supreme Court's term began on October 4, that judge was—and could only be—Hugo Black, the Supreme Court justice assigned to the Fifth Circuit. Black's views on federal jurisdiction suggested the heightened possibility that he would rule favorably on those grounds, but to get to Black in time, Johnson would have to get through the Fifth Circuit itself as quickly as possible. Fortas suggested deliberately losing in the Fifth Circuit by making a quick and weak presentation to the circuit judge least likely to be persuaded by it. Although this may have been the only way of getting to Black in time, it is the kind of tactic lawyers abhor.

Although the Texas lawyers had debated the problem for days, Fortas took little more than an hour to comprehend the entire battle and devise a strategy to win all of it at once. A losing application was quickly made to a Fifth Circuit judge predisposed against it, and on September 24 that application was denied. On September 25, Johnson's Washington lawyers applied to Black for a stay, and Black agreed to hear argument on September 28. On September 27, the magistrates began holding hearings in the disputed counties, and for three days Johnson's Texas lawyers tied up the hearings with dilatory arguments and testimony. On September 29, Black signed an order staying both the injunction and the magistrate's hearings until the Supreme Court could decide the issue. When this order was communicated by telephone to the courthouses in South Texas, one of the federal magistrates was literally stopped in the act of prying open ballot boxes himself. The general election ballots were subsequently printed listing Johnson as the Democratic nominee, and a few weeks later he was elected in a then entirely Democratic state. The ballots in the disputed boxes were never recounted.

Thus, a respected lawyer and future Supreme Court justice provided a strategy that made it possible to steal an election. The moral issues raised thereby are considered in Part III of this Article.

29. There is a difference between indecisiveness and "the ability to *delay* a choice" until the most appropriate time to make it. *See* J. Getzels & P. Jackson, Creativity and Intelligence 126 (1962) (emphasis added). The latter is a valuable capacity in strategy and rests on a "tolerance for ambiguity." *See id.* Without it, decisions are made prematurely on fragmentary information that may become more complete before a decision truly must be made. *See id.*

of mind (the capacity to compare options while under pressure).[30] Consequently, a superior strategist resists the temptation to act on motivations that are not strategic. A tactic is not strategic if it is used to satisfy the lawyer's own emotional needs—for example, to vent anger, to hide fear, to create a reassuring illusion of doing something, to avoid admitting the error of earlier actions, or to reflect the lawyer's personality or style. Nor is a tactic strategic if it is chosen to use resources merely because they are available or to maintain momentum, without considering the consequences. That which feels good or reassuring is distinguishable from that which is strategically wise.[31]

30. In the Russian turmoil of 1905, all the Petersburg labor parties had joined in organizing a soviet of workers' delegates, which, among other things, coordinated two months of strikes for an eight-hour work day. The soviet's executive council was in session in a building that was suddenly surrounded by Cossacks and Czarist police. The delegates knew instantly that escape was impossible. Moreover, the meeting room was filled with documents that the Czarists could use against them and to identify others who were absent. Destroying these documents was the only way that the delegates might be able to influence their fate, but that would take time.

As a police officer entered the executive council's meeting room, interrupted a speech and began to read the arrest warrant, Trotsky, who was presiding, sternly ordered him to stop: "Please do not interfere with the speaker. If you wish to take the floor, you must give your name and I shall ask the meeting whether it wishes to listen to you." I. Deutscher, *supra* note 15, at 143. The officer was so stunned by this display of authority that he actually stood by silently while the trade-union delegate finished his speech. Trotsky then solemnly asked the executive council whether the officer should be permitted to make a statement "for the sake of information." *Id.* That was agreed to, the officer read the warrant and Trotsky moved on to the next item on the agenda. "Excuse me," interjected the police officer, looking at Trotsky hesitantly.

> "Please do not interfere," Trotsky sharply rebuked him. "You have had the floor; you have made your statement; we have acknowledged it. Does the meeting wish to have further dealings with the policeman?"
>
> "No!"
>
> "Then, please, leave the hall."
>
> The officer shuffled his feet, muttered a few words and left. Trotsky called upon the members of the Executive to destroy all documents . . . .
>
> At length a strong detachment of police entered, and Trotsky declared "the meeting of the Executive closed."

*Id.* at 143-44. Deutscher believes that Trotsky acted as he did for the sake of dignity. *See id.* at 142-43. Although that might also be true, the more practical purpose of gaining time seems inescapable.

Even though there were many acquittals, Trotsky was sentenced to life at hard labor in Siberia after a trial in which he acted as his own attorney, conducted withering cross-examinations, and made an opening statement that even the prosecution characterized as honest and courageous. *See id.* at 163-69.

31. Despite his creativity, Churchill was a weak strategist because his love of swashbuckling adventure deprived him of the ability to concentrate effort strategically. *See supra* notes 14-17 and accompanying text. "When Mr. Churchill proposed a peripheral landing, anywhere between Norway and Dakar, Mr. Roosevelt was apt to retort, 'All right, but where do we go from there?' which vexed the Prime Minister, since from many of his favorite targets you could not go anywhere." S. Morison, *supra* note 8, at 29. In Western Europe, the decisive event in ending the Second World War was the landing of an Allied army safely in France, from which it would have the least obstructed route into Germany, but Churchill wanted to delay the Normandy invasion indefinitely while pur-

### B. *The Strategic Persona*

> There are 55 reasons why I shouldn't have pitched him, but 56 why I should.
>
> - Casey Stengel, New York Yankees manager,
> on why he started Ed Lopat in the seventh game of the 1952 World Series

> My main objection to Lou was that he managed by hunch and desperation. You ask Casey Stengel why he made a certain move and he will tell you about a roommate he had in 1919 who demonstrated some principle Casey was now putting into effect. You ask Lou and he will say, 'The way we're going, we had to do *something*.' If there is a better formula for making a bad situation worse, I have never heard it.
>
> - Bill Veeck, owner of the Cleveland Indians,
> on why he wanted to fire manager Lou Boudreau and hire Casey Stengel in 1946

Even without empirical research—and none has ever been published about the strategic temperament in law—one can easily recognize that strategy will come only with great difficulty to a personality that feels rocked by events it believes to be beyond its capacity to influence;[32] that cannot plan ahead; that accepts things on their face and cannot look for hidden information and patterns of factual relationships; that engages in self-deceptions such as wishful thinking and ignoring "information which is unpalatable or which conflicts with preconceptions;"[33] or that suffers from the rigidity that impoverishes imagination or causes inflexible loyalty to an idea whose faults become increasingly apparent with time. But surprisingly, strategy may not automatically come more easily to two temperaments that in law are considered synonymous with competence. One is the aggressive and confrontational temperament that represents

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suing his "favorite targets"—which were everywhere except the decisive place. *See id.* at 51-52.

This kind of thinking, which can cause a morass like Italy (1943 to 1945) or a catastrophe like Gallipoli (1915 to 1916), was a constant source of tension between Churchill and the Americans, whose sense of strategy was much more sharply focused. For example, when Churchill demanded a joint invasion of the island of Rhodes on the ground that "His Majesty's Government can't have its troops standing idle: muskets must flame"—in other words, wanting to use a resource merely because it existed—General George C. Marshall pointedly retorted that "not one American soldier is going to die on [that] goddamn beach." E. Larrabee, *supra* note 16, at 151.

32. *See* B. Tuchman, *supra* note 28, at 177-78 (self-pity among British generals during the American Revolution).

33. N. Dixon, On the Psychology of Military Incompetence 152 (1976) (emphasis omitted).

one species of the "persuasion mode."[34] The other is the narrowly doctrinal temperament associated with the justice ethic identified by Carol Gilligan.[35]

Persuasion-mode thinking is affiliated with a compulsion to posture and argue, especially in ways that are "needlessly stylized and hyperbolic,"[36] and to treat others as objects. Some lawyers go about this loudly and confrontationally, others with more quiet cunning.[37] Although no empirical research has been published on the question, a confrontational outlook may actually inhibit strategic thinking. In fact, the freight-train roar of a confrontational lawyer at full throttle may often be the equivalent of a "smokescreen of strategic bluster"[38] that camouflages the lawyer's own perplexity. Not only do "[p]ersuasion-mode habits predispose lawyers to take evaluative stands automatically,"[39] rather than after strategic reflection, but the continual self-justification in confrontational discourse is one of the "self-sealing properties of [the] persuasion-mode"[40] that inhibits lawyers from subjecting their plans and ideas to the rigorous analysis necessary to strategy.

In Carol Gilligan's work, the contrasting ethics of justice and of care are illustrated in the responses of two eleven-year-old children, Jake and Amy, to a hypothetical called "Heinz's dilemma."[41] Jake "speaks about

34. *See* Condlin, *The Moral Failure Of Clinical Legal Education* in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 317, 327-32 (D. Luban ed. 1983); Condlin, *Socrates' New Clothes: Substituting Persuasion For Learning In Clinical Practice Instruction*, 40 Md. L. Rev. 223, 233-35, 239 (1981).

35. *See* C. Gilligan, In a Different Voice 25-38 (1982).

36. Condlin, *Moral Failure*, *supra* note 34, at 326.

37. *See id.* at 328 ("[T]he persuasion mode is not always associated with bad, unpleasant, aggressive behavior.... [It] is just as often a low-visibility, indirect, and even cordial method of manipulating others."); *infra* note 109 and accompanying text.

38. Sherry, *The Slide to Total Air War*, The New Republic, Dec. 16, 1981, at 20-25 (citation omitted); *see also* Sun-tzu, *supra* note 15, at ch. 9, verse 36 ("When at night the enemy's camp is clamorous, he is fearful.... His troops are terrified and insecure. *They are boisterous to reassure themselves.*") (commentary by Tu Mu) (emphasis added).

39. Condlin, *Moral Failure*, *supra* note 34, at 330.

40. *Id.*; *see also* J. Getzels & P. Jackson, *supra* note 29, at 83 ("Those who have an excessive faith in their ideas are not well fitted to make discoveries.") (quoting Mark Bernard).

41. *See* C. Gilligan, *supra* note 35, at 25-37. Jake and Amy have been asked, in interviews, to state their opinions on Heinz's dilemma: Heinz's wife is ill, and her life can be saved only with a drug that costs more money than Heinz and his wife have. The local druggist refuses to lower his price. Jake and Amy have been asked whether Heinz should steal the drug. Jake answers "yes":

> For one thing, a human life is worth more than money, and if the druggist only makes $1,000 he is still going to live, but if Heinz doesn't steal the drug, his wife is going to die. (*Why is life worth more than money?*) Because the druggist can get a thousand dollars later from rich people with cancer, but Heinz can't get his wife again. . . . [I]f Heinz were caught, the judge would probably think it was the right thing to do. [*But wouldn't he be breaking the law?*] [T]he laws have mistakes, and you can't go writing up a law for everything you can imagine.

*Id.* at 26 (emphasis added). Amy answers "no":

> I think there might be other ways besides stealing it, like if he could borrow the

equality, reciprocity, fairness, rights," while Amy "speaks about connection, not hurting, care, and response."[42] Gilligan presents these as alternative *moral* voices,[43] which they might well be. But they are also different ways of approaching strategic problems, and one is much more effective than the other.

Jake says that Heinz's dilemma is "a math problem with humans,"[44] which, in the circumstances, is a perceptive observation of the role of symbolic logic in the equations that we call legal rules. In fact, for an eleven-year-old, Jake does a rather thorough doctrinal analysis: "he spots the legal issues of excuse and justification, balances the rights, and reaches a decision, while considering implicitly, if not explicitly, the precedential effect of his decision."[45] In contrast, as Carrie Menkel-Meadow has pointed out,

> like a 'bad' law student [Amy] 'fights the hypo' [and] wants to know more facts: Have Heinz and the druggist explored other possibilities, like a loan or credit transaction? Why couldn't Heinz and the druggist simply sit down and talk it out so that the druggist would come to see the importance of Heinz's wife's life?[46]

As naive as those questions might at first seem, they reveal the more strategic voice. Amy is close to finding the decisive event: "she considers the solution to the dilemma to lie in making the wife's condition more salient to the druggist or, that failing, in appealing to others who are in a position to help."[47] While Jake has responded monochromatically to what he believes to be a question about hierarchical logic, Amy has a

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> money or make a loan or something, but he really shouldn't steal the drug—but his wife shouldn't die either. . . . (*Why shouldn't he steal the drug?*) If he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So, they should really just talk it out and find some other way to make the money.

*Id.* at 28 (emphasis added). In the rest of her response, Amy focuses on the relationships between Heinz and his wife and between them and the druggist. In Gilligan's words,

> Amy envisions the wife's continuing need for her husband and the husband's continuing concern for his wife and seeks to respond to the druggist's need in a way that would sustain rather than sever connection. . . . Since Amy's moral judgment is grounded in the belief that, "if somebody has something that would keep somebody alive, then it's not right not to give it to them," she considers the problem in the dilemma to arise not from the druggist's assertion of rights but from his failure of response.

*Id.* at 28.

42. *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 Buffalo L. Rev. 11, 44 (1985) (remarks by Carol Gilligan).

43. *See* C. Gilligan, *supra* note 35, at 31-32; *Feminist Discourse*, *supra* note 42, at 38 (remarks by Carol Gilligan).

44. C. Gilligan, *supra* note 35, at 26.

45. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 46 (1985). Jake's voice "values hierarchical thinking based on the logic of reasoning from abstract, universal principles." *Id.* at 45.

46. *Id.* at 46.

47. C. Gilligan, *supra* note 35, at 29.

more complex response to what she views as a question about practical problem-solving: she tries to discover "not *whether* Heinz should act in this situation ('*should* Heinz steal the drug?'), but rather *how* Heinz should act in response to his awareness of his wife's need ('Should Heinz *steal* the drug?')."[48] When she "fights the hypo," it is because she is perceptive enough to recognize that the problem does not necessarily present "a bipolar choice."[49] She resists the constrictions on option-generation[50] imposed by the interviewer, and her option-generation is richer to the extent that she tries to break out of the interviewer's preconceptions. This is a more common dynamic[51] in the practice of law than seems to be recognized even in the literature produced by law school clinicians.

Amy's option-evaluation[52] is also more realistic because she is looking for what Gilligan calls "the inclusive solution":[53] the one that addresses the entire difficulty by satisfying the needs of all involved. By focusing on relationships, Amy realizes that Heinz is not free of this problem until the druggist is as well. Perhaps with some oversimplification, the end of Amy and Jake's reasoning, as it would be seen acted out on the evening news, would be Amy's announcement of the kind of fund-raising effort that touches everyone's heart and wallet, while Jake desperately tries to persuade jury and judge not to send his client to prison. And if, on different facts, these two "voices" were to litigate against each other, and if Amy were to use her creativity aggressively, she would probably outflank Jake strategically, despite his surer grasp of legal doctrine.[54] Doctrinal

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48. *Id.* at 31.

49. *Feminist Discourse*, *supra* note 42, at 51 (remarks by Carrie Menkel-Meadow).

50. *See supra* notes 19-20.

51. For example,

> [a] lawyer who came to my office . . . presented this problem to me as an attorney for a local bank. Where the signature card required *A*, *B*, and *C* to sign, and *C* refused because of a disagreement with *B*, what kind of court order would permit the bank to release the funds? Since any court proceeding is relatively involved and expensive (and . . . since I had not the faintest idea what kind of an order could be obtained), I suggested that we broaden the problem definition to, 'In what ways might we obtain release of the funds?' [which resulted in] an effective method of convincing *C* to sign the withdrawal slip. *What turned out to be the best solution had simply not occurred to the attorney because he had limited himself to the narrow 'court order' definition of the problem.*

MacLeod, *Creative Problem-Solving—For Lawyers?!*, 16 J. Legal Educ. 198, 201 (1963) (emphasis added).

52. *See supra* notes 19-20.

53. *Feminist Discourse*, *supra* note 42, at 45 (remarks by Carol Gilligan) (emphasis omitted).

54. This is a different conclusion from the one reached by Carrie Menkel-Meadow. She argues (and I agree) that an approach based on care has been mistakenly undervalued in lawyering. *See* Menkel-Meadow, *supra* note 45, at 46-47. But the point here is that even if care is not treated as valuable for its own sake, a voice that is too narrowly doctrinal can be debilitated in strategy.

creativity is different from strategic creativity.[55] Each has its value, but one is not a guarantee of the other.[56]

In a law school, however, doctrinal creativity is cultivated while strate-

55. Strategic creativity is much closer to artistic creativity, and not merely because strategy requires an artistic ability to imagine. *See supra* note 13 and accompanying text. In research on students enrolled in the Art Institute of Chicago, Getzels and Csikszentmihalyi found that the essence of an artistic approach to a problem is the refusal to accept at face value either a provided definition of the problem or a standard solution to it. Instead, the artistic temperament reformulates the problem into a new and different set of issues, *see supra* notes 19, 21, 24, 29 and 31, or envisions a problem others had not seen. *See supra* notes 18 and 23 and accompanying text. Getzels and Csikszentmihalyi call this "problem finding" to distinguish it from the more mechanical or bureaucratic search for a standard solution to an already defined problem (a rote method of problem solving). *See* J. Getzels & M. Csikszentmihalyi, The Creative Vision: A Longitudinal Study of Problem Finding in Art 5, 80-81 (1976). Thus, it is not surprising that even as doctrinal a personality as Lenin insisted that "an uprising must be treated as a work of *art*." R. Payne, The Life and Death of Lenin 356 (1964) (emphasis added).

There is, however, some evidence that law work is especially attractive to temperaments that "prefer problems that are prestructured or prefabricated, . . . prefer [enforcing rules and other] activities that are already defined[,] . . . like to evaluate rules and procedures[,] . . . [and] prefer problems in which one analyzes and evaluates existing things and ideas"—none of which are "creative and constructive planning-based activities" such as strategy. *See* Sternberg, *Prototypes of Competence and Incompetence*, in Competence Considered 117, 140 (R. Sternberg & J. Kolligian eds. 1990) (emphasis omitted); *infra* notes 65-70 and accompanying text.

56. In addition, this material suggests the possibility that the general image of men as better strategists is a false one: child-rearing practices in this society might actually tend to handicap many men in this respect and give women more access to habits of thought on which sound strategizing can be based.

On the question of whether Amy's voice is largely female and Jake's largely male, the empirical evidence is, however, equivocal. Gilligan concludes that, while "most people" are in touch with "both voices in defining [and resolving] moral problems," men tend to discourse in a justice voice and women in a caring voice. *See Feminist Discourse*, *supra* note 42, at 47-48 (remarks by Carol Gilligan). Gilligan's theory seems to be supported by Piaget's comparison of boys' games, which have a "jurisprudential" quality, and girls' games, where play is freer (although Piaget drew different inferences from the same data). *See* J. Piaget, The Moral Judgment of the Child 13-108 (1965). Even though Piaget valued the legalistic quality of the boys' games, other research has shown that play unstructured by rules is closely related to a capacity for imagination. *See* E. Klinger, Structure and Functions of Fantasy 347-48 (1971).

But other studies find Gilligan's distinctions to be less than clear-cut. *See* Brabeck, *Moral Judgment: Theory and Research on Difference between Males and Females*, 3 Developmental Rev. 274, 279-80 (1983); Ford & Lowery, *Gender Differences in Moral Reasoning: A Comparison of the Use of Justice and Care Orientations*, 50 J. Personality & Soc. Psychology 777, 783 (1986).

> [A]fter surveying the literature on moral reasoning, empathy and altruism, [Brabeck] concludes that sex differences in morality are at best minimal and are not consistently found. She raises the question as to why so many people find Gilligan's claims intuitively appealing and believe they speak to an essential truth, even when there is no clear empirical support, or in the case of moral reasoning, there is evidence which contradicts her claims. [Brabeck's] answer is that we may be dealing with a mythic truth rather than an empirical truth . . . [and] she suggests we may have some need to perceive males and females as morally different.

*Id.* Even though Ford and Lowery's subjects "did not significantly differ in their use of the two orientations, . . . they rated the justice orientation as masculine and the care

gic creativity is largely neglected and impliedly discouraged through a single-minded concentration on doctrine. This discouragement is actually not peculiar to law schools; it is common in education generally and can be illustrated by what happened to Amy herself. She was interviewed again at the age of fifteen and asked once more about Heinz's dilemma.[57] Although she reiterated some of the concerns she had spoken of when she was eleven, her answer was the same one Jake had originally given—and at the age of fifteen she mistakenly believed that four years earlier she had given Jake's answer![58] Not only had something of herself been drilled out of her in the intervening years, but the drilling was going on even *during* the interview that occurred when she was eleven—an interview that was dynamically similar to many law school classroom dialogues:

> As the interviewer proceeds . . . , Amy's answers remain essentially unchanged, the various probes serving neither to elucidate nor to modify her initial response. . . . But as the interviewer conveys through the repetition of questions that the answers she gave were not heard or not right, Amy's confidence begins to diminish, and her replies become more constrained and unsure. Asked again why Heinz should not steal the drug, she simply repeats, "Because it's not right." Asked again to explain why, she states again that theft would not be a good solution, adding lamely, "if he took it, he might not know how to give it to his wife, and so his wife might still die." . . . [T]he frustration of the interview[er] with Amy is apparent in the repetition of questions and its ultimate circularity. . . .[59]

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orientation as feminine." *Id.*; *accord* R. Jack & D. Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers 5-12 (1989).

It may be that sexual stereotyping in this society—particularly the ways in which men are trained to be inhibited about creativity and caring—has conditioned both genders to treat as female some forms of conduct that in another society might be considered gender-neutral. *See* R. Pascale & A. Athos, The Art of Japanese Management 202-05 (1981) (among Japanese business executives, extreme sensitivity to the feelings of others is an indication of effectiveness). Even though it attacks hierarchical reasoning, the Critical Legal Studies movement has more in common with Jake than it would like to admit. *Compare* J. Habermas, Communication and the Evolution of Society 73-90 (1979) (endorsing Kohlberg's topography of moral reasoning) *with* C. Gilligan, *supra* note 35, at 25-37 (questioning Kohlberg's framework).

57. *See Feminist Discourse*, *supra* note 42, at 40 (remarks by Carol Gilligan).

58. *See id.* at 41.

59. C. Gilligan, *supra* note 35, at 28-30. Whatever one might think of the result in Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), or of Justice O'Connor's record in other abortion decisions, there may be a trace of Amy's voice in O'Connor's desire to defer until another day the issue of whether Roe v. Wade, 410 U.S. 113 (1973), should be overruled. *See Webster* at 3061 (O'Connor, J., concurring) ("there will be time enough to reexamine *Roe*. And to do so carefully."). But although her theory of judicial restraint is well-grounded in precedent and conservative judicial tradition, she was treated by Justice Scalia to a prolonged and condescending *ad hominem* lecture punctuated with remarks that her position is "irrational," *id.* at 3066 n.*, and "cannot be taken seriously." *Id.* at 3064. Some part of the future for this issue may depend on how O'Connor responds to being treated as the scatter-brained female who got in the way of what the boys wanted.

There is no published research evaluating the effect of legal education on a student whose creativity is primarily strategic, but one study has reported that although "Thinking-Judging" students and "Feeling-Perceiving" students earn comparable law school grades, undergraduate grades and LSAT scores, "Thinking-Judging" students were both proportionally overrepresented in law schools (as compared with medical schools and undergraduate liberal arts schools) and more likely to graduate from law school and subsequently enter the practice of law.[60]

## II. Legal Education and the Process of Strategy

### A. *Impediments*

A number of problems confront the teacher who wishes to teach strategic analysis. The first is the custom of closing off strategic inquiry through the kind of professional mystification described by Donald Schön.[61] Although a fair amount of the scholarship produced by law school clinicians in recent years has been devoted to demystifying professional thinking, the clinical literature and student reading material still treat strategy as unexplainable and indescribable instinct and intuition. Clinical texts instead focus nearly exclusively on matters of technique, tactics and lawyering style. For the most part, textbook writers have tended to confine themselves to lists of tactical bromides, such as "encourage the deponent to talk and ramble,"[62] "make the other side tender the first offer,"[63] and "volunteer weaknesses" in direct examination.[64]

The result is a near absence of scholarship and pedagogy on the *process*

60. *See* Miller, *Personality Differences and Student Survival in Law School*, 19 J. Legal Educ. 460, 460-67 (1967). Since this study, however, events such as the rise of clinical education may have encouraged a greater proportion of the "Feeling-Perceiving" group to enter law practice.

61. *See* D. Schön, The Reflective Practitioner: How Professionals Think in Action 289 (1983). Because lawyers and other professionals have not been able to codify the processes through which they arrive at solutions such as diagnoses and strategies, inquiry into those processes is muted, and the sources of professional superiority are obscured behind labels like "wisdom," "talent" and "intuition." *See* D. Schön, Educating the Reflective Practitioner 12-13 (1987).

62. R. Haydock, D. Herr & J. Stempel, Fundamentals of Pretrial Litigation 231 (1985).

63. M. Meltsner & P. Schrag, Public Interest Advocacy: Materials for Clinical Legal Education 235 (1974); *see also* H. Edwards & J. White, The Lawyer as a Negotiator 112-41 (1977) (similar negotiation lists); R. Haydock, Negotiation Practice 125-65 (1984) (same); M. Schoenfield & R. Schoenfield, Legal Negotiations 28-246 (1988) (same). Most negotiation texts include analyses of negotiation theory based on sociological, psychological or economic research, and one text, G. Williams, Legal Negotiation and Settlement (1983), is composed almost entirely of such material. But a description of the social-science dynamics of a lawyering activity is not strategic thinking in the sense explored in this Article. At best, the social science material is mere data that can be useful in a strategic process that none of these texts explains.

64. *See* T. Mauet, Fundamentals of Trial Techniques 86-87 (2d ed. 1988). Even though these are mere tactics, some writers call them and similar devices "strategies." *See, e.g.*, R. Haydock, D. Herr & J. Stempel, *supra* note 62, at 166-68, 227-37 (discovery

of designing overall plans to control events (which many law school teachers dismiss as too instinctual to be taught or learned). Students are told, for example, what a cross-examination should accomplish, what a good one looks and sounds like, and how to act one out—but rarely how to create one. That leaves a large gap in legal education. Not only is strategizing part of the essential logic of lawyering, but a student who masters merely style, tactics and motor skills learns little more than how to act out a lawyer's apparent role.

Second, the proverbial tedium and anxiety of the practice of law may have an inhibiting effect on the process of strategy, and the corresponding tedium and anxiety of law school may have a similarly inhibiting effect on the process of *learning* strategy. In any form of work or study, original solutions arise out of a state of "focused concentration" so enjoyable that the mind becomes completely absorbed in the task at hand and otherwise dammed-up insights "flow" into consciousness without obstruction.[65] This kind of experience is not limited to artistically or aca-

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"strategies"); G. Bellow & B. Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy 508-86 (1978) (bargaining "strategies").

Three texts, on the other hand, at least begin to treat strategy as a process. *See* R. Fisher & W. Ury, Getting to Yes: Negotiating Agreement Without Giving In 19-57 (1981); D. Gifford, *supra* note 8, at 13-70; K. Hegland, Trial and Practice Skills in a Nutshell 167-91 (1978). In Jon Hyman's words, "fostering creativity is the key to the Fisher and Ury approach," which is based on inventing "options for mutual gain." Letter from Jon Hyman to the author (Nov. 7, 1989); *accord* Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. Rev. 863 (1987). Two other texts—which are adapted from a single set of source material—try to help students understand something of the process of theory development. *See* M. Berger, J. Mitchell & R. Clark, Pretrial Advocacy: Planning, Analysis and Strategy 17-33 (1988); M. Berger, J. Mitchell & R. Clark, Trial Advocacy: Planning, Analysis and Strategy 15-35 (1989).

Clinicians are not necessarily in the vanguard of the development of process-oriented pedagogies. The leading legal research text, for example, has inverted that field's traditional approach so that students experience research as a process, rather than as a static set of expectations. *See* C. Kunz, D. Schmedemann, C. Erlinder, M. Downs, A. Bateson, C. Greene & K. Millard, The Process of Legal Research: Successful Strategies (2d ed. 1989). That book ends in an "epilogue" in which four of the authors give separate and inconsistent accounts of how each of them independently solved the same research problem, together with commentary that explains how the different approaches grew out of varying views of professional work. *See id.* at 313-28. In setting out different models of creativity, this *challenges* students to begin consciously developing their own creative styles.

In contrast, no clinical textbook presently on the market contains varying accounts of how different clinicians went about creating a cross-examination or a discovery plan or a theory of the case or anything else that clinicians consider their subject matter. In fact, a large number of clinicians—if asked to record their own creativity in this way—would say that they cannot because these things are the product of "intuition," "instinct" or "experience." *See supra* note 61. When clinicians themselves decline to examine their own creativity, it is understandable that so many clinical students have so much trouble developing creative independence.

65. *See* Csikszentmihalyi, *The Flow Experience and Its Significance for Human Psychology*, in Optimal Experience: Psychological Studies of Flow in Consciousness 15, 32-35 (M. Csikszentmihalyi & I. Csikszentmihalyi eds. 1988) [hereinafter *Optimal Experience*]. In a number of studies, so many subjects used the word "flow"—both as a verb

demically gifted people.[66] It happens where work is structured to encourage it[67] and where the person doing the work is open to experiencing it.[68] The opposite is "antiflow": activity that is "meaningless, tedi-

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and as a noun—to describe this mental state that the leading researcher in the psychology of artistic performance chose this simple and aptly descriptive Anglo-Saxon term to designate what would otherwise be referred to in more pretentious and obscure verbiage (such as "autotelic experience"). *See* Csikszentmihalyi, *Introduction*, in *Optimal Experience* at 3, 8.

Although uncreative and even mechanical work is done more efficiently in flow, creative work cannot happen at all without it.

> Because of the deep concentration on the activity at hand, the person in flow . . . loses temporarily the awareness of self that in normal life often intrudes in consciousness, and causes psychic energy to be diverted from what needs to be done. . . . When the self is conscious of itself, not only does it become less efficient, but the experience is usually painful. . . . [But when truly challenged], people actually report experiencing a *transcendence* of self . . . . The climber [for instance] feels at one with the mountain . . . .
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> . . . .
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> . . . Irrelevant thoughts, worries, distractions no longer have a chance to appear in consciousness. . . . Self-consciousness, or the worry we so often have about how we appear in the eyes of others, also disappears for the same reason. . . . [Instead,] there is a great inner clarity [and thinking reaches a heightened state that] is logically coherent and purposeful.

Csikszentmihalyi, *The Flow Experience and Its Significance for Human Psychology*, *supra*, at 33-34 (citation omitted). In other words, thought flows without obstruction into action. A person in this state "simply does not have enough attention left to think about anything else," even the passage of time. *See id.* at 32. This experience is so pleasurable that people fluent with it "will attempt to replicate it whenever possible," *id.* at 34, and will not cheerfully tolerate interruption. "The experience of enjoyment is one of personal control, but it is also one in which actions seem to be effortless . . . [without] the sensation of effort and strain." Larson, *Flow and Writing*, in *Optimal Experience* 150, 166.

For people who work predominantly in flow, the dichotomy between work and play becomes meaningless because they experience at least as much fun in work as they do in the activities that are arbitrarily classified as recreation. On the other hand, people whose motivations are primarily extrinsic (security, money, power, fame) are frequently alienated from their work and do it at best only with grudging diligence, not with creativity. *See* M. Csikszentmihalyi, Beyond Boredom and Anxiety 3-4 (1975).

66. *See* Delle Fave & Massimini, *Modernization and the Changing Contexts of Flow in Work and Leisure*, in *Optimal Experience*, *supra* note 65, at 196-98 (farmers in a traditional rural village in Italy report being in flow almost continually throughout the work day).

67. The research suggests that a person can experience flow only when he or she fully comprehends the ultimate goals to be accomplished, when the task presents a challenge that is heightened but not beyond the person's skills or capacity to grow and when he or she knows that the surrounding environment will respond to the quality of the action taken. *See* Csikszentmihalyi, *The Flow Experience and Its Significance for Human Psychology*, *supra* note 65, at 30-34. Flow "typically occurs in . . . games, sports, or artistic performances"—or in other activities that can be transformed into games or artistry—and where "the level of challenges and skills can be varied and controlled" by the person in flow. *See id.* at 30-31.

Any form of tedium or anxiety will interfere with flow. "Surgeons who repeatedly perform the same operations, such as appendectomies, quickly become bored with their work. Academic surgeons who do state-of-the-art operations report experiencing flow as intense as any artist or sportsman." *Id.* at 31; *see also* M. Csikszentmihalyi, *Beyond Boredom*, *supra* note 65, at 123-39 (surgery as a form of challenging play).

68. *See* Csikszentmihalyi, *Introduction*, *supra* note 65, at 6. Flow happens more eas-

ous . . . [and] offers little challenge; is not intrinsically motivating; and creates a sense of lack of control."[69] For many lawyers and law students, these very characteristics—boredom and stress—dominate the work they are asked to do.[70]

A third problem is the paradox that professional thinking can be explained only in language understandable to a person who already knows how to think like a professional. Thus, to learn how to think professionally, students must "plunge into doing—without knowing, in essential ways, what [they need] to learn,"[71] and "exhibit[ing], in order to learn, that which they most need to learn."[72] Although some students enter such a mystery confident that they can eventually "break it open,"[73] the greater number are more comfortable treating a teacher's comments as "a set of expert procedures to be followed mechanically in each situation"[74]—which is not an effective way to solve the types of problems that

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ily to people who feel that they "own" their behavior: they are in control of what they do, and they do not care—or need to care—about whether others approve. *See id.* Flow also depends on an "ability to create enjoyment" through "internal self-regulation." Larson, *Flow and Writing*, *supra* note 65, at 167. Research suggests that the more "modern" one's work and attitude toward work, the less one is able to experience flow, with the result that flow may be becoming less and less common among young people. *See* Delle Fave & Massimini, *supra* note 66, at 204-05.

Flow is "enjoyable for its own sake" and causes effectiveness only *as a by-product*. *See* Rathunde, *Optimal Experience and the Family Context*, in *Optimal Experience*, *supra* note 65, at 343; *see also* M. Csikszentmihalyi, *Beyond Boredom*, *supra* note 65, at 179-206 (arbitrariness of distinction between work and play). Flow increases performance only for people who can experience it spontaneously, without an extraneous offer of reward or threat of punishment. A person whose motivations are primarily geared to the expectations of others will not experience flow frequently, and that person's performance cannot be improved by efforts to encourage flow through positive or negative reinforcement. *See* Csikszentmihalyi, *The Future of Flow*, in *Optimal Experience*, *supra* note 65, at 374. Nor will it be improved substantially through intimidation based on guilt or shame.

69. Allison & Duncan, *Women, Work, and Flow*, in *Optimal Experience*, *supra* note 65, at 120. "[T]he most urgent applications of the flow model [are] in schools and on the job, where most people spend most of their lives—often in boredom or in states of uneasy anxiety." Csikszentmihalyi, *Introduction*, *supra* note 65, at 12.

70. *See* D. Arron, Running From the Law: Why Good Lawyers are Getting Out of the Legal Profession *passim* (1989); Oppenheimer, *The Proletarianization of the Professional*, 20 Soc. Rev. Monographs 213, *passim* (1973). Law work is not usually treated as an activity that can be structured to enhance the creativity of those who undertake it. When courts devise systems of procedural rules, when law firms and other employers structure attorneys' work and when law faculties design and redesign curricula, virtually no thought is given to the deadening effect on creativity of what lawyers and law students are thereby asked to do. In fact, much of the practice and study of law inhibits flow in the same way that assembly-line work in a factory does. Although physicians make similar complaints (especially during their hospital residencies), a physician in private practice—or an architect or even a self-employed auto mechanic—is in far greater control over how work is to be done, how time is to be used and the environment in which all this transpires.

71. D. Schön, *Educating*, *supra* note 61, at 166.

72. *Id.* at 139.

73. *Id.* at 125.

74. *Id.* at 155. Law school teachers often note the increase in student vocationalism and in resistance to assigned work requiring reflection. *See, e.g.*, *Panel Discussion on*

confront legal professionals. This kind of literalism is often supplemented with empty mimicry of the "moves" that students think lawyers make and the social masks that they see lawyers wear.[75]

A fourth problem is the effect of students' backgrounds. Most students have very little experience causing difficult things to happen, making important decisions on behalf of other people or analyzing their own decisions. They thus come to law school without much decisiveness, sense of calculating risk or understanding of complex decision-making. Much of education, even legal education, conditions students to ignore or even distrust their own capacities for originality;[76] to think in terms of a hierarchy of rights, rather than a methodology of problem-solving;[77] and to approach problems and decision-making in a mood of passivity.[78]

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*Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 Cath. U.L. Rev. 337, 344, 357 (1987) (law students have narrow learning goals and resist clinical literature requiring reflection) (comments by Philip Schrag); D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. Legal Educ. 461, 467-69, 477 (1987) (comparing effectiveness of different teaching modes). *But see Panel Discussion*, *supra*, at 351-52, 357 (Critical Legal Studies teachers are more successful in getting students interested in philosophical discourse) (comments by Elliott Milstein, Leah Wortham and Philip Schrag). Increased or not, student vocationalism is not necessarily an impediment to teaching strategic analysis. In fact, where an overly vocational student can come to feel the weight of responsibility for solving a problem, the gap between teacher and student might be narrowed through dialogues that contemporaneously coach the process of creation. *See infra* note 96 and accompanying text. These kinds of dialogues might not, however, reach the kind of student that Carrington and Conley call "alienated." *See* Carrington & Conley, *Correspondence — Negative Attitudes of Law Students: A Replication of the Alienation and Dissatisfaction Factors*, 76 Mich. L. Rev. 1036, 1036-41 (1978); Carrington & Conley, *The Alienation of Law Students*, 75 Mich. L. Rev. 887, 889-91 (1977).

75. *See* Neumann, *supra* note 19, at 753-58.

76. *See* Fuller, *On Teaching Law*, 3 Stan. L. Rev. 35, 43 (1950). Lon Fuller believed that creativity does not easily happen in a mind "that is oriented toward examinations . . . [and] has to ask itself anxiously at every turn that most inhibitive of questions, '*What will other people think?*' " *Id.* (emphasis added). The "fear of making a fool of yourself," K. Hegland, *supra* note 64, at 181, is one of the biggest blocks to creativity. It is certainly a block that can be cemented in place by the law school experience. The empirical research on how the fear of failure and pressures to conform debilitate creativity is summarized in T. Amabile, *supra* note 19, at 74-75, 160, 196-97 and Torrance, *Education and Creativity*, in Creativity: Progress and Potential 98-100 (C. Taylor ed. 1964).

The evidence is mixed about the sources of law school pressures to conform and related stress. Some have blamed law school faculties and curricula. *See* Savoy, *Toward A New Politics Of Legal Education*, 79 Yale L.J. 444, 455-62, 480-87 (1970); Watson, *The Quest For Professional Competence: Psychological Aspects Of Legal Education*, 37 U. Cin. L. Rev. 91, 109-10, 121-22 (1968). Others have suggested that students inflict much of it on themselves and on each other. *See* Carrington & Conley, *Correspondence — Negative Attitudes*, *supra* note 74, at 1043; Carrington & Conley, *Alienation*, *supra* note 74, at 894; Watson, *supra*, at 105-06, 119-20. Still others have argued that stress is inherent in a professional education. *See* Taylor, *Law School Stress and the "Déformation Professionelle"*, 27 J. Legal Educ. 251, 253-54 (1975). In fact, all of these sources may contribute to an atmosphere discouraging creativity in law school. *See* Heins, Fahey & Henderson, *Law Students and Medical Students: A Comparison of Perceived Stress*, 33 J. Legal Educ. 511, 523-25 (1983).

77. *See supra* notes 34 and 41-60 and accompanying text.

78. Although one rarely hears students speak the words "fate" and "luck," the con-

Moreover, instruction in strategic analysis represents an abrupt change in a student's legal education. Doctrinal analysis and rule memorization are only a small part of strategic thinking. A doctrinally gifted student may lack the creativity needed for strategy,[79] while a doctrinally average student may turn out to be a very effective strategist.[80]

Fifth, when students begin to strategize, they are enveloped in a procedural fog that blinds them, because of their inexperience with the operation of rules of evidence and procedure, with burdens of production and persuasion, with the judicial personality (individually and generically), with the folklore of jury behavior and with the courthouse bureaucracy's habits of operation. The pedagogical difficulty is to integrate all these considerations into the strategic process so that students can learn to think about procedure strategically.[81]

A final problem is the difficulty of analyzing the process of creating a strategy after it has occurred. A lawyer or a student may be able to explain a strategy's logic but retreat into frustration and inarticulateness when asked to describe the process through which it was arrived at, even though it is mastery of the *process* that produces a superior strategist. Because creative work continually wanders into and out of consciousness, it should not be surprising when a person, particularly one who is inexperienced in formulating strategy, is unable to remember and reduce to language the complex chain of association that has led to a strategy.[82]

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cepts behind those words dominate the thinking of a student who prepares for a motion or court appearance believing that, although a show of persuasiveness should be made for the sake of appearances, in the end the issue will be decided on the basis of "whatever the judge wants to do." This is certainly the opposite of the capacity to "bring the enemy to the field of battle and . . . not [be] brought there by him." Sun-tzu, *supra* note 15, at ch. 6, verse 2. In teaching students how to make decisions, a fair amount of a teacher's effort is spent overcoming the passivity induced by many years of classroom instruction—including law school doctrinal instruction.

79. Although "a certain amount of intelligence is required for creativity, . . . intelligence and creativity are by no means synonymous." J. Getzels & P. Jackson, *supra* note 29, at 125. Many people become skilled at playing the *role* of a student through test-taking techniques and mimicry of teachers but have limited capacities for—and perhaps fear of—independent thought.

80. Creativity is an everyday characteristic that is not limited to people who are "brilliant" or have artistic temperaments. *See* J. Getzels & P. Jackson, *supra* note 29, at 6-7, 125; T. Amabile, *supra* note 19, at 84. In general, creativity is less common in societies where entertainment tends to be passive, organizations are predominantly hierarchical, life is thought of as a career and conformity is important to career advancement.

81. One way to overcome this problem is to use a sequence of study that helps students walk into the fog gradually. A teacher might begin with a seminar exercise stripped of procedural rules, such as the task of developing a theory on behalf of a person who must testify before a Congressional committee and whose business will suffer if regulatory legislation is enacted. In a second exercise, on different facts, the teacher might explain the effect of all the relevant procedural rules and dynamics and then ask the seminar to build a strategy based on that data. These exercises could lead into case work with clients, a semester-long simulation or a third exercise in which the teacher simply lists the relevant rules and asks the seminar to make a strategy.

82. *See supra* note 19.

In fact, because imagination and memory are inseparable,[83] much of what a student "remembers" in such circumstances may instead be retrospectively imagined, and neither student nor teacher is capable of telling the difference.

Moreover, even when a student is able to speak with at least some clarity (and perhaps originality) about the creation of a strategy, the teacher might not be willing to *hear* what is being said. A teacher who does not understand creativity might expect to hear only fully formed strategic judgments and might dismiss as foolishness partly worked out strategies from which faults have not yet been expunged.[84] Or the teacher might be willing to recognize creative work only if it is expressed in language he or she prefers.[85]

### B. *Strategy-Teaching Discourse*

How can a teacher's discourse with students overcome these problems? Classroom and seminar discussions have only limited value. The most productive discourse would seem to occur in individual critiques of work that the student has tried to strategize. But even then the most common forms of pedagogy are not very productive.

Preliminarily, much critique consists of a teacher talking *at* a student, who in response pretends temporarily to think whatever the teacher

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83. *See* T. Hobbes, Leviathan 28 (Liberal Arts Press ed. 1958) ("*imagination* and *memory* are but one thing, which for divers considerations has divers names") (emphasis added); *see also* E. Loftus & J. Doyle, Eyewitness Testimony 75-85 (1987) (memory can be altered by post-event inputs); I. Rosenfield, The Invention of Memory 83 (1988) ("memories themselves are generalizations that are constantly being 'revised' ").

84. The criticism of ideas as soon as they are expressed can paralyze option-generation. *See* Hallman, *Techniques of Creative Thinking*, 1 J. Creative Behav. 325, 325-26 (1967).

85. For example, in an attempt to learn whether successful betting at the race track is a function of the skills measured by IQ-tests, some social science researchers interviewed successful bettors who study the early version of the Racing Form for many hours before placing a bet. *See* Ceci & Liker, *Academic and Nonacademic Intelligence: An Experimental Separation* in Practical Intelligence: Nature and Origins of Competence in the Everyday World 119, 124 (1986). The researchers claimed to be frustrated because the bettors (i) explained their strategies in ways that were "superficial or cryptic," (ii) could not construct algorithms and (iii) "did not have vocabularies that could easily support descriptions of their thoughts." *Id.* at 128-29. To prove the bettors' inarticulateness, the researchers reproduced the transcript of an interview with "a 62-year-old crane operator with an eighth grade education." *Id.* at 128. But the transcript proves the opposite: although the crane operator does not speak in the cliches of behavioralist research, he has an obvious ability to explain with plain Damon Runyanesque eloquence (and with a vocabulary that is more precise than the researchers') exactly why he has "the horse right here."

It would not be surprising if occasionally some law school professors were equally deaf. Not only do law school teachers speak in dialects of their own—varying according to a given teacher's academic specialty and political persuasion—but clinicians in particular are additionally subjected to the dialect of practicing lawyers. A student can sometimes wander into this jargon-laden environment, speak haltingly of creative strategy and not be entirely understood.

seems to want the student to think.[86] That is less a dialogue than a lecture punctuated with little applauses in the form of student comments aimed at pacifying and impressing the teacher. Students do not learn much from this, even when the teacher talks about the process of strategizing.

In addition, after-the-fact accounts of how a strategy was developed are inherently unreliable because of the inseparability of memory and imagination,[87] the roles of fantasy and the unconscious in creative work,[88] and the inevitable human tendencies to rationalize and self-justify.[89] This is true not only after prolonged strategizing that might

86. *See* Neumann, *supra* note 19, at 753-62 (barriers to effective critique).

87. *See supra* note 83 and accompanying text.

88. *See supra* notes 13, 19 and 65-69 and accompanying text.

89. Consider, for example, the following dialogue from an end-of-the-semester critique focusing on the student's theory of the case. (Generally, theory development is one of the most important strategic decisions in litigation. *See supra* notes 11 and 20.) In a semester-long pretrial litigation simulation, the student had represented a law school professor who complained that his university had wrongfully denied him tenure. (The huh's, um's and you-know's have been deleted.)

*Teacher*: Did your theory change during the case? Did you start with a different theory from the one you ended up with?

*Student*: Oh, yes.

*Tr*: How did it change? What was it when you started out?

*St*: When I started out, it was all based on whether he was induced to take the job because he thought that he was going to be guaranteed tenure or because there was some kind of provision that said, "Listen, once you meet these criteria you're going to get tenure"—some kind of inducement almost like a guarantee, although not expressed, combined with the fact that he had turned down other offers. So maybe there was something with respect to why he turned down the other offers. Then, as things developed and I started finding more facts—for example the fact that he didn't consult the tenure standards until after his second reappointment—I started changing, and then I realized that maybe this is a wrongful discharge, but since New York [the jurisdiction in which the simulation is based] doesn't recognize that, I'm going to have to file it under some other theory.

*Tr*: Breach of contract theory?

*St*: Right. So basically what I did was to say, "Fine, I'll just characterize it and try to tell the court that 'Listen, in essence, even though it's labelled as a breach of contract action, it's really wrongful discharge.' " [*See infra*, note 91.] The problem with that is that it assumes she followed all the tenure procedures. But the problem with my case—and the problem I had structuring it and why I flip-flopped around in terms of theory—basically, I had the same arguments, but the progression of how I was to make them kept changing. I couldn't really figure out the best way to present all my arguments. By the time I got to the memo [in support of his motion for a preliminary injunction] it seemed to be decent, seemed to flow and be logical.

This student clearly wrestled with the process of developing a strategy, and he makes a valiant attempt to explain *how*, and why, he made strategic decisions. But despite the ease with which he seems to loosen himself up creatively, once the act of creation is over he has only the vaguest memory of what actually happened.

For a proposed approach to the problems inherent in such after-the-fact analysis, see *infra* notes 93-97 and accompanying text. (The dialogues reproduced in this Article were tape recorded from critiques in a course in pre-trial litigation.).

stretch over several weeks, but even immediately after a short burst of creativity that might have lasted only moments. For the beginner who has only the barest awareness of how his or her own creativity travels, the trip may at times seem so mysterious that only occasional landmarks glimpsed along the way can be remembered later.

For that reason, the traditional clinicians' "What-was-your-goal?" litany[90] does not help teach strategizing, even though it represents the logic of strategy evaluation. In fact, because it is based on the logic (rather than the process) of strategy, it encourages students to rationalize and justify after the fact. With few exceptions, a litany-grilled student simply responds with whatever ideas will best justify the student's course of action, regardless of whether the student had those ideas in mind at the time the decisions being critiqued were actually made.[91]

It would be much more effective to free most strategy teaching from post-performance conversations dominated by evaluation. If the teacher is to help the student explore the process of creating a strategy, both of

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90. The heart of the litany is something like this:
What was your goal?
What was your strategy for achieving it?
From what array of strategies did you choose this one?
Why did you reject the others?
What led you to believe that the strategy you chose would accomplish the goal?
What led you to believe it would do so more effectively than the alternatives?
What risks did your strategy create?
In retrospect, did you make the best choice? Why or why not?
What did you do to minimize the risks your strategy created?
Did you do everything necessary to execute the strategy?
If you obtained the goal, was that because of the strategy and its execution, or was it because you were saved by fortuitous events not within your control?

91. Although the method of the National Institute of Trial Advocacy ("NITA") successfully teaches the mechanical execution of trial tactics, it is ineffective at teaching trial strategy. A better-than-average NITA critique might include a quick, cursory stab at some portion of the "What-was-your-goal?" litany—usually abandoned after the critiquer has asked two or three questions. More often, the student is told something like this: "Your theory wasn't persuasive. Here's a better one: .... And you should have argued *X* and *Y* and should not even have mentioned *Z*." Or, after doing a cross-examination, the student is told, "You didn't control the witness because you didn't ask leading questions." Later, after cross-examining a subsequent witness who is positively eager to display his own repulsive personality, the student might be told, "You weren't using the witness to your own advantage. Your leading questions kept him from saying the very things that you should have wanted the jury to hear." This kind of critique is more than mere custom in NITA programs: it is actively encouraged in NITA teacher training. *See* K. Broun, U. Lester, M. Nelken, & J. Seckinger, Materials for NITA Teacher Training Program 3 (1985).

In programs sponsored or inspired by NITA, students are limited to learning only techniques or, to put it more bluntly, motor skills. They learn, for example, how to execute a cross-examination, but not how to make cross-examination decisions. They are not subjected to any systematic exploration of the *process* of creating a theory or a cross-examination or any other aspect of trial strategy. Analytically, the result is a cookbook superficiality that ought to trouble law teachers, given the popularity of the law school versions of these programs. For a proposed solution, see *infra* note 100.

them will have to get inside that process at the same time. Perhaps the most effective way of achieving this is through dialogues during creation, in which the teacher prods and probes while the student develops strategy. In such a dialogue, post-hoc evaluation is replaced by contemporaneous coaching as one might experience it in an acting class, in a conservatory of music, or on an athletics field.[92] The following example is a fragment from a much longer interchange between teacher and student. Although it has faults, it at least helps the student "feel" the process of strategy:[93]

*Student*: I don't think it's in the cards that . . . [my client is] going to get tenure in this school.

*Teacher*: Why not?

*St*: I've got one line of cases that say that a personnel manual can imply a contract if it's relied on, and I think I can prove that these tenure standards are at least as good as a personnel manual. But none of those cases involves a professor coming up for tenure.

*Tr*: So there's a gap in the law?

*St*: Yes.

*Tr*: Assuming that you're at your persuasive best, how is it most likely to be filled?

*St*: I've got another line of cases that say courts lack the authority to order a university to grant tenure. That's because the decision to grant tenure rests on standards that are too subjective for a court to do anything about.

*Tr*: And that means . . . ?

*St*: I don't think I can get a court to order the university to grant him tenure.

*Tr*: Because the second line of cases fills the gap left by the first?

*St*: Yes.

*Tr*: And you will not be able to succeed even though the chancellor's actions plainly violate the law school's by-laws?

*St*: Yes.

*Tr*: What's the most you could get from a court? Not what's the most you're likely to get, but what's the most you stand a reasonable chance of getting? Let's see what we've got to work with.

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92. Teachers tend to perform at their best when they and their students learn together, even though at different levels. Teachers are less successful when they turn from what they are studying and "profess" about it to students. Some professing is occasionally necessary, but it has an inherent tendency to drain excitement from what students are experiencing. When they are professed to, students stop actively participating in an adventure and instead start doing what years of formal education have conditioned them to do: preparing to please the teacher by dutifully absorbing the teacher's thoughts and words in order to reproduce them later at an appropriate moment to get the grade that is a student's prize for doing that.

93. Unlike the dialogue in note 89, *supra*, this one occurred *during* theory development. This student also represented the professor in the simulation. Notice how the teacher tries, among other things, to provoke the student to expand option-generation, to explore alternative decisive events and to coordinate alternative strategies so that they complement—rather than interfere with—each other.

*St*: The most a court will be willing to do is order the chancellor to transmit his tenure application to the board of trustees.[94]

*Tr*: Where it will be considered under which set of by-laws?

*St*: Probably the university's, rather than the law school's. That's what the chancellor has been doing. And even if we get a judge to order that she transmit his application, I can just imagine what the board will do. We have no right to appear before the board. She's in the room and we're not. They've been working with her for years, and our guy is unknown to them, except that he's a trouble-maker.

*Tr*: Would a court order the board to use the law school by-laws?

*St*: Possibly.

*Tr*: What good would that do?

*St*: Procedurally, no good because getting the application before the board means the procedural violation has disappeared. Substantively, it means they couldn't reject him on the simple ground that he hasn't produced a book.[95] But still, they could stand the law school by-laws on their head and say he fails them anyway.

*Tr*: Is there a remedy for that?

*St*: No. A court will not order a university to grant tenure.

*Tr*: And that's what you think the board will do?

*St*: Yes.

*Tr*: Can I ask you to forget—just for a few minutes—that you think that? Just for this conversation. Let's come up with the full range of possibilities of what they would do if presented with his application. One possibility you've mentioned: that they'd play ball with the chancellor. What else?

*St*: Well, they could consider it objectively; they could not be influ-

94. The university chancellor has refused to transmit the professor's application to the board. The law school and the university have separate by-laws, which are irreconcilable on this point. The law school by-laws require the chancellor to transmit any application approved by the law school faculty and dean. The university by-laws permit the chancellor to deny tenure on her own authority. The university and the law school also have inconsistent tenure standards, which have never been tested because the law school was founded less than a decade before. The chancellor appears to have followed the university by-laws and standards. The professor claims that the law school by-laws govern and that the university has violated them both procedurally and substantively.

The professor's attorneys would have to persuade the court that the law school by-laws and tenure standards imply a contract on which the professor relied. In the simulation's jurisdiction, the provisions of an employee manual or similar document are impliedly a part of an employment contract and will be enforced if relied upon by the employee. Otherwise, there is no cause of action for wrongful discharge. (Although the actual case that inspired the simulation is largely similar on the facts, *see* Faculty of CUNY Law School v. Murphy, 140 Misc. 2d 525, 531 N.Y.S.2d 665 (N.Y. Sup. Ct. 1988), *aff'd as modified*, 149 A.D.2d 315, 539 N.Y.S.2d 367 (1st Dep't 1989), the simulated university is a private school and is not subject to any of the controlling statutes of the actual case.).

95. The university by-laws require publication of a book for tenure. The law school by-laws do not; they even speak approvingly of using non-traditional scholarship in place of doctrinal articles. The professor has written three law review articles, all advancing the views of the Critical Legal Studies movement and all necessarily relying on non-doctrinal forms of analysis.

enced by her. Or they could be influenced by her negatively: whatever she says, they might want to do the opposite.

*Tr*: If they considered it objectively, what else would have to be true? What would cause them to do that?

*St*: She would have to be a very fair-minded person, which we have evidence that she is not—so that's out. Or they could be so fair-minded that they would be able to pick up on her personal hostility to my client. But she's too smooth an operator for that; it might happen, but I doubt it.

*Tr*: Or over the years, they might have seen her be reliable at times and unreliable at others, and they might have learned to use their own judgment.

*St*: I have no way of checking that out.

*Tr*: Not directly, but perhaps you do a little circumstantially. Do you know their backgrounds?

*St*: Yes.

*Tr*: Have any of them ever taught themselves?

*St*: No, and I think that means that they're going to react the way a judge would. They're going to say, "How do I know whether this guy should get tenure? I'll have to rely on the opinions of people who know better."

*Tr*: Such as the law school faculty and dean?

*St*: But the board hardly ever deals with them. She and the board have worked together for years.

*Tr*: So, as you look at this through the board's eyes, she's the safe and responsible person, he's the trouble-maker—and who knows what this law school faculty [which recommended tenure] is up to?

*St*: Yes.

*Tr*: Is there any way, in the board's eyes, of turning her into the trouble-maker, making the law school faculty look safe and responsible, and turning the client into a victim?

[Teacher and student debate that possibility at length and agree that it is unlikely.]

*Tr*: Let's step back and look at this for a minute. Is there something that is reasonably possible that could happen and that would cause him to get tenure? If there is, then you can figure out how you can cause it to happen.

*St*: It's reasonably possible that the board might ignore the chancellor's views and grant tenure anyway, but it's only possible.

*Tr*: How can you protect the possibility?

*St*: If I can persuade a judge to order the chancellor to transmit the application and order the board to consider it according to the law school by-laws.

[Teacher and student talk about whether the latter should be accomplished through a preliminary injunction or through a summary judgment declaring that the professor's tenure application is governed by the law school by-laws.]

*Tr*: Okay, he might get tenure. But you suspect that he won't. What's the next best thing you can get him?

*St*: He's in an awkward situation because, the way the chancellor has structured this, he's using up his terminal year now, and it's so late in the hiring season that none of the schools he's contacted have openings in his field. He's going to be unemployed come summer without much prospect of a teaching job for the fall anywhere.

*Tr*: And you need to get him out of that position. What will it take?

*St*: It'll take a teaching job. I can't go out and get him one. I can only try to help him keep the one he's got.

*Tr*: Let's break a teaching job down into its components. It's made up of income, fringe benefits, the work of teaching, the status of being on a faculty, and the use of the resources of the school—the library, the secretaries, the photocopy center, the gym, and probably some other things I'm not thinking of right now. If he gets tenure or another job, he gets all that in one shot. But if he doesn't get tenure or another job, can you put it together for him piece-by-piece for the next academic year so that he's protected while he goes to the meat market next year?

[Student suggests negotiating for a package that would give the professor one year of unpaid leave, use of his office, secretarial and photocopy support, etc., while he seeks a year of employment in practice with the enhanced status of being a faculty member on leave.]

*Tr*: Okay, let's call that your parachute goal. How can you get it?

*St*: Demand big damages, litigate to the hilt, then negotiate. In order to minimize their risk and reduce conflict and controversy, they might just be willing to buy him off.

*Tr*: Let's assume for the moment that you will be able to negotiate that kind of deal, and if you get it, it would probably be because it's nearly free to the university. Let's talk about three things. First, is your client interested in that kind of thing?

*St*: I'll have to ask.

*Tr*: Second and third are related. Second, is your leverage good enough for more? Since you've got them dead to rights on their using the wrong by-laws, can you get fringe benefits for him or maybe a lump sum payment?

*St*: That depends on the chancellor's anxiety—if she has any—over whether the board might grant him tenure.

*Tr*: And third, will the parachute strategy interfere with the tenure strategy—maybe by communicating that you're no longer serious about tenure? Or will the tenure strategy interfere with the parachute strategy? You're considering causing or threatening damage to get them to settle: what effect will that have on the tenure application? Conversely, what happens if you start looking for a parachute after they deny him tenure? He wouldn't look like a faculty member on leave next year, even if the university is willing to call him that. And would you even have leverage left at that point? Can you find a way to coordinate the two strategies so that they don't interfere—or even so that they help each other?

*St*: We're back to what the board will do.

*Tr*: And the effect on the board of what you do . . . .

Although this type of dialogue might seem to be a familiar part of clinical education, that is not really so. The version most often encountered in clinics is relatively unstructured and perfunctory and usually impromptu. It often consists of the teacher's providing information that the student has requested because it is outside the student's experience, coupled with a few stray suggestions made by the teacher during the discussion. And such a conversation is usually treated as though it has no purpose other than to help the student get started on a project that can later become the object of a post-performance critique, where the real teaching is thought to occur.

But when it comes to teaching strategy or any other form of creativity, the heart of the teaching is most effectively done *not* in after-the-fact critique, but in exactly this kind of dialogue, where the teacher can help the student explore the process of creation.[96] For that to happen, the teacher has to guide the dialogue through the entire flow-chart of decisions the student must make, exploring each decision in detail—a method that might be spread out over several lengthy dialogues that punctuate the student's individual creative work. In doing so, the teacher's guidance is necessarily limited to the process of strategy and to supplying information that the student cannot be expected to have already, while the student is left with both the freedom and the responsibility to decide. Option-generation will be encouraged if the teacher defers evaluation until after the student has developed a full range of alternatives. These kinds of dialogues are by nature longer, harder and more tedious than after-the-fact critiques. But they are also far richer teaching.

Post-performance critique does, however, have a limited role in teaching strategizing. Although it cannot teach the process of creating a strategy, post-performance critique can help a student understand his or her strategic strengths and weaknesses; whether an effective decisive event was chosen; whether strategy was really organized around that event (or whether the student eventually lost sight of it); whether a workable linkage was built between primary and back-up strategies; whether option-generation has been rich or impoverished; and whether option-evaluation has been well-modulated or has instead been too weak (and therefore uncritical) or too quick (and therefore premature). It can show some uncreative students how little strategizing they in fact have done, and how their non-strategy has forfeited influence over events. If post-performance critique treats the student's strategy as art created by the student, it can touch on insights that the student might not have been able to appreciate during the process of creation, that the teacher might have had difficulty raising earlier, or that the teacher might not even have

96. One of the goals of such a dialogue is to help the student develop a method of strategizing that best suits the student's personality and capacities for imagination, risk-taking and so forth.

recognized. The most productive way to raise all this might be to begin by asking the student how he or she feels about the art work just created and to set aside—at least for the moment—the "What-was-your-goal?" litany.[97]

### C. *The Design of Strategy-Teaching Experience*

In live-client clinics, screening cases for strategy-teaching value depends on a certain amount of luck. Cases need to be challenging and strategically rich but not so complicated that they overwhelm students. Few cases available to a clinic meet these criteria, and it is often difficult to identify them before becoming immersed in representing the client. Although some pedagogical value is lost when students are not confronted with responsibility for the problems of a real human being, students can more reliably be faced with provocative strategic predicaments if the teacher creates a strategy-rich case and asks students to litigate it on a simulated basis over a period of a semester or more.

To be strategy-rich, a simulation must have several characteristics. First, it must give the student individual responsibility for making strategic decisions. Its environment should respond to whatever the student does, and the student should make the decisions as an individual[98] and

97. This is from a post-case critique:

*Teacher*: You've designed and built a litigation, as though it were a sculpture or a bridge. You've lived with it for a while, and now you're walking away from it. As you look back on the thing, how do you feel?

*Student*: I want to run over and fix it.

*Teacher*: Why?

Why does the "How-do-you-feel-about-it?" question evoke self-evaluation more easily than the "What-was-your-goal?" litany does? Certainly, the "How-do-you-feel-about-it?" question is less threatening, while the litany forces the student to put up a self-defense. But the more important reason may be that the question invites students to speak (and think) of their own standards, aspirations and self-judgment, while the litany puts them in the position of reacting to the judgments of others. See the dialogue reproduced and discussed at D. Schön, *Educating*, *supra* note 61, at 143-50, where an architecture teacher does not like a student's performance but keeps his opinion to himself. Instead he asks "What do you think? Do you like it? What do you feel about it?"—changing the subject in the student's mind from "What was wanted of me?" to "What can I accomplish here, and how can my teacher help me accomplish it?" Where a student is willing, the result is the encouragement of creative independence. "The value of his product is, for the creative person, established not by the praise or criticism of others, but by himself. Have I created something satisfying to *me*?" Rogers, *supra* note 20, at 75-76.

98. Despite the fad for group "brainstorming," research on creativity suggests that people are generally less creative when working with a group and that some people are less creative when working even in the presence of others. *See* T. Amabile, *supra* note 19, at 142-46 (summarizing the research). Full creative dialogue with one's self is possible only in solitude. *See* S. Arieti, *supra* note 13, at 373; A. Storr, Solitude: A Return to the Self 21 (1988). Nevertheless, occasional consultation with others may have some creative benefit, stimulating option-generation, especially through mutation and synthesis, and providing other viewpoints for option-evaluation.

Thus, the type of teacher-student conversation described in the text accompanying note 100 should be thought of as a "walk through" that avoids closure: the point is to show students something of the process of strategizing. The conversation should end with the

feel in control of the decision-making process.

Second, a strategy-rich simulation presents "challenging situations requiring original solutions"[99] by putting the student in an unstructured situation and inviting him or her to impose on it a strategic structure of the student's own creation. That means presenting the student with a large number of strategic decisions, together with facts that will support a wide selection of courses of action—so large a number and so wide a selection that ideally the teacher is not able in advance to formulate all the effective strategies that might be available. If a problem admits of only one or two "good" strategies, it misleads students into thinking of strategy as a multiple-choice concept with "right" and "wrong" answers,[100] rather than as a form of artistic creativity.[101]

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expectation that the issues have been opened up, rather than packaged and sealed. Additionally, seminar discussions of strategy in a particular case—whether simulated or presented by a real client—may stifle individual creativity if conducted too early. Moreover, students probably learn less about strategy when they litigate a simulation in multipartner firms than when they litigate alone or, at most, with one partner.

99. B. Tuchman, Stilwell and the American Experience in China 1911-1945, at 124 (1971) (describing the tactical assignments General Stilwell used as an instructor at Fort Benning).

100. The trial simulations currently on the market are particularly deficient in this respect.

> The use of canned problems necessarily places artificial boundaries on theory development which are not present in real life. For example, students are limited in their choices to only a few (usually two) relatively obvious legal or factual theories. Although they must choose . . . a theory, they are given no real basis for doing so. Unable to interview witnesses, conduct original research, or otherwise explore paths to meaningful theories, students are left to make their choices strictly on the basis of inherent credibility or ease of proof.

Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. Legal Educ. 123, 136 (1987). It might be better if trial simulations simply told the student what theory to use. If law school trial practice courses confined themselves to teaching courtroom motor skills (a subject they cover well), theory development could be left to the growing field of pretrial litigation courses, where it is less likely to be given the misleadingly cursory treatment that it receives in trial practice courses. *See infra* note 103.

101. When he took over the Infantry School at Fort Benning in 1927, George C. Marshall—who had a profound effect on the army both as a strategist and as a teacher, *see* F. Pogue, George C. Marshall: Education of a General 1880-1939, at 102 (1963)—issued an order that "any student's solution of a problem that ran radically counter to the approved school solution, and yet showed independent creative thinking, would be published to the class." *Id.* at 256. What a contrast to the way so many law school classrooms are run! "Any student who demonstrated unorthodoxy could be certain of Marshall's approval." E. Larrabee, *supra* note 16, at 112. In this and similar ways, Marshall either taught strategic thinking or taught the skill of teaching strategic thinking to approximately two hundred officers who later became generals during the Second World War. *See id.*

Marshall was criticized for this kind of instruction, *see id.* at 111, but he persisted anyway. The mentality underlying such criticism is a common and repressive force not only in military life but also in many parts of the legal profession. It has some things in common with the bureaucratic and uncreative approach to work embodied in the mediocre and average strategists described in Part IA of this article. "A professional soldier is rarely a professional strategist. His [customary] training is concentrated on the mechanism of tactics and military organization, and in his peace exercises he is far more concerned to see that his own mechanism works properly than to upset his opponent's." B. Liddell Hart, Thoughts on War 230 (1944); *see also* N. Dixon, *supra* note 33, at 159-63

Third, a strategy-rich simulation operates so that, in the natural unfolding of events and without teacher intervention, it produces consequences proportional to the quality of strategy, rewarding that which is effective and penalizing that which is not. "The student must see that his or her actions cause something to happen . . . some consequence or change triggered by the student's response . . . [and] the consequence must flow reasonably from the action taken by the student."[102] This has two benefits. It persuades students of the power of carefully crafted strategy and of their own capacity to gain that power by shedding passivity. It also helps teacher and student diagnose the student's strategic strengths and weaknesses by tracing—as far as memory allows—the extent to which the student's strategizing influenced events. A well-constructed simulation thus helps identify impoverished option-generation, unskeptical option-evaluation, lack of strategic concentration, indecisiveness, and the other strategy faults described in Parts IA and IB of this Article.[103]

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(cult of anti-intellectualism permeates the military, resulting in dearth of challenges to existing practices). For similar emphasis on tactics and motor skills among law school clinical teachers, see notes 58-61 and accompanying text.

In spite of this—and in spite of the cult of macho violence, the pomposity, the hardware worship and the indifference to suffering that one finds in the armed forces—military experience still has much to teach about strategic analysis. For one thing, the conflict inside the military between true strategists and an uncreative bureaucracy is itself instructive. More importantly, the amount of strategic thinking that has been documented and analyzed in military terms vastly exceeds that which has been done with lawyers' work. Although the strategic incompetence that led to Flanders Fields in World War I happens in small ways every day in litigation, it tends to be much more thoroughly dissected when it appears on a larger and historic scale.

102. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education* in Report of the AALS-ABA Committee on Guidelines for Clinical Legal Education 191, 214 (1980). "[S]tudents will learn best if the consequences of their actions are revealed to them by the course of events, rather than as messages from 'on high,' even if the result is somewhat painful or delayed. In most cases, the failure to adopt a good strategy will be taken advantage of by other[s] . . . , and the student who misses an opportunity, or who makes a false move, will learn significantly from the mistake." Schrag, *Teaching Legislative Process through an Intensive Simulation*, 8 Seton Hall Legis. J. 19, 31 (1984).

103. In pretrial litigation courses, for example, injunction cases tend to achieve these results better than damages cases, particularly where the judge is role-played by someone other than the teacher. An "outsider" judge's rulings on temporary restraining order applications and preliminary injunction motions are tangible and credible consequences of the quality of student work. At the end of the simulation, once allowances are made for the effect of performance skills (such as deposition interrogation and motion drafting), the extent to which the opposing party's conduct has been controlled and the extent to which the student's client has escaped control combine to form a fair measure of the balance of strategizing between student and adversary.

With damages cases, something similar might be attempted by imposing an interlocking sequence of summary judgment motions and negotiations. If the summary judgment motion is denied and the negotiators do not agree, however, the teacher must produce a fantasied trial verdict to measure who "won" the pretrial litigation. Students understandably view that as an arbitrary teacher's trick rather than a persuasive demonstration of the cause and effect of strategy. The problem is not solved by having the client give instructions that the student "must" settle the case. First, the negotiations will become a

Finally, a strategy-rich simulation seems so seductively real that, rather than treating it as a game, students are pulled into its tensions and treat it as a kind of reality—just as readers do when they find themselves actually caring what happens to the characters in a novel.[104] This requires theater sense and a certain amount of fiction skills on the teacher's part.[105]

If the state of the literature[106] is a reliable guide to clinical teaching agendas, it would seem that strategic analysis is not directly addressed in much of clinical education. Certainly, the debate at clinical conferences and at clinical section meetings of the Association of American Law Schools tends to focus on technique, style and the appearance of a lawyering performance, rather than on the process of developing the strategy underlying these characteristics. But if strategizing is at the heart of lawyering, why is it undertaught?

New clinicians might avoid teaching the process of strategy because the appearance aspects of lawyering seem to the beginner to be a full teaching agenda. More experienced teachers might avoid teaching the process of strategy for more troubling reasons. Not only is it simply easier to teach what the product should look like, rather than how to create

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farce because it will become well known among students that those registering for the course "must settle." Second, clients rarely give those kinds of instructions at the beginning of a litigation, even though it is at the beginning that the student must make the foundation strategy decisions. Although in real life attorneys must shift strategies when clients decide that they have had enough of litigation, it is more important for students to learn how to see the entire battle, at the beginning, and to conceive of a strategy for that unified struggle.

An injunction simulation is effective in part because it is self-contained: students can be expected to see the outlines of the battle at the beginning (although the contours will change a bit later if discovery is well executed and if the teacher has properly designed the discovery aspect of the simulation); the battle is large enough to challenge but not so large that students cannot see it as a unified whole; and one need not wait until trial to learn who is the winner and who is the loser.

104. This is hardly true of the wooden characters found in NITA simulations. Judge Dixon, Trudy Doyle, the Potters and the other figures in J. Seckinger & K. Broun, Problems and Cases in Trial Advocacy (2d ed. 1983) are one-dimensional and cartoon-like. And students understandably treat them that way.

105. "Theater sense" is the ability to cause an audience to feel the immediacy of events as they are being acted out—something with which clinicians are familiar from trial work. Fiction skills include, for example, the creation of characters and plot. Novelists noted for realism generally say that they do not invent plot or characters, but instead watch helplessly while their imagination discovers those things. *See* J. Gardner, On Becoming a Novelist 120-21 (1983) (a writer becomes truly inspired only when seeing the plot unfold as though in a waking dream); E.M. Forster, Aspects of the Novel 38 (1927); J. Gardner, The Art of Fiction 21 (1984). Although the idea of fiction may at first seem intimidating, clinicians may, as a group, be the best equipped among lawyers—intellectually and emotionally—to understand fiction skills and to use them professionally. No simulation can lose artificiality entirely, but fiction skills can introduce a persuasive amount of what David Barnhizer and others have complained is lacking in simulations: "richness and unpredictability, . . . tension and . . . subtleties of irrationality." Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L. Rev. 1025, 1048.

106. *See supra* notes 61-64 and accompanying text.

it, but strategizing is so difficult to understand and to explain to the uninitiated that teachers may dismiss it as mysterious "instinct," rather than as an analysis that can be learned. Even veteran clinicians might be more confident of their knowledge of performance skills than of their understanding of creativity and how it can be promoted pedagogically. Some teachers may choose to take the path of least difficulty in the face of student resistance to learning analysis, whether in the clinic or in the classroom and whether doctrinal or strategic. And some may be deterred by the logistical difficulties of designing strategy-based simulations or of screening cases for their value in teaching strategy.

But none of these is a sound reason for avoiding the teaching of strategic analysis. Although the process of strategy cannot be fully explained to a beginner, it can be learned through guided experience and in that way is comparable to other forms of analysis taught in law schools. In fact, as long as it is dismissed as "instinct," even teachers will be limited in their ability to strategize. Nor should issues of creativity deter a teacher from taking on strategy: there is an abundant literature outside of law on how the creative process works and how it can be promoted or discouraged.[107] And this Article has already shown how, despite their inexperience, students are constructively challenged by strategy-rich cases and simulations: they quickly understand that if they resist learning to strategize, they foreclose for themselves the feeling of mastery that they so want to attain.

## III. THE MORAL CONTEXT OF STRATEGY

This is an Article about the process of strategy, not the uses to which that process can be put. Perhaps a challenge even greater than teaching strategy is teaching it morally—teaching it in a way that avoids deepening a mood of instrumentalism and amorality[108] and that reconciles strategy with integrity. But the disingenuousness and bullying that generally accompany strategy in American lawyering—the abusive dehumanization of opposing parties and witnesses, for example, and the use of

107. *See* T. Amabile, *supra* note 19; Creativity and Its Cultivation, *supra* note 20; S. Arieti, *supra* note 13; J. Dewey, How We Think (1933); J. Getzels & P. Jackson, *supra* note 29; Contemporary Approaches to Creative Thinking (Gruber, Terrell & Wertheimer, eds. 1962); The Creative Encounter (Holsinger, Jordan & Levenson eds. 1971); V. John-Steiner, *supra* note 13; J. Rossman, Industrial Creativity: The Psychology of the Inventor (1931); Creativity: Progress and Potential, *supra* note 76; E.P. Torrance, Role of Evaluation in Creative Thinking (1964); G. Wallas, *supra* note 19; Richards, Kinney, Benet & Merzel, *Assessing Everyday Creativity: Characteristics of the Lifetime Creativity Scales and Validation with Three Large Samples*, 54 J. Personality & Soc. Psychology 476 (1988).

108. As Kenney Hegland has pointed out, the NITA method of instruction is, in this respect, inadequate: because NITA simulations do not inform any of the role-players, even the witnesses, of the truth about the disputed facts, the "student infers that all avenues of attack are open to him and that the only criterion for selection is effectiveness with the jury," causing litigation to become "not a process for truth seeking, but a forum for clever argument." Hegland, *infra* note 119, at 73.

breathtaking litigation theories that are a quantum distance from any reasonable best light on the evidence[109]—are so remarkable that a discussion of strategy has an amoral quality unless it considers the effect of such practices on all concerned, including lawyers themselves.

Defenders of these practices argue that they are required by the adversary system,[110] that the adversary system is the only satisfactory means of achieving justice,[111] that they are a lawyer's way of becoming a "good

109. The work of destroying another human being is less troublesome if one prepares by stripping that person of the things that provide an understandable identity—by turning the person, in other words, into an object. One begins by peeling off forms of dignity that are otherwise taken for granted, and one continues by finding ambiguity in each of the object's relevant acts and by attaching to the ambiguity an interpretation that condemns the object's intentions and character—regardless of the likelihood or accuracy of that interpretation.

Because these interpretations are repeated articulately and with "sincerity," adjudicators and bystanders eventually recognize a possibility that they might be true, just as the "big lie" in politics is eventually believed because it gains respectability simply by being heard continually. And even where these interpretations are not actually believed, the suspicion that they might be true becomes a factor—through negotiated settlements and compromise verdicts—in resolving conflict to the detriment of the person who has been converted into an object. And finally, in a feat of circular logic, the willingness of adjudicators to be thus taken in is used to justify the behavior that takes them in. For one among many evocative descriptions of this kind of lawyer conduct, see Schafran, *Gender Bias in the Courts: Time is Not the Cure*, 22 Creighton L. Rev. 413, 422-25 (1989) (the New Bedford barroom rape case, the Chambers-Levin Central Park murder case, among others).

110. In fact, the American professional literature is barren of any sustained inquiry into whether these practices are inherent in the common-law adversary system. No published American study of the British, Canadian, Australian or New Zealand legal professions has ever sought to discover whether the abusive practices that are controversial in the United States are engaged in by lawyers in those countries as well.

111. The literature on the relative merits of the adversarial system and the European nonadversarial system is inconclusive, although abundant. *See* M. Damaska, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process *passim* (1986); D. Luban, Lawyers and Justice: An Ethical Study 50-103 (1988); J. Merryman, The Civil Law Tradition *passim* (1969); Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 555-78 (1973); Damaska, *Presentation of Evidence and Fact-Finding Precision*, 123 U. Pa. L. Rev. 1083 *passim* (1975); Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 Mich. L. Rev. 734 *passim* (1987); Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 Buffalo L. Rev. 409 *passim* (1960); Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 *passim* (1985); Luban, *The Adversary System Excuse* in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 83-122 (D. Luban ed. 1983); Tomlinson, *Nonadversarial Justice: The French Experience*, 42 Md. L. Rev. 131 *passim* (1983).

An adversarial trial is a contest "between two *theoretically* equal parties who enjoy considerable leeway to determine themselves . . . the limits and outcome of their dispute," while the "adjudicator plays a largely passive, neutral role until the parties ask him to render a decision." Tomlinson, *supra*, at 134 (emphasis added). A nonadversarial trial, on the other hand, is more of "an official inquiry" in which the court "is responsible for presenting the proofs and is not bound by the parties' positions when it formulates the issues." *Id.* Its procedures "are simpler, less technical, and less lawyer dominated." *Id.* Although some attempt has been made to test the two models through experiments with simulated trials—*see* Lind, Thibaut & Walker, *Discovery and Presentation of Evidence in Adversarial and Nonadversarial Proceedings*, 71 Mich. L. Rev. 1129 (1973); Thibaut,

person,"[112] and that they are "so far mandated by moral right that any advanced legal system" that did not approve them "would be unjust."[113]

Walker & Lind, *Adversarial Presentation and Bias in Legal Decisionmaking*, 86 Harv. L. Rev. 386 (1972)—this research has been criticized as methodologically unsound. *See* Damaska, *Presentation of Evidence*, *supra*, at 1095-1103; Gross, *The American Advantage*, *supra*, at 740 n.22. One law school teacher has published a largely rhetorical "defense" of the adversary system that ignores the bulk of the comparative scholarship, citing the Thibaut-Walker-Lind research but failing to mention any of the criticisms it has encountered. *See* S. Landsman, The Adversary System: A Description and Defense 44-45 (1984).

With the research in this state, it is safe to conclude that "there is no objective or empirical support for the proposition that the adversary system produces greater truth—not to mention greater justice—than any other." Lubet, *supra* note 100, at 130 (citation omitted); *accord* Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 596 (1985). It may in fact be that we have an adversary system not because it produces better justice, but instead because we have inherited it historically, because it provides employment for certain types of personalities, and because it satisfies a public appetite for verbal violence.

112. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1060-61 & n.1 (1976). "And why not [lie for clients]?" asked Charles Curtis in an oft-quoted passage. "The relation between a lawyer and his client is one of the intimate relations. You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself." Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 8 (1951). Thus, a lawyer achieves a personal goodness and purity by lying for the profit-enhancing conglomerate that the lawyer—out of kindness (and for money)—has befriended. *See* Luban, *Adversary System*, *supra* note 111, at 105-06; Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 Stan. L. Rev. 487, 499 (1980).

It is sometimes thought that a belligerent or pugnacious bar is a bulwark against tyranny. *See* D. Rueschmeyer, Lawyers and Their Society: A Comparative Study of the Legal Professions in Germany and in the United States 144-45 (1973). But in the United States, much of the bar will abuse the weak as quickly as it will abuse the strong, and a lawyer's abuse of the weak is a real oppression, not a hypothetical one.

113. Fried, *supra* note 112, at 1066. There are a number of advanced legal systems in western Europe that neither approve of these practices nor could fairly be called unjust. For example, in the United States, the pretrial "interviewing and preparation of witnesses . . . is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods." D. Luban, Lawyers and Justice, *supra* note 111, at 96; *see generally* Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277 (1989) (discussion of issues and problems inherent in witness preparation in our legal system). But a German lawyer "virtually never [has] out-of-court contact with a witness," Langbein, *German Advantage*, *supra* note 111, at 834, because, under the German rules of ethics, a lawyer "may interview witnesses out of court only when it is justified by special circumstances. He has to avoid even the appearance of influencing the witness and is, in principle, not allowed to take written statements." D. Rueschmeyer, *supra* note 112, at 143; *see also* D. Luban, *Lawyers and Justice*, *supra* note 111, at 96-97 ("sever[ing] the search for truth from the attorney's need to win"). And "German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel." Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure I*, 71 Harv. L. Rev. 1193, 1201 (1958).

My observation two decades ago as a graduate student in Stockholm was that the Swedish rules of ethics are not unlike the German, although Swedish lawyers tend to be somewhat more active in the courtroom. Under Swedish law, the police must put together a case dossier that by American standards is voluminous; they must give a complete copy of it to the defense attorney; and if the defense attorney wants any further investigation, he or she can *require* the police to do it. *See* Swedish Code of Judicial Procedure, ch. 23, §§ 18-19, 21 (A. Bruzelius & R.B. Ginsburg, trans. 1979). A Stock-

Not only are these rationalizations unsupported, but—like the dismissal of strategy as "instinct" or "intuition,"[114]—they are part of a structure of self-justifying and reassuring assumptions that close off inquiry[115] into the more perplexing and disconcerting aspects of lawyers' work. It may be that many American lawyers behave as they do not because of any of the justifications usually offered, but because the American bar simply reflects many of the least attractive aspects of the culture surrounding it: a culture that enjoys belligerence and conflict enough to use them as a preferred means of solving problems,[116] a culture so inured to the disin-

holm criminal defense attorney once told me that in 26 years of practice he had never known a defense attorney's demand for further investigation to be unsatisfied.

In criminal trials, German law provides for three kinds of verdicts: guilty, not guilty because the prosecution has not carried its evidentiary burden, and not guilty because the adjudicator believes the defendant to be innocent. A defense attorney is ethically forbidden to seek the last type of verdict "if he 'knows' that the client is guilty." D. Rueschmeyer, *supra* note 112, at 129. According to Rueschmeyer, although the German ethical rules are stricter than the American, the gap "between official standards and the standards actually viewed as binding by the rank and file of the profession" is actually smaller in Germany than in the United States. *See id.* at 144.

No one has ever credibly argued that injustice results from the German lawyer's inability to be a deceitful and bullying "special purpose friend." To the contrary, "an eminent scholar after long and careful study . . . said that if he were innocent, he would prefer to be tried by a [nonadversarial] court, but that if he were guilty, he would prefer to be tried by a common law [adversarial] court." J. Merryman, The Civil Law Tradition 139 (1969).

German procedure and ethics are described here not because German adjudication is particularly admirable, but because it is the "advanced legal system" outside the common law family that is best documented in English. For persuasively stated reservations about the German legal profession, see W. Weyrauch, The Personality of Lawyers: A Comparative Study of Subjective Factors in Law, Based on Interviews with German Lawyers 177-81 (1964).

114. *See supra* note 61 and accompanying text.

115. American lawyers are very adept at using criminal law hypotheticals to shut off skepticism about the morality of certain kinds of lawyer conduct. Criminal law hypotheticals, however, obscure, rather than elucidate, these issues because of (i) the peculiarities of criminal litigation (particularly the effect of the Constitution on criminal procedure); (ii) the role of criminal procedure in defining the general balance of power between the individual and the state in any society; and (iii) the American bar's near total ignorance of how criminal adjudication is handled in other countries.

116. We demonstrate that we are prisoners of our own culture when, for example, American lawyers are "baffled" by the final clause of the typical Japanese commercial contract, which provides "that in the event of disagreement both parties [will] sit down together in good faith and work out their differences"—a procedure whose dynamics we can barely imagine. *See* Lardner, *Annals of Law: The Betamax Case*, The New Yorker, Apr. 6, 1987, at 45, 48; *see also* R. Pascale & A. Athos, *supra* note 56, at 127-30 (American cultural givens often "impede[] the kind of synthesis the Japanese manage so well.").

Although many forms of Japanese law were adapted from western models in the nineteenth century, the introductory text in Japanese legal education informs students that much of the spirit of western law cannot entirely be imported into Japan because, among other things, the concept of "rights" was unknown in the Japanese language until shortly before the Meiji Restoration in 1868. *See* T. Kawashima, Nihon-Jin No Ho-Ishiki ("Legal Mind of the Japanese People") 16 (1967) (Fusae Nara has kindly explained and translated this material). The central place occupied by "rights" and "entitlements" in western legal culture is occupied in Japan by a complex set of duties. Where westerners, in the event of a dispute, will think and speak of their rights, Japanese instead instinc-

genuousness of commerce and the marketplace[117] that people—as in a *souk*—do not seem ashamed when caught in falsehoods or manipulations, and a culture that evaluates a lawyer's persuasiveness by criteria otherwise associated with hustling and hucksterism. It would take sustained historical inquiry to determine whether there has always been as much intellectual thuggery in the American legal profession as there is now,[118] but it is a thuggery that scholars increasingly question.[119]

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tively seek to identify their own obligations to others involved in the controversy. *See id.* at 32; *see generally* R. Benedict, The Chrysanthemum and the Sword 98-144 (1946) (discussing the meaning of "obligation" in Japanese society). *But see* F. Upham, Law and Social Change in Postwar Japan 17-18 (1987) (litigation of politically charged issues is not unknown in Japan). The result tends to be conversations in which parties preserve relationships by recognizing and promising to fulfill their obligations to each other, in contrast to the confrontational demands for vindication with which we are so familiar.

The next significant intellectual movement in American law schools may turn out to be an obligation-oriented analysis that contradicts the conventional atomistic view of individual rights and prerogatives. Obligation-oriented analysis has already begun to appear in scholarship championed separately by the left and by the right. *Compare* C. Gilligan, *supra* note 35, at 64-105 (discussion of female concepts of self and morality in context of abortion) *with* M. Glendon, Abortion and Divorce in Western Law 50-58 (1987) (outlining the interplay of societal values and obligations in abortion issue). *See supra* notes 41-59 and accompanying text. The government's obligation to behave properly may be more important than the individual's right to have the government behave properly: our constant attention to rights may dysfunctionally shift the spotlight from the party whose responsibility is really at issue to the party who can too easily be judged not to have suffered enough. Moreover, rights-based rationalizations lend themselves with deceptive ease to doctrine that protects the powerful from the weak, rather than the reverse. That was certainly true in the long era that culminated in Lochner v. New York, 198 U.S. 45 (1905), and is increasingly true of the Supreme Court today. *See* Horwitz, *Rights*, 23 Harv. C.R.-C.L. L. Rev. 393, 398 (1988). Finally, "duties precede rights logically and chronologically." Holmes, *Codes and the Arrangement of the Law*, 5 Am. L. Rev. 1, 3 (1870).

117. In a recent study, 60% of Americans interviewed believed that "[m]ost people will tell a lie if they can gain by it"; 62% believed that "[p]eople claim to have ethical standards, but few stick to them when money is at stake"; and 58% believed that "[p]eople pretend to care more about one another than they really do." D. Kanter & P. Mirvis, The Cynical Americans: Living and Working in an Age of Discontent and Disillusion 291 (1989). In terms of age, the least cynical interviewees were between 40 and 49, while the most cynical were 24 or younger and 60 or older. *See id.* at 293.

118. American lawyers might once have felt greater ethical and moral restraints. The first American collection of ethical precepts was compiled by David Hoffman, whose twelfth resolution, for example, read "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence [sic] than the *legal bar*, he shall never make me a partner in his knavery." D. Luban, Lawyers and Justice, *supra* note 111, at 10 (quoting D. Hoffman, A Course of Legal Studies 754 (1836)); *see also* Shaffer, *David Hoffman's Law School Lectures, 1822-1833*, 32 J. Legal Educ. 127, 127 (1982) (calling Hoffman "the father of American legal ethics"). It may be impossible for us now to discover historically the morality of the nineteenth century bar, but a number of nineteenth century lawyers expressed sentiments—such as "I do not consider it the duty . . . of a lawyer to assist a scoundrel at law"—which would be considered naive today. *See* Farmer, *Legal Practice and Ethics in North Carolina, 1820-1860*, 30 N.C. Historical Rev. 329, 349 (1953).

119. *See, e.g.*, Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. Legal Educ. 69, 71-72 (1982) (moral dilemma in the NITA model for teaching litigation skills); Hyman, *supra* note 64, at 872-77 (contrast between traditional fiduciary approach and

American lawyers greatly underestimate the extent to which their own personalities are affected by—and, conversely, affect—a legal culture in which thinking is primarily instrumental:

> Protracted engagement in . . . practices [of deception] must leave its trace on a person. . . . The moral damage to character that lawyers in time tend to sustain . . . can vary in degree and kind. Persons of good character who resort to the shady means of their trade while managing to maintain a lively picture of the justified, ultimate aims of their vocation will no doubt regret their infidelity to truth and justice as well as their unfairnes[s] [sic] to particular individuals. . . . Such persons would suffer the strain born of the knowledge that . . . their moral integrity is constantly imperiled. Others who have less self-mastery and a less firm attachment to ideals are more likely to . . . shift their attachments to more immediate goods such as the wealth and status with which society rewards the successful exercise of their combative skills. Still different lawyers may . . . prize the acts of cunning, manipulation, and humiliation for their own sake. For them, the satisfactions of the profession consist in the enjoyment of the spectacle of others being subject to their power.[120]

In a 1978 essay circulated clandestinely while he was in prison, Václav

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multidimensional approach to negotiation); Lubet, *supra* note 100, at 127-39 (criticism of trial advocacy teaching); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 64 (1980) (lawyers should "bring . . . [their] full moral sensibilities to play in . . . [their] professional role[s]"); Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C.L. Rev. 213, 221-51 (1990) (providing a moral model for attorneys in the role of counselor); Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. Pa. L. Rev. 761, 764-83 (1990) (criticism of lawyers' deceptive practices that are rooted in economic self-interest suggests that a "Golden Rule of Candor" should regulate the attorney-client relationship); Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1119-37 (1988) (lawyers should exercise judgment and discretion and examine the overall consideration of "doing justice" in deciding which clients to represent and how to represent them); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 130-44 (criticism of mentality prevalent in professional advocacy that subverts values of autonomy, responsibility and dignity).

120. Eshete, *Does a Lawyer's Character Matter?*, in The Good Lawyer, *supra* note 111, at 270, 274-75; *see also* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1, 13 (1975) ("[T]here are definite character traits that . . . the lawyer must take on . . . . What is less clear is that they are admirable ones."). The rationalizations used to justify this situation, *see supra* notes 110-114 and accompanying text, can accurately be gathered under William Simon's evocative phrase "the ideology of advocacy." Simon, *The Ideology of Advocacy*, *supra* note 119, at 30-39. However,

> [i]deology is a specious way of relating to the world. It offers human beings the illusion of an identity, of dignity, and of morality while making it easier for them to *part* with them. As the repository of something . . . objective, it enables people to deceive their conscience and conceal their true position and their inglorious *modus vivendi*, both from the world and from themselves. . . . It is a veil behind which human beings can hide their own "fallen existence", their trivialization, and their adaptation to the status quo.

Havel, *The Power of the Powerless*, in The Power of the Powerless: Citizens Against the State in Central-Eastern Europe 23, 28-29 (J. Keane ed. 1985).

Havel argued that in a system of dictated ideology the obedience of any one person helps prevent others from escaping the roles assigned to them by the system; that "each helps the other to be obedient"; and that "everyone in his or her own way is [thus] both a victim and a supporter of the system."[121] Havel began with the image of a greengrocer who unthinkingly displays in the shop window a poster—probably delivered with the day's produce—that reads "Workers of the World, Unite!":

> I think it can be safely assumed that the overwhelming majority of shopkeepers never think about the slogans they put in their windows, nor do they use them to express their real opinions. . . . [This greengrocer put the poster] into the window simply because it has been done that way for years, because everyone does it, and because that is the way it has to be. If he were to refuse, there could be trouble.[122]

As long as the only known method of living is the ideologically dictated one, and as long as no one has seen any examples of living otherwise, then no one knows *how* to live "within the truth."[123] The power of the powerless greengrocer was to stop obeying and thereby to stop encouraging the obedience of others, thus destroying the impression that "everyone does it" and that "that is the way it has to be."[124]

Certainly, the lawyer who engages in bullying and trickery because he or she is surrounded by other lawyers doing the same thing thereby helps all lawyers "to be obedient" to the system of abusive strategy—a system of which that lawyer and the others are simultaneously victims and supporters. If, however, this lawyer were to decide to stop being an intellectual thug and to aspire to the qualitatively different effectiveness of a moral strategist, he or she would face profound difficulties. In an adversary system that is mistakenly assumed to be *necessarily* abusive, the accumulated habits of a lifetime would tell many colleagues, supervisors, adversaries and clients that this lawyer does not understand "the way it has to be." The accepted modes of lawyer discourse would make it hard for this lawyer to communicate with adversaries or to elicit a moral re-

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121. Havel, *supra* note 120, at 36-37.

122. *Id.* at 27.

123. *Id.* at 40.

124. *Id.* at 27. Not only does this analysis premise an argument in favor of moral strategy, but it was *itself* a moral strategy. In the Czechoslovak uprising of November 1989, it was the decisive idea—the one that persuaded the public to rise up in the *manner* it did and that caused the regime to unravel in the *way* that it did. *See supra* note 11; E. Abel, The Shattered Bloc: Behind the Upheaval in Eastern Europe 49-70 (1990); T. Garton Ash, The Magic Lantern 78-130 (1990); *see also* Elon, *A Reporter at Large: Prague Autumn*, The New Yorker, Jan. 22, 1990, at 125, 131 ("parable of the greengrocer . . . [was] a basic text of the revolution").

Conspiratorial and violent revolutions lead to the establishment of conspiratorial, violent and dishonest regimes. Something better usually results from revolutions conducted in the open on the basis of principled strategies and tactics. Similarly, in lawyers' work, the *manner* in which we win a victory becomes a historical fact that affects the situation that follows, the client's appreciation of it, and—ultimately, after many such victories—the kind of people we are.

sponse even from adversaries who might want to give one. And the returns this lawyer would obtain for clients would always be considered suspect due to the unexamined and unproved assumption that an amoral strategist could have achieved more in a quantitative sense. Some lawyers do succeed in becoming moral strategists in spite of all this. But their means of doing so are so unstudied—and so rarely held up as models—that we know very little about how they succeed and how others might emulate them.

In 1975, Richard Wasserstrom pointed out that we do not know whether damage to a lawyer's personality is inevitable, and that the reason for our ignorance is that neither the legal profession nor law schools has recognized the problem.[125] Since then, only one book[126] has appeared explaining a method of lawyering based on principle, rather than on fakery and force. The subject of that book—negotiation—is a widespread means of lawyerly conflict resolution that is perhaps least associated with adversarial procedural rules.[127] The next step—a very big step—is to develop equally principled methodologies of adversarial litigation.[128]

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125. *See* Wasserstrom, *supra* note 120, at 15.

126. *See* R. Fisher & W. Ury, *supra* note 64, at xii; *see also* Hyman, *supra* note 64, at 897-921 (discussion of inherent conflicts between lawyer's dual roles as advocate and negotiator).

127. "Amy . . . suggests not only different kinds of substantive solutions, she also thinks of a whole different sort of process: *dialogue between the parties*," *Feminist Discourse*, *supra* note 42, at 52 (remarks by Carrie Menkel-Meadow) (emphasis added)—a process all too often obstructed, rather than facilitated, by adversarial lawyers. See, for example, Hyman, *supra* note 64, at 902-03, where a law student, disregarding some of the most common customs of lawyerly negotiation, settles a dispute that lawyers had been unable to resolve.

128. Anecdotal evidence suggests that at least a few such methods may already exist in other common-law countries using the adversarial system. In the United States, for example, lawyers and law students are routinely taught never to ask the final, summing up question on cross-examination. The standard and hackneyed cautionary tale involves the cross-examination of an eyewitness who has testified on direct that the defendant bit off the complainant's ear. During cross-examination, the defendant's lawyer establishes that the event happened at night in a place without ambient light; that the witness observed from a considerable distance; and that at the critical moment the witness's view was blocked. Not satisfied, the lawyer asks the disfavored "one question too many": Q — "Then why . . . did you tell the jury you saw my client bite off the other man's ear?" A — "Because . . . I saw him spit it out!" R. Aron, K. Duffy & J. Rosner, Cross-Examination of Witnesses: The Litigator's Puzzle 148-50 (1989); *see also* T. Mauet, *supra* note 64, at 219 ("[d]on't ask the last obvious question").

But British barristers say that they feel *compelled* to ask exactly that kind of question during cross-examination because, if they do not, the adversary will argue to the jury in summation that the cross-examiner never gave the witness a fair chance to respond—implying that the cross-examiner is a manipulative, insincere and untrustworthy person who has tried to prevent the jury from getting at the whole truth. Although it is conceivable that the public's sense of fair play is higher in Britain than in the United States, it seems at least equally likely that the conduct of the bar itself in Britain has led the public to expect certain kinds of open dealings in the courtroom.

## CONCLUSION

Strategic mediocrity and even incompetence are widespread in the legal profession, even though it is possible to identify the fundamental principles of strategic analysis: concentration of effort on an hypothesized decisive event, planning from that event backward in time to the present, generating the largest number of reasonable strategic options from which to choose, accurately predicting the effectiveness of each option, shoring up points of weakness through sub-strategies, developing back-up strategies in case the original strategy proves ineffective, handling masses of detail in ways that produce strategic coherence, thinking in several dimensions at once, treating the entire conflict as an organic whole, and so on.

Perhaps strategic mediocrity and incompetence are pervasive because strategic analysis poses special difficulties for two temperaments endemic to law: the aggressively confrontational and the narrowly doctrinal. Although law attracts the former, a temperament that fulfills itself through confrontation is the antithesis of strategic cunning. And doctrinal creativity is different from strategic creativity, which more closely resembles the types of thinking found in fields usually classified as artistic.

Legal education has difficulty teaching strategic analysis for other reasons as well. Both in lawyering and in the teaching of lawyering, strategic inquiry has traditionally been closed off through a kind of professional mystification that falsely treats strategic effectiveness as the incomprehensible result of "instinct" or "intuition" rather than of definable forms of analysis. Clinical instruction, where strategic analysis would seem most naturally to be taught, has focused instead almost exclusively on performance technique and styles of lawyering. Moreover, the study and practice of law are themselves structured in ways that seem to discourage, through oppressive tedium and anxiety, the kind of mental state in which strategic creativity flourishes: the focused concentration that causes a rock climber, for example, to "feel at one with the mountain." There are other problems, too. Among them are the complexity of explaining any form of professional creativity to those who do not already understand it, the problem of integrating procedure into strategy, and the passivity and naiveté about the decision-making process induced by legal and undergraduate education.

The two most prominent features of clinical education—post-performance critique aimed at evaluation of the student's work and field work on live cases—are only partially suited to the teaching of strategic analysis. Because of the inseparability of memory and imagination, students have enormous difficulty reproducing their strategic thinking after it has happened. At the same time, if a teacher is to help a student explore strategic reasoning as a process, both teacher and student must get inside that process together through extensive dialogues while the student is still in the act of developing strategy. And even the best screened live cases

present strategic dilemmas more haphazardly than well-designed simulations can, despite the latter's superficiality in other respects.

The moral problems associated with strategy remain, however, and they are likely to remain long after we have come to understand strategic reasoning and its pedagogy. A form of analysis and the conduct needed to teach it can be elucidated through plain intellectual effort, but the uses to which that analysis is put are determined by much larger—and in this case darker—forces.